



# South Carolina Bar

Continuing Legal Education Division

## **2019 SC BAR CONVENTION**

### **Real Estate Practices Section**

“Competing In Today’s Market: Residential and Commercial Trends and Strategies to Protect and Grow Your Practice”

**Saturday, January 19**

*SC Supreme Court Commission on CLE Course No. 190249*

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**South Carolina Bar**

Continuing Legal Education Division

**2019 SC BAR CONVENTION**

**Real Estate Practices Section**

**Saturday, January 19**

Ethics/Malpractice Liability in Real Estate  
Transactions: An Ounce of Prevention is Worth  
a Pound of Cure

*Eric S. Bland*  
*Ronald “Ronnie” L. Richter, Jr.*

Ethics / Liability in Real Estate Transactions: An Ounce of Prevention is Worth a Pound of Cure  
(or How to Avoid Getting Sued or Reported)

1. Do Not Taste of the Fruit: Rule 1.8 Conflicts of Interest
  - a. SCRPC 1.8(a): Prohibited Transactions
  - b. SCRPC 1.8(h): Prospective Limitations on Liability
2. I Am My Brother's Keeper
  - a. Discuss Johnson v. Alexander
  - b. Discuss Aiding and Abetting Liability
3. You Down With OPP? Trust Account Management
  - a. Discuss Moore v. Weinberg
  - b. Review Current Disciplinary Decisions
4. I'm Sorry, Do I Know You? Redefining Duties
  - a. The Erosion of Privity in the New Age of Duty
  - b. Discuss Sentry Select Insurance Company v. Maybank Law Firm, LLC
  - c. The Importance of Engagement and Disengagement Letters
    - Defining the Attorney Client Relationship in the Absence of a Fee Agreement



# South Carolina Bar

Continuing Legal Education Division

## **2019 SC BAR CONVENTION**

### **Real Estate Practices Section**

**Saturday, January 19**

Top 5 Current Tips/Topics of  
Commercial Real Estate

*Wilson W. McDonald*

## **[TOP] FIVE TIPS AND TOPICS IN COMMERCIAL REAL ESTATE**

**Wilson W. McDonald, Esq.**

- I. Introduction
- II. Assessable Transfer of Interest and the Cap – Explaining it to your client, what your client should do about it and when.
- III. The Certificate of Tax Compliance – When you need one and why. When you don't.
- IV. Rollback Taxes - What are they and who pays them?
- V. Utility Availability – Why getting the ALTA 17.2 can be a good thing.
- VI. New-ish Lender Regulatory Requirements
  - a. Know Your Borrower
  - b. HVCRE
- VII. Final thoughts

## **Top 5 Current Tips/Topics Commercial Real Estate**

Wilson W. McDonald  
*Investors Title Insurance Company  
Columbia, South Carolina*

- I. **Introduction and Qualifier.** These are not necessarily the “Top” nor even possibly the most “Current” Tips /Topics in Commercial Reals Estate. However, they are items that you may come across pretty regularly in a commercial transaction. So, I thought this talk may be a good refresher for those of you who regularly handle commercial real estate transactions as well as some good points to keep in mind for those of you who may only handle the occasional commercial transaction. In no particular order, here are some tips.
  
- II. **Point of Sale Valuation and the Cap.**
  - A. Assessable Transfer of Interest (“ATI”). What constitutes an ATI is set forth in SC Code Section 12-37-3150(A). Subject to some exceptions noted in SC Code Section 12-37-3150(B), a conveyance by deed is an ATI.
  - B. Once an ATI has occurred, the real property is subject to reassessment. The fair market value of the property is then determined as of 12/31 of the year in which the ATI has occurred and the property is then subject to the new fair market value as of the following tax year (again subject to a few exceptions). See SC Code Section 12-37-3140(A) & (E).
  - C. For real property that is subject to the six (6%) percent assessment ratio since it is being used for commercial purposes under SC Code Section 12-43-220(e), the taxpayer can seek an exemption. Under SC Code Section 12-37-3135(B)(2), the exemption would be in an amount equal to 25% of the ATI fair market value of the subject property as long as the ATI fair market value of the property is not less than the fair market value of the property prior to the ATI occurring.
  - D. The exemption is not automatic. In order to obtain the exemption, the owner of the real property or its agent must request it from the county assessor before January 31 of the tax year in which the owner first claims eligibility for the exemption. See SC Code Section 12-37-3135(C).
  - E. In some cases, the client may retain you to be its agent to apply for the exemption. However, if it does not, I would recommend that you make sure the client/buyer is aware that it needs to make application for the exemption on its own. Attached is a copy of a notice my prior firm provides whenever it is representing a purchaser of commercial real property.

**Notice of Exemption Pursuant to S.C. Code Sec. 12-37-3135(B)**

Congratulations on the purchase of your new property in \_\_\_\_\_ County, South Carolina (the "Property"). Please be advised that the Property is subject to the six (6%) percent assessment ratio as it is being used for commercial purposes under S.C. Code Section 12-43-220(e).

S.C. Code Section 12-37-3135(B)(1) states: "When a parcel of real property and any improvements thereon subject to the six percent assessment ratio provided pursuant to Section 12-43-220(e) and which is currently subject to property tax undergoes an assessable transfer of interest after 2010, **there is allowed an exemption from property tax of an amount of the ATI fair market value of the parcel** as determined in the manner provided in item (2) of this subsection. Calculation of property tax value for such parcels is based on exemption value. The exemption allowed by this section applies at the time the ATI fair market value first applies.

Under S.C. Code Section 12-37-3135(C) the **"exemption allowed in this section does not apply unless the owner of the property, or the owner's agent, notifies the county assessor that the property will be subject to the six percent assessment ratio provided pursuant to Section 12-43-220(e) before January thirty-first for the tax year for which the owner first claims eligibility for the exemption.** No further notifications are necessary from the current owner while the property remains subject to the six percent assessment ratio.

If you are planning to seek the exemption for the first tax year following your purchase of the property, we strongly advise you to contact \_\_\_\_\_ County Tax Assessor's Office either by certified mail or in person to see if your Property will qualify for the exemption ("ATI Exemption").

Our firm has not been engaged to apply for the ATI Exemption on your behalf nor is our firm responsible for your failure to apply for the ATI Exemption.

By: \_\_\_\_\_ (SEAL)

Print Name: \_\_\_\_\_

Its: Attorney

Dated: \_\_\_\_\_

I/We acknowledge receipt of a copy of this letter and understand that I/we must apply for the ATI Exemption myself/ourselves.

Dated: \_\_\_\_\_

**BUYER(S):**

\_\_\_\_\_

By: \_\_\_\_\_ (SEAL)

Print Name: \_\_\_\_\_

Its: \_\_\_\_\_

\_\_\_\_\_ (SEAL)

Name: \_\_\_\_\_

### III. Certificate of Tax Compliance

#### A. SC Code Section 12-54-124:

#### **Transfer of business assets; tax liens; suspension of business license; certificate of compliance.**

In the case of the transfer of a majority of the assets of a business, other than cash, whether through sale, gift, devise, inheritance, liquidation, distribution, merger, consolidation, corporate reorganization, lease or otherwise, any tax generated by the business which was due on or before the date of any part of the transfer constitutes a lien against the assets in the hands of a purchaser, or any other transferee, until the taxes are paid. Whether a majority of the assets have been transferred is determined by the fair market value of the assets transferred, and not by the number of assets transferred. The department may not issue a license to continue the business to the transferee until all taxes due the State have been settled and paid and may revoke a license issued to the business in violation of this section.

This section does not apply if the purchaser receives a certificate of compliance from the department stating that all tax returns have been filed and all taxes generated by the business have been paid. The certificate of compliance is valid if it is obtained no more than thirty days before the sale or transfer.

HISTORY: 2003 Act No. 69, Section 3.Y, eff June 18, 2003.

- B. SC Department of Revenue Ruling 04-2 – See copy attached.
- C. SC Department of Revenue Form C-268 - Certificate of Tax Compliance Request Form – See copy attached.
- D. Example of a Certificate – See copy attached.

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State of South Carolina  
**Department of Revenue**  
301 Gervais Street, P. O. Box 125, Columbia, South Carolina 29214  
Website Address: <http://www.sctax.org>

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SC REVENUE RULING #04-2

SUBJECT: “Transferor Affidavit” Exception to Code Section 12-54-124 Upon the Transfer of Certain Assets

EFFECTIVE DATE: June 18, 2003

REFERENCES: S. C. Code Ann. Section 12-54-124 (Enacted June 18, 2003)

AUTHORITY: S. C. Code Ann. Section 12-4-320 (Supp. 2000)  
S. C. Code Ann. Section 1-23-10(4) (Supp. 2000)  
SC Revenue Procedure #03-1

SCOPE: The purpose of a Revenue Ruling is to provide guidance to the public and to Department personnel. It is a written statement issued to apply principles of tax law to a specific set of facts or a general category of taxpayers. **A Revenue Ruling is an advisory opinion; it does not have the force or effect of law and is not binding on the public.** It is, however, the Department’s position and is binding on agency personnel until superseded or modified by a change in statute, regulation, court decision, or advisory opinion.

Effective June 18, 2003, Act No. 69 (Section 3Y) added Code Section 12-54-124 concerning a tax lien placed on assets transferred for tax liabilities that were generated by the transferor on or before the date when a majority of the business assets are transferred, the non-issuance of a license by the Department to the transferee until all taxes have been paid, and an exception to these rules if a certificate of compliance is timely obtained by the transferee from the Department. The new statute reads:

In the case of the transfer of a majority of the assets of a business, other than cash, whether through sale, gift, devise, inheritance, liquidation, distribution, merger, consolidation, corporate reorganization, lease or otherwise, any tax generated by the business which was due on or before the date of any part of the transfer constitutes a lien against the assets in the hands of a purchaser, or any other

transferee, until the taxes are paid. Whether a majority of the assets have been transferred is determined by the fair market value of the assets transferred, and not by the number of assets transferred. The department may not issue a license to continue the business to the transferee until all taxes due the State have been settled and paid and may revoke a license issued to the business in violation of this section.

This section does not apply if the purchaser receives a certificate of compliance from the department stating that all tax returns have been filed and all taxes generated by the business have been paid. The certificate of compliance is valid if it is obtained no more than thirty days before the sale or transfer.

The purpose of this advisory opinion is to answer some common questions that have arisen in the application of this new law and to explain a method by which a transferee who is not receiving business assets, or where the transferor is not transferring a majority of the assets of a business in this and other related or planned transfers, may have assurance that the Department will not assert that Code Section 12-54-124 placed a lien against the assets in the hands of the transferee, and if applicable, the Department will not refuse to issue a license and will not revoke a license based upon Code Section 12-54-124.

The statute provides that the law does not apply if a transferee receives a timely certificate of compliance. This advisory opinion sets forth a mechanism whereby the law will also not apply in certain situations even if a transferee does not obtain a certificate of compliance. In the Department's opinion, it was not the legislative intent of this statute to impede the sale of assets or expect the transferee to always know whether business assets or a majority of the assets of a business are being transferred. Accordingly, the Department has determined in the situations described below that it will not assert that Code Section 12-54-124 applies if a valid "Transferor Affidavit" is obtained. In such situations, the Department will not place a lien against the assets in the hands of the transferee, and the Department will not refuse to issue and will not revoke a license based upon Code Section 12-54-124. The Department, however, will pursue the transferor if the transferor does not file all applicable returns and pay its tax liabilities. Note: Neither Code Section 12-54-124, a "Certificate of Compliance," nor the "Transferor Affidavit" protect the transferee from a lien placed on the assets prior to the transfer by other statutory or judicial means. For example, the transferee is not protected from a lien existing on the property due to nonpayment of real property taxes.

### **Question 1 – Transferor Affidavit**

Q. If the transferor asserts that the assets transferred are not business assets or do not constitute a majority of its business assets, then how may a transferee be protected from the provisions of Code Section 12-54-124?

A. The transferee can obtain from the transferor a "Transferor Affidavit." The purpose of this affidavit is to protect the transferee who is not receiving business assets or where

the transferor is not transferring a majority of the assets of a business in this and other related or planned transfers from a tax lien that may be placed on the assets transferred pursuant to Code Section 12-54-124 if the transferor does not file all applicable returns or pay all of its South Carolina tax liabilities. The “Transferor Affidavit” is valid for 30 days from the date signed by the transferor. In other words, if the transferee obtains a valid “Transferor Affidavit” and the transfer takes place during this 30 day period, then the Department will not assert that Code Section 12-54-124 placed a lien placed against the assets in the hands of the transferee, and if applicable, the Department will not refuse to issue a license and will not revoke a license based upon Code Section 12-54-124. Note: Neither Code Section 12-54-124, a “Certificate of Compliance,” nor the “Transferor Affidavit” protect the transferee from a lien placed on the assets prior to the transfer by other statutory or judicial means. For example, the transferee is not protected from a lien existing on the property due to nonpayment of real property taxes.

A form “Transferor Affidavit” is attached to this advisory opinion. This affidavit may be used or a substitute affidavit is acceptable in lieu of this affidavit provided all information is reflected on the substitute affidavit.

## **Question 2 – Certificate of Compliance**

Q. What is the difference between a “Transferor Affidavit” and a “Certificate of Compliance?”

A. The purpose of a timely certificate of compliance is to protect the transferee from a tax lien that may be placed on the business assets transferred pursuant to Code Sections 12-54-124 and/or 12-36-530 **when a majority of the assets of a business are being transferred or when a business is sold**, even if the transferor did not file all applicable returns and pay all of its South Carolina tax liabilities. Note: Neither Code Section 12-54-124, a “Certificate of Compliance” nor the “Transferor Affidavit” protects the transferee from a lien placed on the assets prior to the transfer by other statutory or judicial means. For example, the transferee is not protected from a lien existing on the property due to nonpayment of real property taxes.

A certificate of compliance issued prior to the transfer is valid for 30 days from the date it is issued by the Department. If the transfer takes place during this 30 day period, then the Department will not assert that Code Section 12-54-124 placed a lien against the assets in the hands of the transferee, and if applicable, the Department will not refuse to issue a license and will not revoke a license based upon Code Section 12-54-124. See SC Revenue Procedure #03-5, “Certificate of Compliance Exception to a Lien Placed on Assets Transferred,” for additional information on the procedure to use if requesting a certificate of compliance from the Department, and the applicability of the certificate of

compliance to liens placed against the sale of any business pursuant to Code Section 12-36-530. Note: The transferor still remains liable for filing all applicable returns and paying all of its South Carolina tax liabilities even if a certificate of compliance is provided to the transferee.

### **Question 3 – Definition of “Business”**

Q. What is a business?

A. Since Code Section 12-54-124 does not contain a definition of “business,” it is the Department’s opinion that relying on the common meaning of “business” for income tax purposes is reasonable when interpreting the provisions of Code Section 12-54-124. In South Carolina’s Income Tax Act, Code Section 12-6-30(10) defines “business” to include trade, profession, occupation, or employment. Further, South Carolina has adopted many of the provisions of the Internal Revenue Code, such as Internal Revenue Code Sections 162<sup>1</sup> and 280A.<sup>23</sup>

In determining whether a transferor is engaged in a “business,” and subject to the provisions of Code Section 12-54-124 upon the transfer of a majority of the business assets in this and other related or planned transfers, the Department will apply income tax principles in Chapter 6 of Title 12 and Internal Revenue Code principles that have been adopted, such as Code Sections 162 and 280A.

For example, in determining if the transferor of a vacation home that has both personal use and rental use is a “business” subject to the provisions of Code Section 12-54-124, the Department will look to the federal income tax concepts in Internal Revenue Code Section 280A. <sup>3</sup> In general, if Section 280A limits the deduction of the vacation home rental expenses, then it is the Department’s opinion that there is not a transfer of “business” assets subject to the provisions of Code Section 12-54-124. The transferor may furnish the transferee a “Transferor Affidavit” stating that the vacation home transferred is not a business asset; a certificate of compliance is not necessary.

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<sup>1</sup> Internal Revenue Code Section 162, “Trade or Business Expenses,” allows a deduction for ordinary and necessary expenses paid or incurred during the taxable year that are directly connected with or pertaining to the taxpayer’s business.

<sup>2</sup> Internal Revenue Code Section 280A, “Disallowance of Certain Expenses in Connection with Business Use of Home, Rental of Vacation Homes, etc.” provides limitations on the amount of deductions that may be taken in connection with the rental of a residence or vacation home that is also used as a residence of the taxpayer.

<sup>3</sup> Note: Any person who makes short term rentals of real estate will be liable for accommodations tax on his rentals whether or not the rentals constitute a business as defined by this advisory opinion. See Code 12-36-910 and 12-36-510.

Alternatively, if Section 280A does not limit the deduction of the vacation home rental expenses, including depreciation, then it is the Department's opinion that there is a transfer of "business" assets. Since this is the only vacation home owned by the transferor in this example, the transfer would be a transfer of a "majority of the business assets" and would be subject to the provisions of Code Section 12-54-124. A certificate of compliance is necessary to protect the transferee from the lien provisions of Code Section 12-54-124.

Note: Even if the transferee receives a "Transferor Affidavit" or certificate of compliance, the transferee should note that if he is purchasing real property from a nonresident seller that he may be required to withhold income taxes from the nonresident seller. See Code Section 12-8-580 and SC Revenue Advisory Bulletin #02-6 for more information.

#### **Question 4 – Definition of "Majority of the Assets of a Business"**

- Q. What is the transfer of a majority of the assets of a business?
- A. Code Section 12-54-124 provides that the fair market value of the assets is used to determine whether a majority of the assets have been transferred. The number of assets transferred is not used to make this determination.

Generally, a legal entity is one business, but it is possible for a legal entity, i.e., corporation, limited liability company, etc., to contain more than one discrete business enterprise. For example, a company owns six grocery stores having equal fair market value. If the company transfers the business assets of two of the grocery stores, then it is the Department's opinion that the provisions of Code Section 12-54-124 would not apply since a majority of the business assets are not being transferred. The transferor may furnish the transferee a "Transferor Affidavit" stating that a majority of the business assets, based on fair market value, are not being transferred in this transfer and other related or planned transfers. See SC Revenue Advisory Bulletin #01-1 for guidance in determining when a legal entity contains one or more discrete businesses.

#### **Question 5 – Definition of "Transfer"**

- Q. Does the statute apply even if the planned or related transfers occur over a period of time or involve more than one transferee?
- A. Yes, neither the period of time to complete the transfer nor the number of transferees involved affects the application of the law. For example, a company liquidating its retail business may transfer all the assets of the business over a period of time to several different persons, or the business may use an auctioneer to sell all of the business assets in one day. In either case, the provisions of Code Section 12-54-124 apply. The transferee can request the transferor provide a timely certificate of compliance. See SC Revenue

Procedure #03-5, "Certificate of Compliance Exception to a Lien Placed on Assets Transferred." Unrelated transfers will not be aggregated.

**Question 6 - Applicability to Foreclosures**

Q. Is this provision applicable to foreclosures?

A. A foreclosure is a forced sale by a court. If: (1) the Judge finds that Code Section 12-54-124 is inapplicable, (2) the party whose assets are being foreclosed completes a "Transferor Affidavit," or (3) the transferee obtains a timely certificate of compliance, then the Department will not assert that Code Section 12-54-124 placed a lien against the assets in the hands of the transferee, and if applicable, the Department will not refuse to issue a license and will not revoke a license based upon Code Section 12-54-124.

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/Burnet R. Maybank III

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Burnet R. Maybank III, Director

Columbia, South Carolina

March 2 \_\_\_\_\_, 2004

**Transferor Affidavit  
Tax Lien Inapplicable  
SC Code Section 12-54-124**

The undersigned transferor hereby certifies as follows:

1. This affidavit is being given in connection with a transfer of property to assure the transferee that the Department will not assert that Code Section 12-54-124 placed a lien against the assets in the hands of the transferee, and if applicable, the Department will not refuse to issue a license and will not revoke a license based upon Code Section 12-54-124. This affidavit issued for purposes of Code Section 12-54-124 is valid for 30 days from the date signed.

It is understood that this affidavit does not protect the transferee from a lien placed on the assets prior to the transfer by other statutory or judicial means, or relieve the transferor of his liabilities to pay all of its taxes or file all applicable returns, and that it does not protect the transferee from the Department refusing to issue a license, or revoking a license, for any other reason. For example, the transferee is not protected from a lien existing on the property due to nonpayment of real property taxes.

2. The undersigned is the transferor of the assets described in the attached description.
3. The Transferor's name is \_\_\_\_\_

4. The Transferor's address is \_\_\_\_\_  
\_\_\_\_\_

5. The Transferor's taxpayer identification number is \_\_\_\_\_

6. Date of Transfer \_\_\_\_\_

7. The Transferee's name is \_\_\_\_\_

8. The Transferee's address is \_\_\_\_\_  
\_\_\_\_\_

I hereby certify the following concerning the transfer (check appropriate box):

- The assets transferred are not business assets.

Less than a majority of the business assets, based on fair market value, are being transferred in this and other related or planned transfers.

The undersigned authorizes the delivery and disclosure of this affidavit to the South Carolina Department of Revenue and acknowledges that any false statement contained herein is punishable by fine, imprisonment, or both. Recognizing that I am subject to the criminal penalties under Code Section 12-54-44(B)(6)(a)(i), I declare that I have examined this affidavit and to the best of my knowledge and belief it is true, correct, and complete.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Name – Please Print

**Instructions**  
**Transferor Affidavit - SC Code Section 12-54-124**

**Purpose of Transferor Affidavit**

The purpose of this affidavit is to provide assurance to the transferee who is not receiving business assets or where the transferor is not transferring a majority of the assets of a business in this and other related or planned transfers that the Department will not assert that Code Section 12-54-124 placed a lien on the assets in the hands of the transferee, and if applicable, the Department will not refuse to issue a license and will not revoke a license based upon Code Section 12-54-124. Caution: This affidavit does not protect the transferee from a lien placed on the assets prior to the transfer by other statutory or judicial means, or relieve the transferor of his liabilities to pay all of its taxes or file all applicable returns.

**Who May Execute this Affidavit**

Any transferor who is not transferring business assets or not transferring a majority of the assets of a business based on the fair market value in this and other related or planned transfers may give this affidavit to each transferee to provide assurance that the Department will not assert that Code Section 12-54-124 placed a lien on the assets in the hands of the transferee if the transferor has South Carolina tax liabilities or has not filed all applicable returns. The Department will pursue the transferor if the transferor did not file all applicable returns or pay all of its tax liabilities.

Note: A transferor who is transferring a majority of the assets of a business may provide each transferee with a timely certificate of compliance before finalizing the transfer to provide assurance that the Department will not assert that Code Section 12-54-124 placed a lien on the assets transferred. See SC Revenue Procedure #03-5, "Certificate of Compliance Exception to a Lien Placed on Assets Transferred," for additional information.

**Reliance on Transferor Affidavit**

The "Transferor Affidavit" is valid for 30 days from the date signed by the transferor. Accordingly, if the qualifying transfer takes place during this 30 day period, then the Department will not assert that Code Section 12-54-124 placed a lien on the assets in the hands of the transferee, and if applicable, the Department will not refuse to issue a license and will not revoke a license based upon Code Section 12-54-124. The transferee may rely on the "Transferor Affidavit" if the transferee does not know the affidavit is false.

**When and Where to Execute this Affidavit**

The transferor should fully complete this affidavit and submit it directly to each transferee. Each transferee should retain the affidavit and provide it if requested during audit. This affidavit should not be remitted to the Department until it is requested by the Department.

1350

dor.sc.gov



STATE OF SOUTH CAROLINA  
DEPARTMENT OF REVENUE  
CERTIFICATE OF TAX COMPLIANCE  
REQUEST FORM

C-268  
(Rev. 7/16/18)  
6207

Physical Address: South Carolina Department of Revenue, Tax Compliance Office,  
300A Outlet Pointe Blvd, Columbia, SC 29210  
Mailing Address: South Carolina Department of Revenue, Tax Compliance Office,  
PO Box 125, 29214-0785

FOR OFFICE USE ONLY

**SECTION 1 - TAXPAYER INFORMATION**

Legal Name \_\_\_\_\_

Name as Filed on Return/Business Name \_\_\_\_\_

Mailing Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_ Telephone Number: ( ) \_\_\_\_\_

SSN/FEIN \_\_\_\_\_ State of Incorporation: \_\_\_\_\_

How was business acquired?  Purchase  Started (Start Date) \_\_\_\_\_  Merger (Date of Merger) \_\_\_\_\_

Is this entity a single member LLC?  yes  no If yes, is it a disregarded entity?  yes  no

Owners' Name \_\_\_\_\_ FEIN/SSN: \_\_\_\_\_

As a single member LLC, we must have your SSN or FEIN to complete this process. If not, it may cause a delay in processing.

Is this a real estate transaction?  yes  no If yes, please list the property address \_\_\_\_\_

**SECTION 2 - REQUESTOR INFORMATION**

This request is being made by:  Taxpayer  Other\* (explain) \_\_\_\_\_

\* A power of attorney must be attached to this request.

Requestor Name \_\_\_\_\_

Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip Code \_\_\_\_\_

Telephone Number ( ) \_\_\_\_\_ Fax Number ( ) \_\_\_\_\_

Please provide the name of the person(s) authorized to discuss confidential tax information pertaining to this request if additional information is needed.

Name \_\_\_\_\_ Relationship to Taxpayer \_\_\_\_\_

Telephone Number \_\_\_\_\_ Fax Number \_\_\_\_\_

Check here if certificate is being requested for corporate reinstatement after administrative dissolution.

**SECTION 3 - PERSON TO RECEIVE RESPONSE**

Check applicable blocks:

Send results to the taxpayer.

Send results to the person named below, even if the taxpayer is not in compliance.

If information is to be mailed to someone other than the taxpayer, provide the party's name and mailing address:

Name \_\_\_\_\_

Address \_\_\_\_\_

City/State/Zip \_\_\_\_\_

Telephone Number: ( ) \_\_\_\_\_ Fax Number: ( ) \_\_\_\_\_

**SECTION 4 - PAYMENT OF \$60.00 (NONREFUNDABLE) IS REQUIRED**

Amount enclosed ..... ▶ \_\_\_\_\_

Signature of Taxpayer/Requestor \_\_\_\_\_

Title (if applicable) \_\_\_\_\_

Print Name \_\_\_\_\_

Date \_\_\_\_\_

Email \_\_\_\_\_

If emailing or faxing the request, please submit payment separately to the Mailing Address at the top of the form and provide the name and FEIN/SSN of the taxpayer.

62071014



STATE OF SOUTH CAROLINA  
DEPARTMENT OF REVENUE

301A Outlet Pointe Blvd., Columbia, South Carolina 29210  
P.O. Box 125, Columbia, South Carolina 29214

December 9, 2017

Wilson W. McDonald, Esq.  
c/o Sewell Gray Robinson  
PO Box 11449  
Columbia SC 29211

Re: Federal Identification Number: xxx-xx-xxxx

**Certificate of Tax Compliance**

Pursuant to South Carolina Code of Laws §12-6-5512, this certifies that [REDACTED] LLC has filed all returns required to be filed with the South Carolina Department of Revenue (SCDOR) for the tax types and periods listed below. All returns and taxes required to be filed and payable to the South Carolina Department of Revenue are current.

This letter does not include taxes that may become due if the taxpayer is issued a proposed assessment, selected for audit, currently under audit, in appeals or litigation with the South Carolina Department of Revenue, or tax liens that may not be collected by levy or proceedings in court. The South Carolina Department of Revenue provides this Certificate of Compliance only for returns required to be filed and only for payments made directly to SCDOR.

<u>Taxes</u>	<u>File Number</u>	<u>Period Covered</u>
LLC	N/A	No Filing Requirements through 2016

*This certificate is valid for thirty (30) days with the Secretary of State following the above date. A new request must be submitted once the time has expired.*

**\*\*If this certificate is required due to an administrative dissolution, a copy of this certificate and an "Application for Reinstatement of a Corporation Dissolved by Administrative Action" (for domestic corporations) or "Application for Reinstatement of a Corporation When Certificate of Authority Has Been Revoked" (for foreign corporations) must be mailed within 30 days of the date of this letter to the Secretary of State's Office. This application can be obtained from the Secretary of State's website at [www.sos.com](http://www.sos.com).**

Sincerely,

*Jennifer Boston*

Jennifer Boston  
South Carolina Department of Revenue  
Government Services/Tax Compliance  
(803) 898-5381  
taxrequest@dor.sc.gov

#### **IV. The ALTA 17.2 – Utility Availability**

*See Next Page*



# Investors Title Insurance Company

P.O. Drawer 2687  
Chapel Hill, North Carolina 27616-2687

## ALTA ENDORSEMENT FORM 17.2-06 (Utility Access) (10/16/08)

This endorsement is made a part of the Policy to which it is attached.

The Company insures against loss or damage sustained by the Insured by reason of the lack of a right of access to the following utilities or services: [CHECK ALL THAT APPLY]

- |   |  |   |
|---|--|---|
| <input type="checkbox"/> Water service            | <input type="checkbox"/> Natural gas service | <input type="checkbox"/> Telephone service    |
| <input type="checkbox"/> Electrical power service | <input type="checkbox"/> Sanitary sewer      | <input type="checkbox"/> Storm water drainage |
| <input type="checkbox"/> _____]                   | <input type="checkbox"/> _____]              | <input type="checkbox"/> _____]               |

either over, under or upon rights-of-way or easements for the benefit of the Land because of:

- (1) a gap or gore between the boundaries of the Land and the rights-of-way or easements;
- (2) a gap between the boundaries of the rights-of-way or easements ; or
- (3) a termination by a grantor, or its successor, of the rights-of-way or easements.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Investors Title Insurance Company  
By: W. Morris Fine, President (SEAL)

\_\_\_\_\_  
Authorized Signatory



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ALTA 17.2-06 (10/16/08)

## V. Roll-back Taxes

### A. Authority - South Carolina Code Section 12-43-220(d)(4):

(4) Except as provided pursuant to Section 12-43-222, when real property which is in agricultural use and is being valued, assessed, and taxed under the provisions of this article, is applied to a use other than agricultural, it is subject to additional taxes, hereinafter referred to as roll-back taxes, in an amount equal to the difference, if any, between the taxes paid or payable on the basis of the valuation and the assessment authorized hereunder and the taxes that would have been paid or payable had the real property been valued, assessed, and taxed as other real property in the taxing district, in the current tax year (the year of change in use) and each of the five tax years immediately preceding in which the real property was valued, assessed, and taxed as herein provided. If in the tax year in which a change in use of the real property occurs the real property was not valued, assessed, and taxed under this article, then the real property is subject to roll-back taxes for each of the five tax years immediately preceding in which the real property was valued, assessed, and taxed hereunder. In determining the amounts of the roll-back taxes chargeable on real property which has undergone a change in use, the assessor shall for each of the roll-back tax years involved ascertain:

(A) the fair market value without consideration of the standing timber of such real property under the valuation standard applicable to other real property in the same classification;

(B) the amount of the real property assessment for the particular tax year by multiplying such fair market value by the appropriate assessment ratio provided in this article;

(C) the amount of the additional assessment on the real property for the particular tax year by deducting the amount of the actual assessment on the real property for that year from the amount of the real property assessment determined under (B) of this section;

(D) the amount of the roll-back for that tax year by multiplying the amount of the additional assessment determined under (C) of this section by the property tax rate of the taxing district applicable for that tax year.

(5) Any other provision of law to the contrary notwithstanding, a dockside facility whose primary use is the landing and processing of seafood is considered agricultural real property.

(6) Any property which becomes exempt from property taxes under

Section 12-37-220(A)(1) or any economic development property which becomes exempt under Section 12-37-220(B) is not subject to rollback taxes.

- B. Who Pays? There is no hard and fast rule on this. It can be negotiated between a Buyer and a Seller. Depending on the proposed new use of the property, roll-back taxes can get pretty expensive. There are good arguments on both sides (for example, the Seller has had the benefit of the lower agricultural assessment; or the Buyer is the one who is actually changing the use that triggers the taxes becoming due). I have had one lawyer explain it to me that he typically tries to get whoever is getting the economic benefit of the changed use to pay them. So if a Seller is selling the property for a price that factors in the intended use, the Seller should pay. Alternatively, if the subject property is priced similarly to other property in the area that will remain agricultural, the Buyer would pay. So ultimately, who pays them all or if they are paid jointly by the parties should be factored into the price of the subject property.

## **VI. Some Newer Lender Regulatory Requirements**

### **A. Know Your Borrower**

- i. Authority - Customer Due Diligence Requirements for Financial Institutions, published on May 11, 2016, as amended on September 29, 2017 (the "CDD Rule" or the "Rule"). I have attached a copy of the Financial Crimes Enforcement Network ("FinCen"), Guidance #FIN-2018-G001, issued on April 3, 2018 to the end of this outline that contains several Frequently Asked Questions about the Rule. Essentially, the CDD Rule requires covered financial institutions to obtain certain information on any individual or entity owning directly or indirectly 25% or more of a legal entity customer and on an individual who has managerial control of the legal entity customer.
- ii. Impact – These requirements primarily come into play in transactions where there are multiple owners or members of a borrower. So, it is good to be aware of them and advise your client to anticipate that it will be required to provide information of itself, its members/owners and possibly even an individual or entity acquiring or financing a refinance/ payoff of the bank's loan. I have had experiences where these requirements were interpreted to cover not only a bank's customer but to extend to an individual or entity acquiring property securing the bank's loan as well as an individual who was making a loan to a client that was going to pay-off the bank's loan and then be secured by the same property. It was hard for the individual lender in

that case to understand why the bank that was being paid off required what the individual considered his personal information before the bank would agree to accept a payoff of its loan.

## B. HVCRE

- i. Authority – Enacted as part of Dodd Frank. The OCC, Federal Reserve and FDIC all published capital regulations in July, 2013. Section 214 of S.2155 which was signed into law by President Trump on May 24, 2018 provides some much-needed clarification of the risk-based capital treatment of High Volatility Commercial Real Estate (“HVCRE”) loans. The regulators released proposed rulemaking on September 18, 2018 and comments were due prior to the date of this talk.

- ii. What is a HVCRE Loan?

Loans for permanent financing would not be considered HVCRE loans and there are some other exceptions. Generally, an HVCRE loan is any loan used for acquisition, development or construction of real estate, unless the loan finances: (i) 1-4 family residential properties; (ii) real property that would qualify as a "qualified investment" in community development (generally, any loan which would qualify as a permissible investment for the Community Reinvestment Act should meet this test); (iii) the purchase or development of agricultural land; (iv) commercial real estate projects where (A) the loan-to-value ratio is less than or equal to the applicable regulator's maximum permitted amount (depending on the type of loan and such bank's applicable regulator-typically 80%), and (B) the borrower contributes capital to the project in the form of cash or unencumbered readily marketable assets (which can include certain development costs out of pocket) of at least 15% of the real estate project's "as completed" appraised value.

- iii. Why do we care?

When a loan is categorized as HVCRE, banks must reserve fifty (50%) percent more than they would for a non HVCRE commercial loan. Generally, most corporate loans carry a risk weight of 100%. If a loan is an HVCRE loan, the risk weight is 150%. So for example, a bank would have to reserve \$6 million in capital to make a \$50 million HVCRE loan, rather than the \$4 million it would be required to reserve for a typical commercial real estate loan.

Therefore, it is important to make sure your client is aware of the issues a bank may have in making an HVCRE loan, if it will do so at

all. In most cases, your client will likely need to be at or below the bank's loan-to-value ratio threshold and be prepared to contribute capital to the project in the form of cash or unencumbered readily marketable assets (which can include certain development costs out of pocket) of at least 15% of the real estate project's "as completed" appraised value.

## **VII. Close/Questions**

***[Insert FIN-2018-G001 Here]***

# Guidance

FIN-2018-G001

Issued: April 3, 2018

Subject: Frequently Asked Questions Regarding Customer Due Diligence Requirements for Financial Institutions

The Financial Crimes Enforcement Network (FinCEN) is issuing these Frequently Asked Questions to assist covered financial institutions in understanding the scope of the Customer Due Diligence Requirements for Financial Institutions, published on May 11, 2016, as amended on September 29, 2017 (“CDD Rule” or “Rule”), available at <https://www.fincen.gov/resources/statutes-regulations/federal-register-notice/customer-due-diligence-requirements>. On July 19, 2016, FinCEN published FAQs, available at <https://www.fincen.gov/resources/statutes-regulations/guidance/frequently-asked-questions-regarding-customer-due-diligence>. FinCEN may issue additional FAQs, guidance, or grant exceptive relief as appropriate.

A covered financial institution with notice of or a reasonable suspicion that a customer is evading or attempting to evade beneficial ownership or other customer due diligence requirements should consider whether it should not open an account, close an account, or file a suspicious activity report, regardless of any interpretations below.

## Frequently Asked Questions (FAQs)

### **Question 1: Beneficial ownership threshold**

**Can a covered financial institution adopt and implement more stringent written internal policies and procedures for the collection of beneficial ownership information than the obligations prescribed by the Beneficial Ownership Requirements for Legal Entity Customers (31 CFR 1010.230)?**

- A. Yes. Covered financial institutions may choose to implement stricter written internal policies and procedures for the collection and verification of beneficial ownership information than the requirements prescribed by the Rule.

Transparency in beneficial ownership provides highly valuable information that supports law enforcement, tax, regulatory or counterterrorism investigations. The Rule sets forth the standard for collecting such valuable information at 25 percent of beneficial ownership. Therefore, covered financial institutions will meet their beneficial ownership obligations by collecting information on individuals, if any, who hold directly or indirectly, 25 percent or more of the equity interests in and one individual who has managerial control of a legal entity customer. A covered financial institution may choose, however, to collect such information on natural persons who own a lower percentage of the equity interests of a legal entity customer as well as information on more than one individual with managerial control.

***Question 2: Interaction of the beneficial ownership threshold with other AML program obligations***

**Are there circumstances where covered financial institutions should consider collecting beneficial ownership information at a lower equity interest threshold under the anti-money laundering (AML) program rules with regard to certain customers?**

- A. There may be circumstances where a financial institution may determine that collection and verification of beneficial ownership information at a lower threshold may be warranted, based on the financial institution's own assessment of its risk relating to its customer.

Transparency in beneficial ownership, however, is only one aspect of a covered financial institution's customer due diligence obligations. A financial institution may reasonably conclude that collecting beneficial ownership information at a lower equity interest than 25 percent would not help mitigate the specific risk posed by the customer or provide information useful to the financial institution in analyzing the risk. Rather, any additional heightened risk could be mitigated by other reasonable means, such as enhanced monitoring or collecting other information, including expected account activity, in connection with the particular legal entity customer.

In all cases, however, it is important that covered financial institutions establish and maintain written procedures that are reasonably designed to identify and verify the identity of beneficial owners of legal entity customers and to include such procedures in their AML compliance program.<sup>1</sup>

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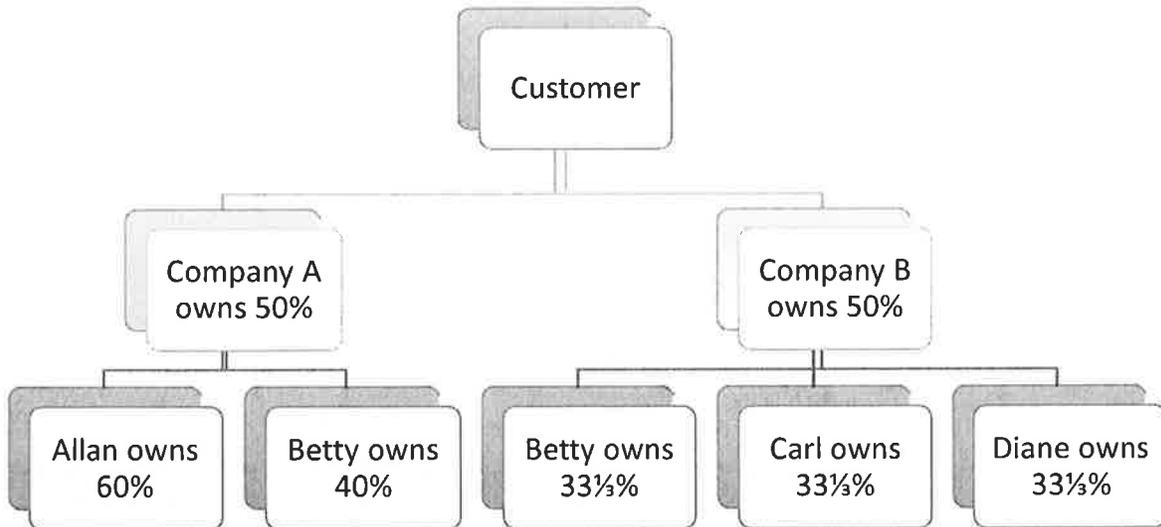
1. See 31 U.S.C. § 5318(h); 31 CFR 1010.230(a).

**Question 3: Collection of beneficial ownership information for direct and indirect owners: Legal entity customers with complex ownership structures**

When a legal entity is identified as owning 25 percent or more of a legal entity customer that is opening an account, is it necessary for a covered financial institution to request beneficial ownership information on the legal entity identified as an owner?

A. Under the Rule’s beneficial ownership identification requirement, a covered institution must collect, from its legal entity customers, information about any individual(s) that are the beneficial owner(s) (unless the entity is excluded or the account is exempted). Therefore, covered financial institutions must obtain from their legal entity customers the identities of individuals who satisfy the definition, either directly or indirectly through multiple corporate structures, as illustrated in the following example.

For purposes of the Rule, Allan is a beneficial owner of Customer because he owns indirectly 30 percent of its equity interests through his direct ownership of Company A. Betty is also a beneficial owner of Customer because she owns indirectly 20 percent of its equity interests through her direct ownership of Company A plus  $16\frac{2}{3}$  percent through Company B for a total of indirect ownership interest of  $36\frac{2}{3}$  percent. Neither Carl nor Diane is a beneficial owner because each owns indirectly only  $16\frac{2}{3}$  percent of Customer’s equity interests through their direct ownership of Company B.



A covered financial need not independently investigate the legal entity customer's ownership structure and may accept and reasonably rely on the information regarding the status of beneficial owners presented to the financial institution by the legal entity customer's representative, provided that the institution has no knowledge of facts that would reasonably call into question the reliability of the information.

#### **Question 4: Identification and Verification: Methods of verifying beneficial ownership information**

**What means of identity verification are sufficient to reliably confirm beneficial ownership under the CDD Rule?**

- A. Covered financial institutions must verify the identity of each beneficial owner according to risk-based procedures that contain, at a minimum, the same elements financial institutions are required to use to verify the identity of individual customers under applicable Customer Identification Program ("CIP") requirements. This includes the requirement to address situations in which the financial institution cannot form a reasonable belief that it knows the true identity of the legal entity customer's beneficial owners.<sup>2</sup> Although the CDD Rule's beneficial ownership verification procedures must contain the same elements as existing CIP procedures, they are not required to be identical to them.<sup>3</sup> For example, a covered financial institution's policies and procedures may state that the institution will accept photocopies of a driver's license from the legal entity customer to verify the beneficial owner(s)' identity if the beneficial owner is not present, which is not permissible in the CIP rules. (See Question 6.)

A financial institution's CIP must contain procedures for verifying customer identification, including describing when the institution will use documentary, non-documentary, or a combination of both methods for identity verification.<sup>4</sup> Covered financial institutions may use the same methods to verify the identity of the beneficial owner of a legal entity customer. In addition, in contrast to the CIP rule, the CDD Rule expressly authorizes covered financial institutions to use photocopies or other reproduction documents for documentary verification.<sup>5</sup>

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2. Under the CIP rules, a financial institution's CIP must include procedures for responding to circumstances in which the financial institution cannot form a reasonable belief that it knows the true identity of a customer. These procedures should describe: (1) when the institution should not open an account; (2) the terms under which a customer may use an account while the institution attempts to verify the customer's identity; (3) when it should close an account, after attempts to verify a customer's identity have failed; and (4) when it should file a Suspicious Activity Report in accordance with applicable laws and regulations. *See, e.g.*, 31 CFR 1020.220(a)(2)(iii).
3. *See* 31 CFR 1020.220(a)(2); 31 CFR 1023.220(a)(2); 31 CFR 1024.220(a)(2); or 31 CFR 1026.220(a)(2).
4. *See* 31 CFR 1020.220 (a)(2)(ii).
5. *See* 31 CFR 1010.230(b)(2).
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Documentary verification may include unexpired government-issued identification evidencing nationality or residence and bearing a photograph or similar safeguard, such as a driver’s license or passport.<sup>6</sup> Non-documentary methods of verification may include contacting a beneficial owner; independently verifying the beneficial owner’s identity through the comparison of information provided by the legal entity customer (or the beneficial owner, as appropriate) with information obtained from other sources; checking references with other financial institutions; and obtaining a financial statement.<sup>7</sup>

Financial institutions should conduct their own risk-based analysis to determine the appropriate method(s) of verification and the appropriate documents or types of photocopies or reproductions to accept in order to comply with the beneficial owner verification requirement.

**Question 5: Collection of beneficial ownership information: Required addresses**

**What address should be obtained for a legal entity customer’s beneficial owner(s) to comply with the certification requirement – residential or business?**

- A. The address requirements for certification under the CDD Rule are the same as those outlined in the CIP rule. For an individual beneficial owner, covered financial institutions must obtain either a residential or a business street address. If neither is available, acceptable substitutes may include an Army Post Office (APO) or Fleet Post Office (FPO) box number, or the residential or business street address of next of kin or of another contact individual.<sup>8</sup>

**Question 6: Identification and verification: Legal entity customer representative**

**What process should a covered financial institution use to identify and verify the identity of a beneficial owner of a legal entity customer when the beneficial owner is unavailable to appear in person during the opening of a new account and chooses to provide to the legal entity’s representative a copy of a driver’s license?**

- A. A covered financial institution may identify the beneficial owner(s) of a legal entity customer either by obtaining a completed Certification Form or equivalent information from the legal entity customer’s representative and may rely on such information, provided that it has no knowledge of facts that would reasonably call

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6. See 31 CFR 1020.220 (a)(2)(ii)(A).

7. See 31 CFR 1020.220 (a)(2)(ii)(B).

8. See 31 CFR 1020.220(a)(2)(i)(3); 31 CFR 1023.220(a)(2)(i)(3); 31 CFR 1024.220(a)(2)(i)(3); 31 CFR 1026.220(a)(2)(i)(3).

into question the reliability of such information.<sup>9</sup> Furthermore, covered financial institutions may verify the identity of a beneficial owner who does not appear in person, through a photocopy or other reproduction of a valid identity document, or by non-documentary means described in response to Question 4 above.

**Question 7: Identification and verification: Existing customers as beneficial owners of new legal entity customer accounts**

**If an individual named as a beneficial owner of a new legal entity account is an existing customer of the covered financial institution subject to the financial institution's CIP, is a covered financial institution still required to identify and verify the identity of this individual, or may it rely on the CIP identification and verification of the individual that it previously performed?**

- A. In general, covered financial institutions must identify and verify the identity of the beneficial owner(s) of legal entity customers at the time each new account is opened. However, if the individual identified as the beneficial owner is an existing customer of the financial institution and is subject to the financial institution's CIP, a financial institution may rely on information in its possession to fulfill the identification and verification requirements, provided the existing information is up-to-date, accurate, and the legal entity customer's representative certifies or confirms (verbally or in writing) the accuracy of the pre-existing CIP information.

For example, a representative of X Corp opens a new account for the company at a covered financial institution and identifies John Doe, who has a personal account at the institution, as a 25 percent equity owner of X Corp. As required under the CIP rule, the institution identified and verified John Doe's identity at the time the personal account was established. In this situation, a covered financial institution may rely on the pre-existing CIP identification and verification information it maintains for John Doe, provided that X Corp's representative certifies or confirms (verbally or in writing) the accuracy of the pre-existing information on John Doe in order to comply with the Rule. The covered financial institution's records of beneficial ownership for the new account could cross-reference the relevant CIP records and the verification of information would not need to be repeated.

**Question 8: Location of Certification Form or Appendix A to the final rule**

**Are covered financial institutions required to use the beneficial ownership Certification Form (Appendix A to the Rule) and if so, how can they obtain a copy of the Form?**

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9. See 31 CFR 1010.230(b)(1).

- A. There is no requirement that covered financial institutions use the Certification Form. Rather, the form is optional and provided for the convenience of covered financial institutions as one possible method to obtain the required beneficial ownership information. Financial institutions may choose to comply with the requirements of the Rule by using another method, such as through the institutions' own forms, or any other means that comply with the substantive requirements of this obligation. Covered financial institutions should retain the form and not file it with FinCEN.

Covered financial institutions may obtain a fillable and non-fillable copy of the *optional* Certification Form in Appendix A of the CDD Rule at <https://www.fincen.gov/resources/filing-information>.

**Question 9: Retention of beneficial ownership information: Multiple sets of beneficial ownership certification documents**

**If a covered financial institution has updated the beneficial ownership information on the account(s) of a legal entity customer, and subsequently a new account is opened on behalf of the same legal entity customer, is the institution required to retain all sets of beneficial ownership documentation, thereby retaining up to three sets of information: the original set collected at account opening, the updated set, and a third, a duplicate of the second (updated) set for the new account?**

- A. Yes. Covered financial institutions are required to retain all beneficial ownership information collected about a legal entity customer. Identifying information, including the Certification Form or its equivalent, must be maintained for a period of five years after the legal entity's account is closed.<sup>10</sup> However, all verification records must be retained for a period of five years after the record is made.<sup>11</sup> Therefore, whether a financial institution must retain a set of identification or verification records is dependent upon the date an account is opened and closed, or the date a record is made. For example, if a covered financial institution relies on pre-existing beneficial ownership information in its possession as true and accurate identification information when opening a new account for a legal entity customer, the financial institution should maintain the original records, and any updated information, including a record of **any verbal or written confirmation** of pre-existing information (for example, as described in Questions 7 and 10), until five years after the closing of the new account in order to comply with the recordkeeping requirements in the regulation. Covered financial institutions must also retain a description of every document relied on for verification, any non-

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10. See 31 CFR 1010.230(i)(2).

11. *Id.*

documentary methods and results of measures undertaken for verification, as well as the resolution of any substantive discrepancies discovered in identifying and verifying the identification information for five years after the record is made.

**Question 10: Identification and verification: Certification when a single legal entity customer opens multiple accounts**

**If a legal entity customer opens multiple accounts at a covered financial institution (whether or not simultaneously), must the financial institution identify and verify the customer's beneficial ownership for each account?**

- A. Generally, covered financial institutions must identify and verify the legal entity customer's beneficial ownership information for each new account opening, regardless of the number of accounts opened or over a specific period of time. However, an institution that has already obtained a Certification Form (or its equivalent) for the beneficial owner(s) of the legal entity customer may rely on that information to fulfill the beneficial ownership requirement for subsequent accounts, provided the customer certifies or confirms (verbally or in writing) that such information is up-to-date and accurate at the time each subsequent account is opened and the financial institution has no knowledge of facts that would reasonably call into question the reliability of such information. The institution would also need to maintain a record of such certification or confirmation, including for both verbal and written confirmations by the customer.

**Question 11: Identification and verification: Accounts for internal recordkeeping or operational purposes**

**FinCEN understands that after a covered financial institution (particularly in the securities and futures industries) opens a new account for a legal entity customer and identifies its beneficial ownership, the financial institution may subsequently open one or more additional accounts or subaccounts for that customer – for the institution's own recordkeeping or operational purposes and not at the customer's specific request – so that the customer may, for example invest in particular products or implement particular trading strategies. Would such accounts fall within the definition of "new accounts" for purposes of the beneficial ownership requirement?**

- A. The beneficial ownership requirement applies to a "new account," which is defined to mean "each account *opened ... by a legal entity customer*"<sup>12</sup> [emphasis added]. An account (or subaccount) relating to a legal entity customer will not be considered a "new account" or an "account" for purposes of the Rule when a financial institution creates such an account (or subaccount) for its own

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12. See 31 CFR 1010.230(g). In addition, the term "account" is defined by reference to the definition in the CIP rules. 31 CFR 1010.230(c).

administrative or operational purposes and not at the customer’s request—such as to accommodate a specific trading strategy—and the financial institution has already collected beneficial ownership information on such legal entity customer. The distinction between such accounts opened by customers and those opened solely by the financial institution is consistent with the Rule’s purpose to mitigate the risks related to the obfuscation of beneficial ownership when a legal entity tries to access the financial system through the opening of a new account.<sup>13</sup>

This interpretation is limited to accounts (or subaccounts) created solely to accommodate the business of an *existing* legal entity customer that has previously identified its beneficial ownership. Thus, the following accounts (or subaccounts) would *not* fall within this interpretation:

- o accounts (or subaccounts) created to accommodate a trading strategy being carried out by a *separate* legal entity, including a subsidiary of the existing legal entity customer; and,
- o accounts (or subaccounts) through which the customer of a financial institution’s existing legal entity customer carries out trading activity directly through the financial institution without intermediation from the existing legal entity customer.

**Question 12: Collection of beneficial ownership information:  
Product or service renewals**

**Are financial institutions required to have their legal entity customers certify the beneficial owners for existing customers during the course of a financial product renewal (e.g., a loan renewal or certificate of deposit)?**

- A. Yes. Consistent with the definition of “account” in the CIP rules and subsequent interagency guidance,<sup>14</sup> each time a loan is renewed or a certificate of deposit is rolled over, the bank establishes another formal banking relationship and a new account is established. Covered financial institutions are required to obtain information on the beneficial owners of a legal entity that opens a new account, meaning (in the case of a bank) for each new formal banking relationship established, even if the legal entity is an existing customer. For financial services or products established before May 11, 2018, covered financial institutions must obtain certified beneficial ownership information of the legal entity customers of

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13. See 68 FR at 25093 (The preamble to the CIP rules provides that “Treasury and the Agencies note that the [USA PATRIOT] Act provides that the regulations shall require reasonable procedures for ‘verifying the identity of any person seeking to open an account.’ Because these transfers are not initiated by customers, these accounts do not fall within the scope of section 326.”)

14. See “Interagency Interpretive Guidance on Customer Identification Program Requirements under Section 326 of the USA PATRIOT Act, FAQs: Final CIP Rule,” p. 8 (April 28, 2005).

such products and services at the time of the first renewal following that date. At the time of each subsequent renewal, to the extent that the legal entity customer and the financial service or product (*e.g.*, loan or CD) remains the same, the customer certifies or confirms that the beneficial ownership information previously obtained is accurate and up-to-date, and the institution has no knowledge of facts that would reasonably call into question the reliability of the information, the financial institution would not be required to collect the beneficial ownership information again. In the case of a loan renewal or CD rollover, because we understand that these products are not generally treated as new accounts by the industry and the risk of money laundering is very low, if at the time the customer certifies its beneficial ownership information, it also agrees to notify the financial institution of any change in such information, such agreement can be considered the certification or confirmation from the customer and should be documented and maintained as such, so long as the loan or CD is outstanding.

**Question 13: Collection of beneficial ownership information:  
Existing accounts**

**Are covered financial institutions required to collect or update beneficial ownership information on customers with accounts opened prior to May 11, 2018, the Rule’s applicability date?**

- A. Financial institutions are not required to conduct retroactive reviews to obtain beneficial ownership information from customers with accounts opened prior to May 11, 2018. The obligation to obtain or *update* beneficial ownership information on legal entity customers with accounts established before May 11, 2018, is triggered when a financial institution becomes aware of information about the customer during the course of normal monitoring relevant to assessing or reassessing the risk posed by the customer, and such information indicates a possible change of beneficial ownership.<sup>15</sup>

**Question 14: Obligation to solicit or update beneficial ownership information absent specific risk-based concerns**

**Are covered financial institutions required to obtain or update beneficial ownership information during routine periodic reviews of existing accounts, absent risk-based concerns; that is, are such reviews a trigger for the application of the Rule’s beneficial ownership requirements?**

- A. No. Covered financial institutions do not have an obligation to solicit or update beneficial ownership information as a matter of course during regular or periodic reviews, absent specific risk-based concerns. Financial institutions are required to

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15. See 81 FR at 29421.

develop and implement risk-based procedures for conducting ongoing customer due diligence, including regular monitoring to identify and report suspicious activity and, on a risk basis, to maintain and update customer information. Thus, periodic reviews are not by themselves a trigger to obtain or update beneficial ownership information. As stated in response to Questions 13 and 16, the obligation to obtain or update information is triggered when, in the course of normal monitoring, a financial institution becomes aware of information about a customer or an account, including a possible change of beneficial ownership information, relevant to assessing or reassessing the customer's overall risk profile. Absent such a risk-related trigger or event, collecting or updating of beneficial ownership information is at the discretion of the covered financial institution. Financial institutions may exercise this discretion to collect or update beneficial ownership information on customers as often as they deem appropriate.

***Question 15: Processes for monitoring and updating customer information***

**Are covered financial institutions required to implement different processes than currently established to comply with the Rule's ongoing monitoring and updating requirement?**

- A. To the extent that a covered financial institution has monitoring processes in place that allow the institution to meet the Rule's requirements, such institution may use its existing monitoring processes to comply with customer due diligence monitoring and updating obligations. As the preamble to the Rule states, "current industry practice to comply with existing expectations for SAR reporting should already satisfy this proposed requirement."<sup>16</sup>

***Question 16: Updating beneficial ownership information***

**If an update to beneficial ownership information is required, can the change(s) be made in a covered financial institution's databases without physically obtaining and re-certifying the information?**

- A. It depends. A covered financial institution must develop written internal policies, procedures, and internal controls with respect to collecting, maintaining, and updating a legal entity's beneficial ownership information. The Rule requires that covered financial institutions monitor and, on a risk-basis, update the customer information, including the beneficial ownership information, and does not require re-certification when the information is up-

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16. 81 FR 29420.

to-date and accurate.<sup>17</sup> Covered financial institutions may therefore update their records to reflect a change of information for an existing beneficial owner using the same or similar processes the institution implemented to record account information it obtains from customers in connection with the institution's account opening processes. For example, if the update were only to a change of address for an existing beneficial owner whose identity information has already been collected and verified, then full re-certification would likely not be required. In this circumstance, it may be reasonable for the covered financial institution to communicate verbally with the legal entity customer to confirm the accuracy of the change of address and reflect such information in its databases. If, however, the updated information were a change of beneficial ownership, then the new beneficial owner's identity would need to be collected, certified, and verified.

**Question 17: Beneficial ownership information: Identifying and verifying at account opening compared to updating after a risk-related trigger**

**Does FinCEN distinguish between the requirements for identifying and verifying beneficial owner information at the time of a new account opening and at the time of a triggering event?**

- A. No. Whether a covered financial institution identifies and verifies the identity of the beneficial owner at the time a legal entity initially opens a new account or at the time of a triggering event, the fundamental elements of identification and verification are the same. That is, covered financial institutions must identify each beneficial owner by obtaining their name, date of birth, address, and identifying number (such as a social security number or other identifying number permissible under the CIP rule), and verify their identities. However, financial institutions' written policies, procedures, and processes, as well as the sum of information, may differ with respect to the collection of information at the time a legal entity customer initially opens a new account or at the time an existing account is updated after a triggering event.

On or after May 11, 2018, when a legal entity customer initially opens a new account or an existing account is updated to incorporate beneficial ownership information for the first time in response to a triggering event, covered financial institutions must identify and verify the identity of beneficial owners as set forth in section 1010.230(b).

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17. See e.g., 31 CFR 1020.210(b)(5)(ii) (for banks); 1023.210(b)(5)(ii) (for brokers or dealers in securities), 1024.210 (b)(5)(ii) (for mutual funds), 1026.210(b)(5)(ii) (for futures commission merchants and introducing brokers in commodities).

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In contrast, the breadth of information collected as the result of a triggering event during the normal course of monitoring to identify and report suspicious activity and to maintain and update customer information should be determined by what information has changed. That is, only the information that has changed must be updated (*e.g.*, changing the address of the beneficial owner). To the extent that the triggering event results in a determination that the beneficial ownership of the legal entity may have changed entirely, the identity of any new beneficial owner(s) must be collected, certified, and verified, consistent with section 1010.230(b).

**Question 18: Collection of beneficial ownership information: Pooled Investment Vehicles whose operators or advisers are not excluded from the definition of legal entity customer**

**Are covered financial institutions required to identify and verify the identity of the beneficial owners that own 25 percent or more of the ownership interests of a pooled investment vehicle whose operators or advisers are not excluded from the definition of legal entity customer?**

- A. No. Although the Rule requires covered financial institutions to collect and verify the identity of beneficial owners who own 25 percent or more of the equity interests of a legal entity customer, in general, institutions are not required to look through a pooled investment vehicle to identify and verify the identity of any individuals who own 25 percent or more of its equity interests. Because of the way in which ownership of a pooled investment vehicle fluctuates, it would be impractical for covered financial institutions to collect and verify ownership identity for this type of entity. Therefore, there is no requirement that the financial institution should request the customer to look through the pooled investment vehicle to determine and report any individual's equity interest. However, covered financial institutions must collect beneficial ownership information for the pooled investment vehicle under the control prong to comply with the Rule (*i.e.*, an individual with significant responsibility to control, manage, or direct the vehicle; such individuals could be, *e.g.*, a portfolio manager, commodity pool operator, commodity trading advisor, or general partner of the vehicle).<sup>18</sup>

**Question 19: Collection of beneficial ownership information: Trusts with multiple trustees**

**When 25 percent or more of the equity interests of a legal entity customer are owned by a trust that is overseen by co-trustees (multiple trustees), are covered financial institutions required to identify and verify the identity of all co-trustees?**

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18. In cases where such manager, operator or advisor is itself an entity, then it would be necessary to identify an individual with responsibility to control, manage or direct the manager, operator, advisor or general partner. See 31 CFR 1010.230(e)(3)(i), 81 FR at 29415.

- A. No. If a trust owns directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, 25 percent or more of the equity interests of a legal entity customer, the beneficial owner under the ownership/equity prong is the trustee. Where there are multiple trustees or co-trustees, financial institutions are expected to collect and verify the identity of, at a minimum, one co-trustee of a multi-trustee trust who owns 25 percent or more of the equity interests of a legal entity customer that is not subject to an exclusion. A covered financial institution may choose to identify additional co-trustees as part of its customer due diligence, based on its risk assessment and the customer risk profile and in accordance with the institution's account opening procedures.

**Question 20: Collection of beneficial ownership information: Trustee entity as a beneficial owner**

**If a legal entity is the trustee (e.g., law firm, bank trust department, etc.) of a trust that owns 25 percent or more of the equity interests of a legal entity customer, can that entity be identified as a beneficial owner under the ownership/equity prong or does a natural person need to be so identified?**

- A. If a trust owns directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise, 25 percent or more of the equity interests of a legal entity customer, the beneficial owner for purposes of the *ownership/equity prong* is the trustee, regardless of whether the trustee is a natural person or a legal entity.<sup>19</sup> In circumstances where a natural person does not exist for purposes of the ownership/equity prong, a natural person would not be identified. However, a covered institution should collect identification information on the legal entity trustee as part of its CIP, consistent with the covered institution's risk assessment and the customer risk profile. In addition to the *ownership/equity prong*, covered financial institutions are also required to identify and verify a natural person as the beneficial owner of the legal entity customer under the *control prong* to comply with the Rule.<sup>20</sup>

The ownership/equity and control prongs, although related, are independent requirements. Thus, satisfaction of, or exclusion from, regulatory obligations under one prong does not mean a covered financial institution's obligations under the other prong are also satisfied or excluded.

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19. See 31 CFR 1010.230(d)(3).

20. See 31 CFR 1010.230(d)(2).

**Question 21: Verification of claims of exclusion from the definition of “legal entity customer”**

What methods should covered financial institutions use to verify eligibility for exclusion from the definition of a “legal entity customer”?

- A. Several types of legal entity customers are excluded from the collection and verification requirements of the Rule, under section 1010.230(e)(2), because, for example, their regulators require the reporting of beneficial ownership information or such information is publicly available. A financial institution may rely on information provided by the legal entity customer to determine whether the legal entity is excluded from the definition of a legal entity customer, provided that it has no knowledge of facts that would reasonably call into question the reliability of such information. Whether a financial institution has such knowledge would depend on the facts and circumstances at the time an account is opened. Covered financial institutions must establish and maintain written risk-based procedures reasonably designed to identify and verify the identity of the beneficial owners of all legal entity customers at the time a new account is opened, unless the customer is otherwise excluded from the definition of legal entity customer. Covered financial institutions are expected to address and specify, in their risk-based written policies and procedures, the type of information they will obtain and reasonably rely upon to determine eligibility for exclusions.

**Question 22: Definition of legal entity customer: Sole proprietorship and unincorporated associations**

Are sole proprietorships formed by spouses or other unincorporated associations considered legal entity customers under the Rule?

- A. No. Sole proprietorships—individual or spousal—and unincorporated associations are not legal entity customers as defined by the Rule, even though such businesses may file with the Secretary of State in order to register a trade name or establish a tax account. This is because neither a sole proprietorship nor an unincorporated association is a separate legal entity from the associated individual(s), and therefore beneficial ownership is not inherently obscured.<sup>21</sup>

**Question 23: Definition of charities, non-profits or similar entities**

Are covered financial institutions limited to the Internal Revenue Code (IRC) definitions of charities, non-profits, or similar entities when assessing their eligibility for exclusion from the definition of legal entity customer?

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21. See 81 FR, 29398, 29412 (May 11, 2016).

- A. No. The exclusion from the definition of legal entity customer for charities and non-profit entities is not limited to those entities that meet the definition or description of charitable, nonprofit, or similar entities under the IRC. The Rule does not rely on the tax-exempt status of an entity as described in the IRC. All nonprofit entities—whether or not tax-exempt—that are established as a nonprofit, or nonstock corporation, or similar entity that has been validly organized with the proper State authority are excluded from the *ownership/equity prong* of the requirement because nonprofit entities generally do not have ownership interests.<sup>22</sup> Financial institutions, however, are required to collect beneficial ownership information under the *control prong* from any such entity.<sup>23</sup>

**Question 24: Definition of legal entity customer: Publicly traded companies and entities listed on foreign exchanges.**

**Are companies publicly traded in the United States and entities listed on foreign exchanges excluded from the definition of legal entity customer and, therefore, excluded by the Rule?**

- A. Companies traded publicly in the United States are excluded from the definition of legal entity customer. Specifically, the Rule excludes from the definition of legal entity customer certain entities that are considered “exempt persons” under 31 CFR 1020.315(b). This includes any company (other than a bank) whose common stock or analogous equity interests are listed on the New York Stock Exchange, the American Stock Exchange (currently known as NYSE American), or NASDAQ stock exchange.<sup>24</sup> The Rule also excludes a U.S. entity when at least 51 percent of its common stock or analogous equity interest is held by a listed entity.<sup>25</sup> These U.S. companies are excluded from the Rule because they are subject to public disclosure and reporting requirements that provide information similar to what would otherwise be collected under the Rule.

Companies listed on foreign exchanges are *not* excluded from the definition of legal entity customer. Such companies may not be subject to the same or similar public disclosure and reporting requirements as companies publicly traded in the United States and, therefore, collecting beneficial ownership information for them is required.

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22. See 81 FR at 29412.

23. *Id.*

24. See 31 CFR 1020.315 (b)(4).

25. See 31 CFR 1020.315 (b)(5).

**Question 25: Collection of beneficial ownership information: Legal entities listed on foreign exchanges**

May covered financial institutions take a risk-based approach for collecting beneficial ownership information from legal entity customers listed on foreign exchanges?

- A. No. Financial institutions may not take a “risk-based approach” to collecting the required beneficial ownership information from legal entity customers that are listed on foreign exchanges, because such institutions are not excluded from the definition of legal entity customer. However, as they may with regard to other legal entity customers, whether listed or not, covered institutions may rely on the public disclosures of such entities, absent any reason to believe such information is inaccurate or not up-to-date.

**Question 26: Foreign financial institutions**

Does the exclusion for foreign financial institutions from the Rule’s definition of “legal entity customer” depend on whether the beneficial ownership requirements applied by such institution’s foreign regulator match U.S. requirements?

- A. No. For purposes of beneficial ownership identification, the Rule excludes from the definition of “legal entity customer” a foreign financial institution created in a non-U.S. jurisdiction when the foreign regulator for that financial institution collects and maintains information on the beneficial owner(s) of the regulated institution.<sup>26</sup> The rule does not require covered financial institutions to research the specific transparency requirements imposed on a foreign financial institution by its regulator and compare them with those imposed on U.S. financial institutions by U.S. Federal functional regulators. However, if the foreign regulator does not collect and maintain beneficial ownership information on the foreign financial institution it regulates, then U.S. financial institutions will have to collect and maintain beneficial ownership information on accounts opened by foreign financial institutions in compliance with the Rule. As with any exclusion, covered financial institutions may rely on the representations of its legal entity customer as to whether an exclusion applies, provided that they have no knowledge of facts that would reasonably call into question the reliability of such representation. (See Question 21.)

For purposes of existing customer due diligence requirements, covered financial institutions that maintain correspondent accounts for foreign financial institutions are already required to establish and maintain specific risk-based due diligence procedures and controls for such accounts that include consideration of all

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26. See 31 CFR 1010.230(e)(1)(xiv).

relevant factors,<sup>27</sup> and are required to identify beneficial ownership for certain high-risk foreign banks.<sup>28</sup> These correspondent accounts will continue to be subject to these existing requirements rather than the requirements set forth in the AML Program requirements contained in the Rule.

**Question 27: Exclusion from the definition of legal entity customer: U.S. Government list of foreign regulators that maintain beneficial ownership information**

**Will the U.S. Government maintain a list of non-U.S. jurisdictions where the regulator of financial institutions within that jurisdiction maintains beneficial ownership information regarding the financial institutions they regulate or supervise?**

- A. No. Covered financial institutions should contact the relevant foreign regulator or use other reliable means to ascertain whether the foreign regulator maintains beneficial ownership information for the financial institutions that it regulates or supervises.

**Question 28: Exclusion from the definition of legal entity customer: Non-U.S. governmental department, agency, or political subdivision engaged only in governmental activities**

**What types of entities would be considered a “non-U.S. governmental department, agency or political subdivision that engages only in governmental rather than commercial activities”<sup>29</sup> such that they would qualify for exclusion from the definition of a legal entity customer?**

- A. Examples of legal entity customers that would be considered non-U.S. governmental entities engaged in only governmental and not commercial activities include entities that are owned and operated by a non-U.S. government agency or political subdivision, such as embassies or consulates, as well as entities that are instrumentalities of a foreign government, such as government-owned enterprises engaging in activities that are exclusively governmental in nature, that is, activities involving the direct exercise of legislative, executive, or judicial authority and which do not involve taking profits from the endeavor. Those State-owned enterprises engaged in profit-seeking activities, including, among others, sovereign wealth funds, airlines, or oil companies, would not qualify for the legal entity customer exclusion. Generally, many State-owned enterprises may not have an individual that owns at least a 25 percent equity interest because a governmental department, agency, or political subdivision holds such interest.

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27. See 31 CFR 1010.610(a)(2)(iv).

28. See 31 CFR 1010.610(b)(3).

29. 31 CFR 1010.230(e)(2)(xv).

In these circumstances, a covered financial institution would only be required to identify an individual under the control prong. Similarly, with respect to a State-owned enterprise that is a pooled investment vehicle not subject to another exclusion, financial institutions would be required to obtain beneficial ownership information under the control prong but not under the ownership/equity prong of the definition of beneficial owner.

Furthermore, similar to other instances of identification and verification within the Rule's context, a covered financial institution may reasonably rely upon the representations of the legal entity customer, absent knowledge of facts that would call into question the reliability of the beneficial ownership information provided to the financial institution.

**Question 29: Private label retail credit accounts established at the point of sale**

**Does the point of sale exception only apply to accounts opened at the cash register or does it refer to all applications for credit accounts that are for use at the private label retailer only?**

- A. The Rule provides an exemption from the requirements for a covered financial institution that "opens an account for a legal entity customer that is: [a]t the point-of-sale to provide credit products, including commercial private label credit cards, solely for the purchase of retail goods and/or services at these retailers, up to a limit of \$50,000." The point of sale exemption is provided for retail credit accounts opened to facilitate purchases made at the retailer because of the very low risk posed by opening such accounts at the brick and mortar store.

**Question 30: Equipment Finance and Lease Exemption: Definition of equipment**

**What kind of businesses and equipment are covered under the equipment finance exemption?**

- A. The Rule reflects FinCEN's understanding that businesses require financing to obtain equipment to conduct ongoing business operations. Many such businesses, including both large and small businesses, open accounts solely for the purpose of financing the purchase or lease of that equipment. Subject to certain limitations, the Rule provides an exemption from the requirement to identify and verify the identity of a legal entity customer's beneficial owners for equipment finance and lease accounts established at a covered financial institution because of the low risk for money laundering posed by these accounts.<sup>30</sup> The exemption is intended

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30. See 31 CFR 1010.230(h)(1)(iv).

to cover business equipment such as farm equipment, construction machinery, aircraft, computers, printers, photocopiers, and automobiles that a business purchases or leases. The Rule does not limit the exemption to small businesses. Regardless of the application of the exemption, a covered financial must comply with all other applicable BSA/AML obligations, which may include the obligation to file SARs where there is a suspicion that the equipment may be used to facilitate criminal activity.

**Question 31: Equipment Finance and Leasing Exemption: Accounts opened to finance the purchase or leasing of equipment**

**Does the equipment lease and purchase exemption apply when the customer leases directly from the covered institution?**

- A. Yes, consider the following. Aviation LLC, which operates several flight training schools, visits Aircraft Vendor to acquire five aircraft for its flight training schools. Aviation LLC selects the aircraft and contacts the Lessor Covered Financial Institution to obtain the necessary equipment finance to acquire the aircraft. After a review of the aircraft and Aviation LLC’s business, the Lessor Covered Financial Institution agrees to purchase the aircraft from Aircraft Vendor and then lease them to Aviation LLC for a specified rent amount and duration. The Lessor Covered Financial Institution purchases the aircraft, pays the purchase price directly to Aircraft Vendor, and obtains title to the aircraft as collateral. The Lessor Covered Financial Institution then enters into a lease agreement with Aviation LLC, which opens an account at the financial institution solely for the purpose of obtaining the aircraft and making periodic rent payments. There is no possibility of a cash refund to Aviation LLC under the lease terms.

The equipment lease and purchase exemption would apply because the account established at the covered financial institution meets all of the requirements of the exemption, which are that (1) the account’s purpose is to finance the purchase or leasing of equipment, (2) payments are remitted directly by the financial institution to the vendor or lessor, and (3) there is no possibility of a cash refund on the account activity. First, Covered Financial Institution remit full payment directly to the vendor and obtained title to the equipment in order to lease the equipment to the legal entity customer. Second, Aviation LLC opened the account solely for the purpose of financing an equipment lease to acquire aircraft for its training schools. Finally, there is no possibility of a cash refund to Aviation LLC. As noted in the final rule, accounts created to provide financing for equipment lease or purchase, subject to certain conditions, are exempt from the beneficial ownership requirement because they present a low risk for money laundering and terrorist financing.<sup>31</sup>

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31. *Id.*

**Question 32: Currency Transaction Report (CTR) and aggregation of transactions**

Under what circumstances should the transactions of a legal entity customer and those of the beneficial owner(s) be aggregated for purposes of filing a CTR? Are financial institutions required to proactively cross-check beneficial ownership information to comply with the CTR aggregation requirement?

- A. As a general matter, financial institutions are required to aggregate multiple currency transactions “if the financial institution has knowledge that [the multiple transactions] are by or on behalf of any person and result in either cash in or cash out totaling more than \$10,000 during any one business day.”<sup>32</sup> With respect to legal entity customers that may share a common owner, unless there is an affirmative reason to believe otherwise, covered financial institutions should presume that different businesses that share a common owner are operating separately and independently from each other and from the common owner. Thus, absent indications that the businesses are not operating independently (*e.g.*, the businesses are staffed by the same employees and are located at the same address, the accounts of one business are repeatedly used to pay the expenses of another business or of the common owner), financial institutions should not aggregate transactions involving those businesses with those of each other or with those of the common owner for CTR filing.<sup>33</sup>

**Question 33: Listing beneficiaries on CTRs**

When completing a CTR for a business (*i.e.*, corporations, limited liability companies, and general partnerships) will beneficial owners now need to be listed as beneficiaries in such CTRs? If yes, would this also include trust and estate accounts?

- A. No. The Rule does not change the existing currency transaction reporting requirements or any guidance FinCEN published pursuant to this reporting requirement. Thus, a covered financial institution is not required to list the beneficial owners of a business, or trust or estate account, when completing a CTR as a matter of course. A financial institution must list a beneficial owner in Part 1 of the CTR only if the financial institution has knowledge that the transaction(s) requiring the filing is made on behalf of the beneficial owner and results in either cash in or cash out totaling more than \$10,000 during any one business day.

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32. 31 CFR 1010.313.

33. See FinCEN Ruling 2001-2, “Currency Transaction Reporting: Aggregation,” (Aug. 23, 2001) and FinCEN Guidance 2012-G001, “Currency Transaction Report Aggregation for Businesses with Common Ownership,” (March 16, 2012), respectively. See also 81 FR at 29409.

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**Question 34: Impact of the Rule on the AML program Board of Directors or senior management review process**

Are covered financial institutions now required to follow specific procedures to approve changes to AML programs or require Boards of Directors or senior management to approve such changes? Can Federal functional regulators direct financial institutions within their jurisdiction to follow a specific approval process?

- A. Covered financial institutions may continue to follow their existing internal procedures for approving AML program changes, including changes that incorporate the Rule's new program requirements. However, these procedures should be consistent with the requirements and expectations of the institution's Federal functional regulator.

**Question 35: Documenting nature and purpose of customer relationship on a risk-basis**

The Rule requires financial institutions to understand "the nature and purpose of customer relationships to develop a customer risk profile." What type of information should financial institutions collect to satisfy this requirement and may the documentation of the nature and purpose of a customer relationship be made on a risk-basis?

- A. Understanding the nature and purpose of a customer relationship in order to develop a customer risk profile is an important part of ongoing customer due diligence, and is required for all customers and accounts. An understanding based on category of customer means that for certain lower-risk customers, a financial institution's understanding of the nature and purpose of a customer relationship can be developed by inherent or self-evident information, such as the type of customer or type of account, service, or product or other basic information about the customer including information obtained at account opening.

The profile may, but need not, include a system of risk ratings or categories of customers. Accordingly, the documentation that is required to demonstrate an understanding of the nature and purpose of a customer relationship would vary with the type of customer, account, service, or product.

**Question 36: Use of information on customer risk profile**

Once the nature and purpose of a customer relationship has been established, what are FinCEN's expectations concerning the use of this information?

- A. Understanding the nature and purpose of a customer relationship—the information gathered about a customer at account opening—is essential to developing a customer risk profile. This information should be used to develop a baseline against which customer activity, such as the customer’s expected use of wires or typical number of deposits in a month, can be assessed for possible suspicious activity reporting. If account activity changes, particularly with regard to what should be anticipated based on the original nature and purpose of the account, risk-based monitoring may identify a need to update customer information, including, as appropriate, beneficial ownership.

**Question 37: The nature and purpose of customer relationship**

**In understanding the nature and purpose of customer relationships, are financial institutions required to develop and document customer risk profiles for self-evident products or customer type (e.g., a safe deposit box)?**

- A. Financial institutions must implement risk-based procedures as part of their AML program to demonstrate an understanding of the nature and purpose of customer relationships to develop customer risk profiles. Customer risk profiles refer “to the information gathered about a customer at account opening used to develop a baseline against which customer activity can be assessed for suspicious activity reporting. This may include self-evident information such as the type of customer, or type of account, service or product.”<sup>34</sup> It is reasonable that in the case of certain products, such as safety deposit boxes, the nature and purpose are self-evident and therefore no additional documentation would be needed to demonstrate an understanding of their nature and purpose, beyond the documentation to establish the particular type of account.

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**For Further Information**

Additional questions or comments regarding the contents of this Guidance should be addressed to the FinCEN Resource Center at [FRC@fincen.gov](mailto:FRC@fincen.gov), (800) 767-2825, or (703) 905-3591. *Financial institutions wanting to report suspicious transactions that may relate to terrorist activity should call the Financial Institutions Toll-Free Hotline at (866) 556-3974 (7 days a week, 24 hours a day).* The purpose of the hotline is to expedite the delivery of this information to law enforcement. Financial institutions should immediately report any imminent threat to local-area law enforcement officials.

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34. 81 FR 29398, 29398 (May 11, 2016).

**FinCEN's mission is to safeguard the financial system from illicit use and combat money laundering and promote national security through the collection, analysis, and dissemination of financial intelligence and strategic use of financial authorities.**



**South Carolina Bar**

Continuing Legal Education Division

**2019 SC BAR CONVENTION**

**Real Estate Practices Section**

**Saturday, January 19**

**Are You Really Covered? The Do's & Don'ts  
of E/O Policies**

*Dan Riebling*

# E&O, Cyber Crime, Wire Fraud - Are you covered?

*Dan Riebling, Riebling Insurance Agency, LLC*

*January 19, 2019*



Daniel Riebling received a Bachelor's Degree in Information Systems and Operations Management from Fairfield University's Dolan School of Business.

Daniel has been a licensed insurance broker since 2006 creating insurance solutions for the financial services industry. Since 2010, he has concentrated his efforts in working with the title industry towards the development of a comprehensive Errors & Omissions, Cyber Liability and Crime policies for title agents. As a recognized industry leader, he has participated in several title industry sponsored conferences addressing all aspects of the insurance risks facing the title industry. As President of Riebling Insurance Agency LLC, he has directed this specialty broker in providing comprehensive insurance coverages to 700+ title agents in the U.S.

# Chapter I: The Good Old Days...

## Comprehensive E&O Coverages

### Corporate Title Agents

- Professional Services are broadly defined as those services performed by any insured for a fee in any of the following capacities:
  - *Title Insurance Agent*
  - *Title Abstractor*
  - *Title Searcher*
  - *Escrow Agent*
  - *Closing Agent*
  - *Notary Public*

### Attorney Agents - Broad Professional Services Defined as:

- Services performed or advice given by the Insured in the Insured's practice as a lawyer, arbitrator, mediator, or Title Agent.
  - Services as a notary public.
  - Services as a trustee, administrator, conservator, executor, guardian, receiver or in a similar fiduciary capacity except when any insured is a beneficiary of any trust or estate serviced and the fee accruing from such work inures to the benefit of any Insured.
- Prior Acts Coverage – All claims caused by wrongful acts subsequent to the retroactive date and before the end of the policy period are covered.
  - Claims caused by independent contractors are covered.
  - Claims related to a defect or deficiencies not recorded in the public records are covered.

## Chapter II: The Beginning...

- Title Agents Errors & Omissions (E&O)
- Lawyers Professional Liability
- Cyber Liability (Cyber)
- Escrow Security Bond/Computer Crime (ESB)



### To assist Title Agents in meeting new industry challenges:

- ALTA's Best Practices
- Lender Concerns regarding third party liabilities
- Theft of Escrow Funds
- Protection of consumer personal financial information
- New CFPB requirements and expansion of the regulations governing the title industry

# Cyber Liability



Cyber Liability provides coverage in the event you suffer a security breach, your customers' non public information is compromised and they sue you for damages and expenses. Coverage is also provided for Data Extortion/Ransomware Attacks. These costs are covered under the following Cyber Liability policy insuring agreements:

- **Security and Privacy Liability** - *Damages and defense expenses incurred as a result of a lawsuit filed against you arising out of privacy and computer security breaches.*
- **Privacy Regulatory Defense & Penalties** - *Legal expenses you incur to respond to or defend against a regulatory action arising out of a privacy or computer security breach, as well as regulatory fines and penalties assessed in the action (as insurable by law).*
- **Data Extortion** - *Costs you incur to investigate and respond to a cyber extortion demand, including money you pay to terminate the threat.*
- **Cost you may incur as a result of the following:**
  - Data Recovery*
  - Customer Notification*
  - Credit Monitoring Costs*
  - Multimedia Liability*

## Chapter III: Email Wire Fraud – Three Waves of Attack

- 1<sup>st</sup> Wave of Attack (2015)
  - Outgoing Wire Transfers – Seller’s Funds
  - Targeting title agents and attorneys
  - Started small and grew rapidly
- 2<sup>nd</sup> Wave of Attack (2016 – 2017)
  - Incoming Wire Transfers – Buyer’s Funds
  - Targeting homebuyers and real estate agents
  - Started big and has not stopped
- 3<sup>rd</sup> Wave of Attack (2018)
  - Outgoing Wire Transfers – Mortgage Payoffs
  - Targeting smaller regional lenders and title agents/attorneys
  - Worst of them all!

## Chapter IV: Email Wire Fraud – Are you covered?

- Title Agent E&O and Lawyers Professional Liability
  - Excluded
    - ❖ We will exclude claims “Based upon or arising out of Unauthorized Access to the Insured’s Electronic Communications System.”
    - ❖ We will exclude claims for “Commingling of funds or account, inability to pay or failure to safe guard funds.”
    - ❖ We will exclude claims for “Willful or intentional failure to, or inability to pay, collect, disburse or safeguard any funds in accordance with escrow instructions.
  - Endorsed
    - ❖ We will pay on behalf of an insured those sums insured becomes legally obligated to pay for covered loss caused by an employee of the insured transferring funds from an account of the insured in reliance upon fraudulent instructions received from a criminal purporting to be a legitimate party to the transaction.

## Chapter IV: (Continued)

- Cyber Liability and Cyber Crime
  - Electronic Funds Transfer – what does that mean?
    - ❖ fraudulent electronic, e-mail, telegraphic, cable, teletype, telefacsimile, or telephone instructions issued to a financial institution to debit a Transfer Account and to transfer, pay or deliver Funds from said Transfer Account through an electronic funds transfer system at specified times or under specified conditions, which instructions purport to have been transmitted by the Insured or by a person duly authorized by the Insured to issue such instructions, but which have been fraudulently transmitted by another; and
  - Social Engineering Fraud – sounds good, what is it?
    - ❖ Means the transfer of the Insured’s money or securities to a person, place or account beyond the Insured entities control by an employee of the Insured entity acting in good faith reliance upon a verbal, written or electronic instruction that purports to be legitimate but, in fact, was fraudulent
  - Telecommunication Theft – not even close!
    - ❖ Means a third party’s intentional, unauthorized and fraudulent use of the Insured’s telecommunications services and the charges and fees incurred by the Insured in excess of the Insured’s normal operating costs.



## Chapter IV: (Continued)

- Fidelity/Crime Bonds
  - Direct or Indirect?
    - ❖ Typically cover a direct loss (Insured's Money) and will exclude an indirect loss (Client/Lender Funds)
  - Operating or Escrow Account?
    - ❖ The standard bond form purchased by the majority of agents, typically to satisfy state licensing requirements, only cover the theft of the agents' funds from the operating account by their employees, not escrow funds. Even if these bonds offer "Social Engineering" and/or "Computer Crime" endorsements they also may not cover fraudulent email instruction losses.
  - Social Engineering/Electronic Funds Transfer – Again!

# Cyber Crime - The Coverage you need!

## ➤ **Fraudulent Wire Transfers by Insured – Outbound**

*We will reimburse you for funds you wire to any incorrect party pursuant to a socially engineered wire instruction received by you.*

*We will reimburse you for loss (including compensation you are required to pay) as a direct result of you having to reimburse any third party for theft, committed by a third party by electronic means, of their money or other financial assets from a bank account held by you on their behalf.*

## ➤ **Fraudulent Wire Transfers by Third Party – Inbound (Buyer's Funds)**

*We will reimburse you for funds a third party wires to an incorrect party pursuant to a socially engineered wire instruction received by a third party that appear to have come from you providing a forensic review of your computer network was hacked or otherwise compromised.*

*We will reimburse you in the event of fraudulent electronic communications designed to impersonate you for the cost of reimbursing your customers for their financial loss arising directly from the fraudulent communications.*

# What can you do?

## Policies and Procedures

- **Outgoing Wire Transfers (Seller's Funds) – PICK UP THE PHONE!**
  - ❖ Prior to transferring any escrow funds, verify the original and any subsequent change instructions for the disbursement of Escrow Funds by making an answered outbound telephone call to a legitimate party and confirm the original and/or subsequent changed wire instructions or mailing address and:
    - (1) The phone number used to call a legitimate party must be obtained from an independent third party, such as the internet; and
    - (2) This conversation, the confirmation of the wire instructions or mail address, and the method used to obtain the phone number must be documented in the insured's records for each transaction.
  
- **Outgoing Wire Transfers (Mortgage Payoffs)**
  - ❖ Keep a master list of wire instructions for banks that you have worked with in the past. This master list should be locked down whereby it takes two individuals to change the wire instructions on the master list. If wire instructions are included on a payoff letter they should always be crossed checked with the master list because hackers are getting into e-fax systems and altering these letters. For those lenders you have not done business with in the past, diligence should be used in obtaining their wire instructions.
  
- **Incoming Wire Transfers (Buyer's Funds)**
  - ❖ Include an email signature disclosure statement and/or utilize a disbursement disclosure form stressing the following warning:
  - ❖ **WARNING – FRAUDULENT FUNDING INSTRUCTIONS:** Email hacking and fraud are on the rise to fraudulently misdirect funds. Please call your escrow officer using contact information found from an independent source, such as the sales contract or internet, to verify any funding instructions received. We are not responsible for any wires sent by you to an incorrect bank account.
  
- **TRAINING, AWARENESS & RESPONSIBILITY.**

## Chapter V: Current Marketplace

- **Carrier's Viewpoint**
- **Market Stability**
- **2019 Outlook**

**Thank you SC Bar Convention!**



Date: January 19, 2019

South Carolina Bar Convention

Dan Riebling: E&O, Cyber Liability and Fidelity Bonds – Are you covered?

- I. Introduction
- II. The Good Old Days – before email wire fraud
  - a. Title Agent E&O
  - b. Cyber Liability
  - c. Fidelity Bonds
- III. Cyber Extortion, Phishing Scams – the beginning
  - a. ALTA Best Practices
  - b. Creation of the CFPB
  - c. Insurance policies start to reflect these industry changes
- IV. Email Wire Fraud – the three waves of attack
  - a. Outgoing Wire Transfers - Seller's Funds
  - b. Incoming Wire Transfers – Buyer's Funds
  - c. Mortgage Payoffs
- V. Policies and Procedures
  - a. Training
  - b. Awareness
  - c. Responsibility
- VI. Current Insurance Marketplace
  - a. Carrier's Viewpoint
  - b. Market Stability
  - c. 2019 Outlook
- VII. Closing



**South Carolina Bar**

Continuing Legal Education Division

**2019 SC BAR CONVENTION**

**Real Estate Practices Section**

**Saturday, January 19**

**FIRPTA Withholding & LLCs: Have I Been  
Doing This Correctly?**

*Scott Y. Barnes*

# **THE USE OF LIMITED LIABILITY COMPANIES IN REAL ESTATE TRANSACTIONS**

Scott Y. Barnes

Real Estate Practices Section | January 19, 2019

## LEGISLATION

- 1994
  - South Carolina adopted its first Limited Liability Company Act
- 1996
  - South Carolina adopted the Uniform Limited Liability Company Act

## STATUTORY PROVISIONS

- Limited Liability Company is a legal entity separate from its members
  - S.C. Code § 33-44-201
- Limited Liability Company can have one member or an unlimited number of members
  - S.C. Code § 33-44-202

## STATUTORY PROVISIONS

- Limited Liability Company may be organized for any lawful purpose and has the same powers as an individual to carry out those purposes
  - S.C. Code § 33-44-112

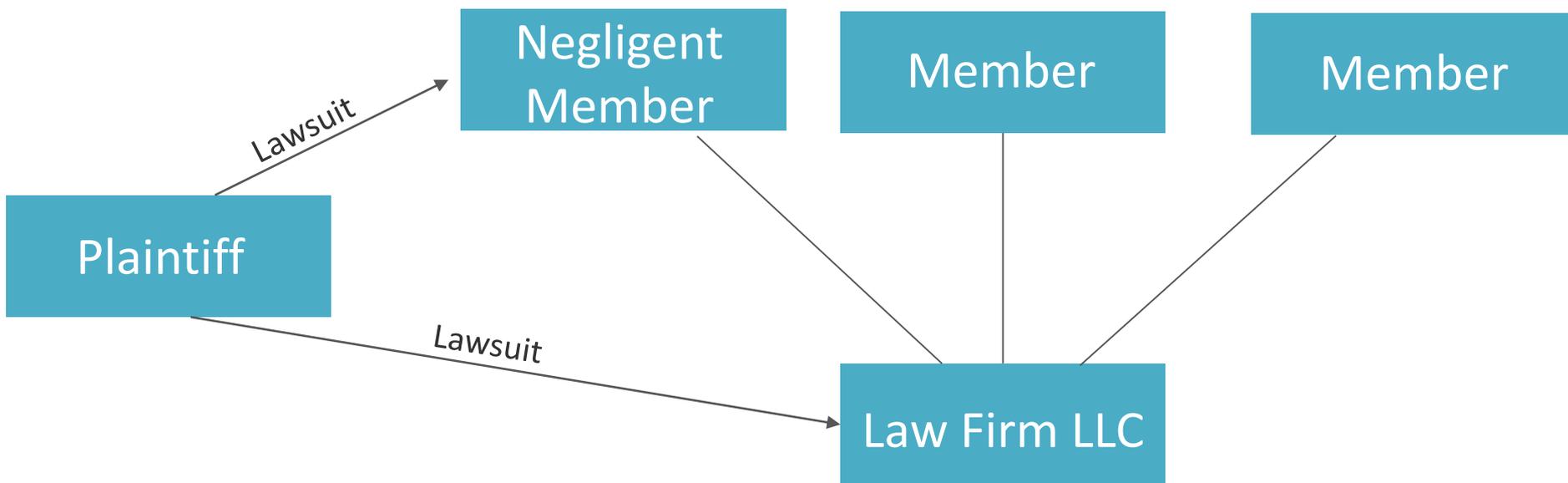
## STATUTORY PROVISIONS

- A single member LLC is generally treated as a "disregarded entity" for all state and federal tax purposes
  - S.C. Code Ann. § 12-2-25, Treas. Reg. § 301-7701-3
- A member or manager of a limited liability company is not liable for the debts, obligations or liabilities of the LLC
  - S.C. Code § 33-44-303

## JUDICIAL EXCEPTIONS OF THE LIMITATION OF LIABILITY OF A MEMBER

- Member commits a tort while acting as a member of the LLC
- Dutch Fork Development Group II, LLC v. SEL Propertices, LLC, 406 S.C. 596, 753 S.E. 2d 840, citing 16 Jade Street LLC v. R. Design Constr. Co. LLC, 728 S.E. 2d 448 (2012)

## JUDICIAL EXCEPTIONS OF THE LIMITATION OF LIABILITY OF A MEMBER



## JUDICIAL EXCEPTIONS OF THE LIMITATION OF LIABILITY OF A MEMBER

- Piercing the corporate veil when entity used to protect fraud, justify wrong or defeat public policy
  - Two prong test
    - Balancing of the equities
    - 8 Sturkie factors
      - Sturkie v. Sifly, 280 S.C. 453, 313 S.E. 2d 316 (Ct. App. 1984)

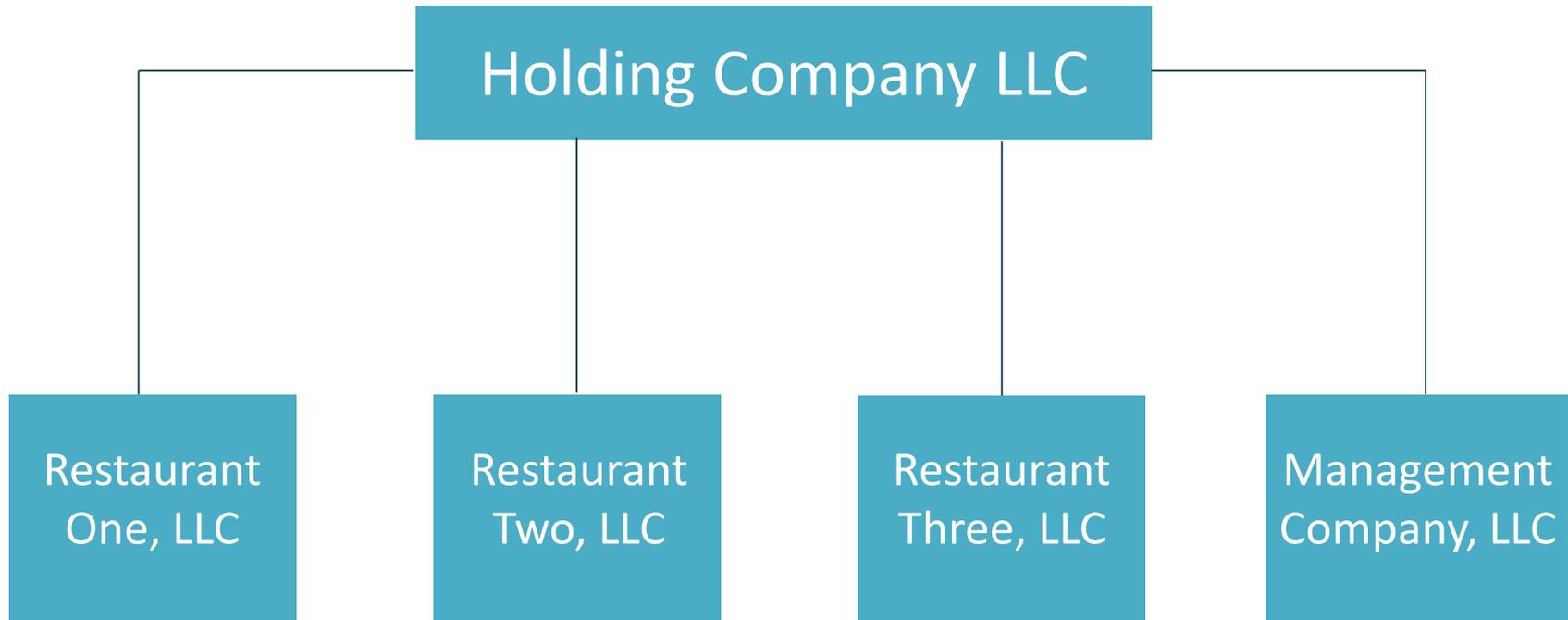
## 8 STURKIE FACTORS

1. Entity undercapitalized
  2. No corporate formalities
  3. Non-payment of dividends
  4. Insolvency of entity
  5. Siphoning of funds
  6. Nonfunctioning of officers and directors
  7. No records
  8. Entity mere façade
- See also Drury Development Corporation v. Found, Inc. Co., 380 S.C. 97, 668 S.E. 2d 798, 800 (2008)

## JUDICIAL EXCEPTIONS OF THE LIMITATION OF LIABILITY OF A MEMBER

- Amalgamation of Interest (single business enterprise)
  - Kyle Pertuis v. Front Roe Restaurants, Inc. et. al., 817 S.E. 2d 273, reh'g denied (August 18, 2018)
  - Multiple enterprises, unified business operations and resources entities treated as a single business enterprise where fiction of separate entities would "defeat justice"

## JUDICIAL EXCEPTIONS OF THE LIMITATION OF LIABILITY OF A MEMBER



## JUDICIAL EXCEPTIONS OF THE LIMITATION OF LIABILITY OF A MEMBER

- Factors considered
  1. Common employees
  2. Common officers
  3. Centralized accounting
  4. Payment of wages by one entity to another entity's employees
  5. Common business name
  6. Services rendered by the employees of one entity on behalf of another entity
  7. Undocumented transfers of funds between entities
  8. Unclear allocation of profits and losses between entities

## PRINCIPAL RESIDENCE

- Single member LLC entitled to 4% assessment ratio
  - CFRE, LLC v. Greenville County Assessor, 395 S.C. 67, 716 S.E. 2d 877 (2011)
- Multi-member LLC made up of "immediate family members" may qualify for the 4% assessment ratio. S.C. Code Ann. § 12-43-220 (c)(8(ii))

## TAX LIENS

- CCA 201116019
  - a federal tax lien does not attach to and the IRS cannot levy on the property of a single member LLC to satisfy its members tax liability

## DISTRIBUTIONS OUT OF A MULTI-MEMBER LLC

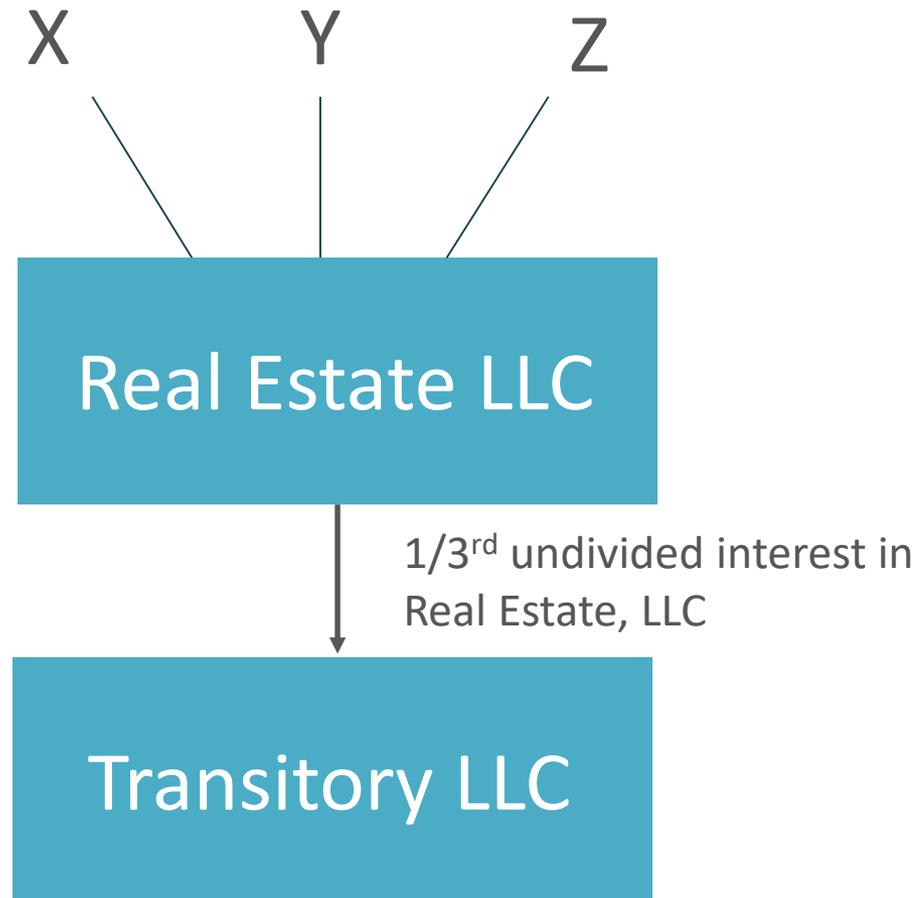
### STEP 1



## DISTRIBUTIONS OUT OF A MULTI-MEMBER LLC

### STEP 2

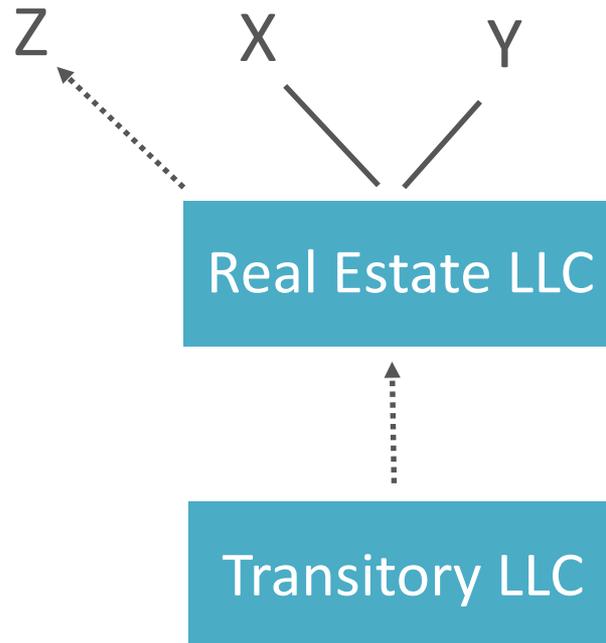
Drop down of property to be distributed in redemption of membership interest



## DISTRIBUTIONS OUT OF A MULTI-MEMBER LLC

### STEP 3

Redemption of  
Z's Membership

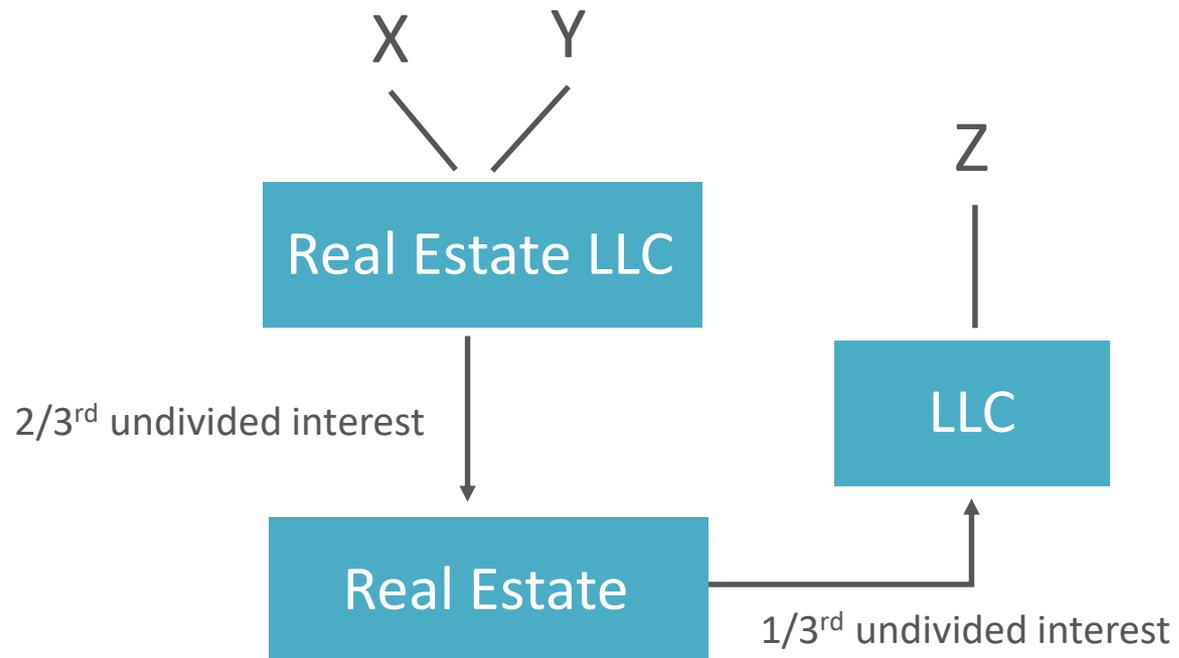


# DISTRIBUTIONS OUT OF A MULTI-MEMBER LLC

## STEP 4

Tenants in Common

Ownership Following Redemption

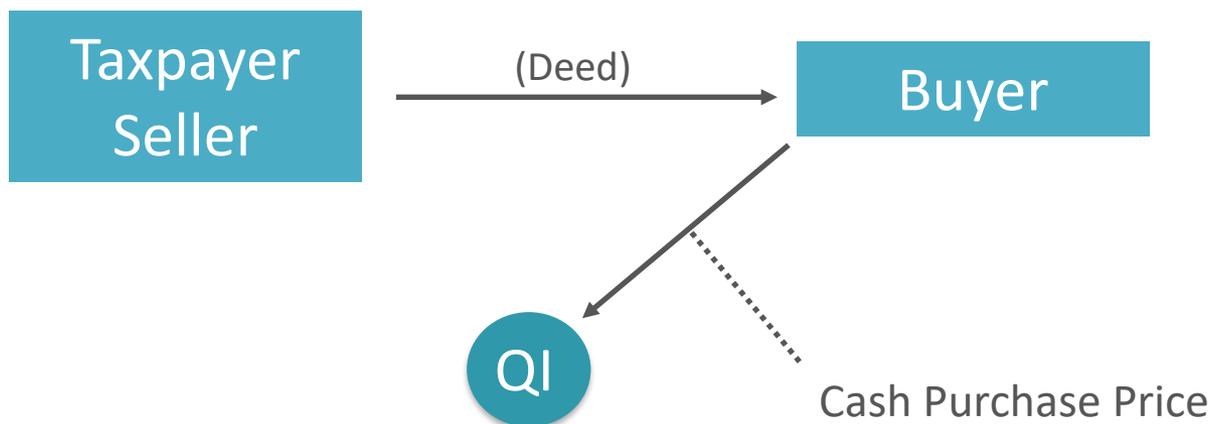


# LIKE-KIND EXCHANGE

## STEP 1

Deferred exchange

Sale of Relinquished Property

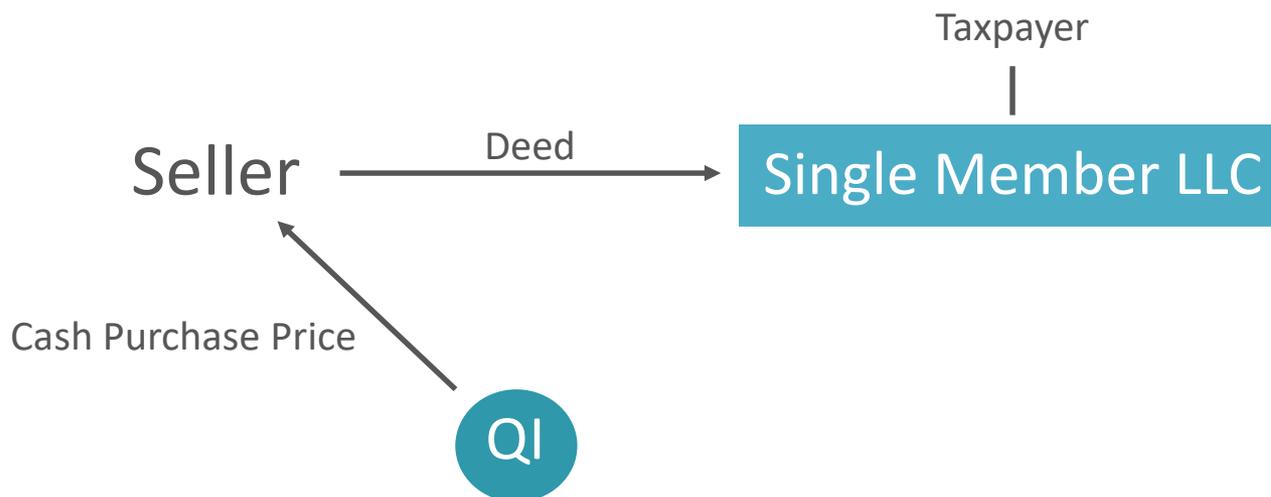


# LIKE-KIND EXCHANGE

## STEP 2

Deferred exchange

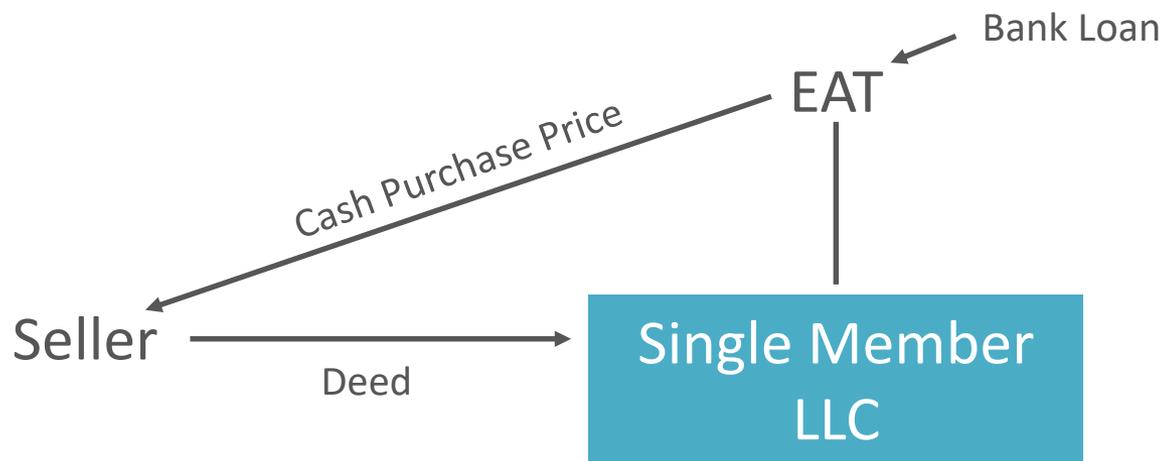
Purchase of Replacement Property



# REVERSE EXCHANGE

## STEP 1

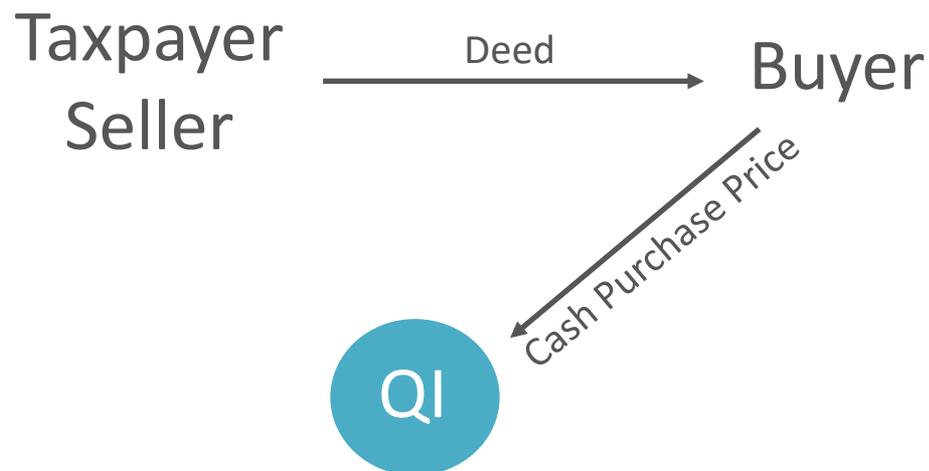
Purchase of Replacement Property



## REVERSE EXCHANGE

### STEP 2

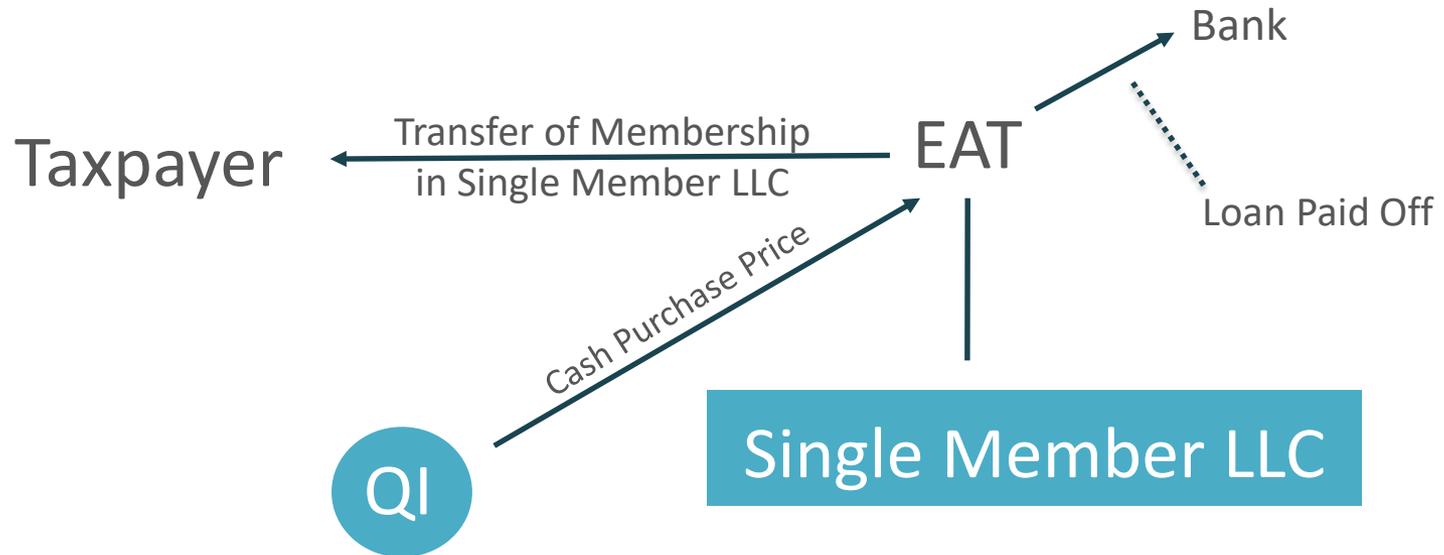
Sale of Relinquished Property



# REVERSE EXCHANGE

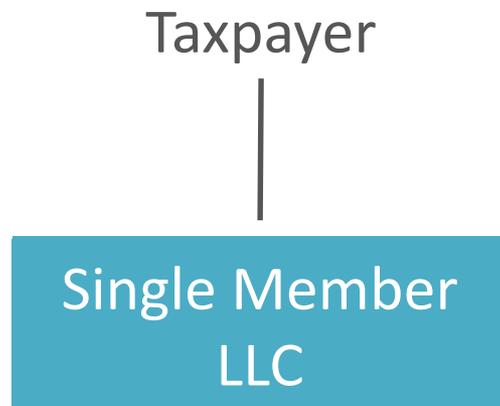
## STEP 3

Purchase of Replacement Property



## REVERSE EXCHANGE

### STEP 4



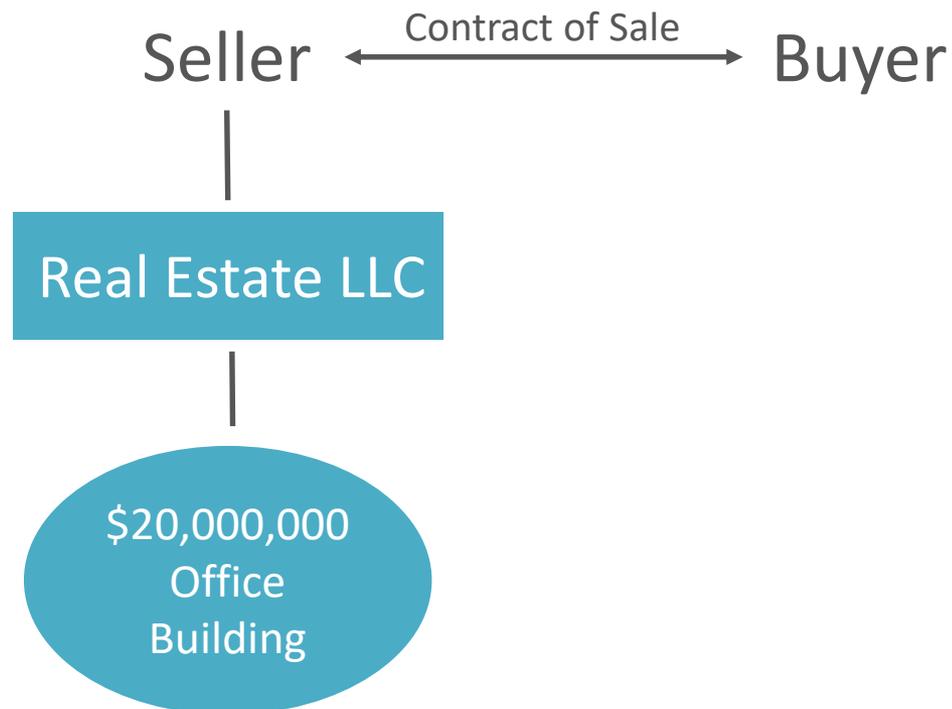
## USE BY NONPROFIT ORGANIZATION



## DEED RECORDING FEE

### STEP 1

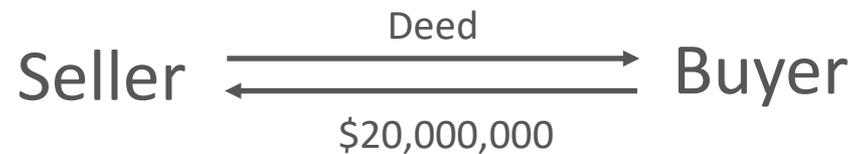
Sale of real estate



## DEED RECORDING FEE

## STEP 2

Sale of real estate

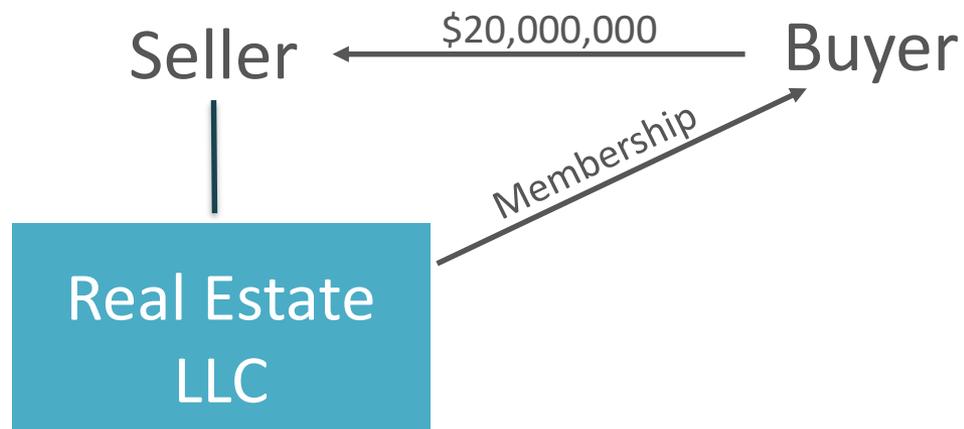


Deed recording fee \$74,000

## DEED RECORDING FEE

## STEP 1

Sale of LLC membership



## DEED RECORDING FEE

### STEP 2

Sale of LLC membership

Buyer



Real Estate LLC

Deed recording fee \$0



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# **SOUTH CAROLINA WITHHOLDING TAX ON SALES OF REAL ESTATE BY NONRESIDENTS – LIKE-KIND EXCHANGES AND INSTALLMENT SALES**

Scott Y. Barnes

Real Estate Practices Section | January 19, 2019

# LIKE-KIND EXCHANGE

## SIMULTANEOUS EXCHANGE

- No withholding

## DEFERRED EXCHANGE

- Seller elects to pay the withholding with personal funds
- Buyer remits withholding amount on Form I-290
- If exchange is completed, seller requests a refund on Form I-290X

# I-290 FORM

1350



STATE OF SOUTH CAROLINA  
DEPARTMENT OF REVENUE

**NONRESIDENT REAL ESTATE WITHHOLDING**

**I-290**

(Rev. 10/5/17)  
3271

Mail to: South Carolina Department of Revenue, Real Estate Withholding, Columbia, SC 29214-0024  
Return and payment are both due by 15th day of month following month of sale.  
**I-290 must be completed for each seller.**

**AMENDED**

County _____		Location of Property Tax Map No. _____		Date of Withholding (PD CVD) Month _____ Date _____ Year _____		
Seller's First Name _____ <small>(More than one seller? See instructions.)</small>		Buyer's First Name _____				
Seller's Last Name _____		Buyer's Last Name _____				
Address _____		Address _____				
Phone _____		Phone _____				
Seller's <input type="checkbox"/> SSN _____ <input type="checkbox"/> FEIN _____		Buyer's <input type="checkbox"/> SSN _____ <input type="checkbox"/> FEIN _____				
Withholding by Third Party (check one): <input type="checkbox"/> Lending Institution <input type="checkbox"/> Real Estate Agent <input type="checkbox"/> Closing Attorney <input type="checkbox"/> Other _____		Third Party's Name _____				
		Address _____				
		Phone _____				
		FEIN or SSN _____				
1. The amount withheld is based on (check one): <input type="checkbox"/> Gain, if seller provides affidavit of gain (if installment sale, see reverse side) <input type="checkbox"/> Amount realized, if no affidavit of gain is provided (if installment sale, see reverse side)			Date of Closing Month _____ Date _____ Year _____			
			1.			
2. Check appropriate % and multiply by amount on line 1. 7% <input type="checkbox"/> If seller is not a corporation 5% <input type="checkbox"/> If seller is a corporation			2.			
3. Total payment to seller (gross sales price less selling expenses less certain mortgages paid or assumed).			3.			
4. Compare lines 2 and 3, enter the smaller amount.			4.			
5. For late payments, calculate penalty and interest due. <input type="checkbox"/> Penalty 5a. _____ <input type="checkbox"/> Interest 5b. _____			5. (Total Penalty and Interest Due)			
6. Total tax, penalty and interest due.			6.			
7. <input type="checkbox"/> The Seller has elected out of installment sales treatment for South Carolina purposes. (See reverse side.)						
8. Due date of first installment						
9. The seller is to receive payment in the following manner: <input type="checkbox"/> Monthly <input type="checkbox"/> Annually <input type="checkbox"/> Other - Attach an explanation						
The buyer must give two copies of this form to each seller each time the buyer remits a withholding payment to the South Carolina Department of Revenue. Missing or incomplete information on this form will cause processing delays and you may receive additional correspondence. <b>I-290 must be completed for each seller.</b>						

When signing this form, it is important that the information contained in your report be correct and complete. To willfully furnish a false or fraudulent statement to the SC Department of Revenue is a crime.

Buyer's Signature \_\_\_\_\_ Name \_\_\_\_\_ Date \_\_\_\_/\_\_\_\_/\_\_\_\_  
Title \_\_\_\_\_ Telephone (\_\_\_\_) \_\_\_\_\_ Email \_\_\_\_\_

# I-290X FORM

1350		
	STATE OF SOUTH CAROLINA DEPARTMENT OF REVENUE <b>AMENDED NONRESIDENT                  REAL ESTATE WITHHOLDING</b>	<b>I-290X</b> (Rev. 2/5/16) 3290
Mail to: South Carolina Department of Revenue, Real Estate Withholding, Columbia, SC 29214-0024		
* County _____	Location of Property _____ * Tax Map No. _____	* Date of Withholding (PD CVD) Month _____ Date _____ Year _____
* Seller's Name _____ Address _____ Phone _____	* Buyer's Name _____ Address _____ Phone _____	
* Seller's FEIN or SSN _____	FEIN or SSN _____	
* Withholding by Third Party (check one): <input type="checkbox"/> Lending Institution <input type="checkbox"/> Real Estate Agent <input type="checkbox"/> Closing Attorney <input type="checkbox"/> Other _____	* Third Party's Name _____ Address _____ Phone _____ FEIN or SSN _____	
ATTACH YOUR COPY OF THE ORIGINAL FORM I-290		Date of Closing Month _____ Date _____ Year _____
* 1. Reason for filing I-290X (check one): <input type="checkbox"/> a. Seller is stating the amount of gain required to be recognized (Attach computations.) <input type="checkbox"/> b. Seller was exempt from withholding under Revenue Ruling #09-13. State exemption: _____ <input type="checkbox"/> c. The original withholding was incorrectly computed. (Attach Computations.)		
* 2. Original amount withheld and paid with I-290 (See line 4 of I-290)	▶ 2. _____	
3. Amount realized	3. _____	
4. Amount of gain on sale (if 1b is checked, enter zero)	4. _____	
* 5. The lesser of line 3 or 4 multiplied by: 7% <input type="checkbox"/> If seller is not a corporation 14-0812-0004 5% <input type="checkbox"/> If seller is a corporation 14-0812-0003	▶ 5. _____	
6. Refund Requested (If line 2 is greater than line 5 enter the difference)	6. _____	
7. Balance Due (If line 2 is less than line 5 enter difference and pay this amount)	▶ 7. _____	
8. Balance of withholding to be claimed on your income tax return (Line 2 less line 6; or, line 2 plus line 7)	8. _____	
When signing this form, it is important that the information contained in your report be correct and complete. To wilfully furnish a false or fraudulent statement to the SC Department of Revenue is a crime.		
Seller's Signature _____ Name _____ Date ____/____/____ Title _____ Telephone (____) _____ Email _____		
<b>*THIS IS A REQUIRED FIELD AND THE INFORMATION MUST BE COMPLETED.</b>		
32901035		

## QUALIFIED INTERMEDIARY

- Seller marks box 16 C on I-295 indicating intent to qualify transfer as a like kind exchange and gives it to the QI
- Buyer enters into a contract with the QI for QI to file the I-290 and pay withholding if exchange fails
- IF exchange qualifies, the I-290 is not filed. Buyer retains a copy of the I-290 and contract with QI.
- IF only a portion of the exchange qualifies, the QI files a "modified I-290" and remits the withholding amount. QI sends the "modified I-290" to the buyer and seller.

# **INSTALLMENT SALES**

## INSTALLMENT SALES

- General Rule
  - Buyer must withhold on each payment and submit an I-290 to SCDOR
  - Debt assumed or taken subject to by the buyer is treated as a principal payment and subject to withholding

## INSTALLMENT SALES

- Exceptions
  - If seller gives the buyer a "seller's affidavit" as to gain recognized on each payment, then buyer can use the gain to compute withholding
  - Seller elects out of installment sales treatment. Buyer remits withholding.

## INSTALLMENT SALES

- Withholding payment under \$500
  - May delay payment until withholding totals \$500 but no later than January 15 of the following year
- Withholding for the year is less than \$350
  - Withholding not required
  - Sales to single buyer or related buyer aggregated
  - Seller subsequently elects to report the gain and asks SCDOR to advise buyer to terminate withholding



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# **FIRPTA WITHHOLDING**

Scott Y. Barnes

Real Estate Practices Section | January 19, 2019

## U.S. TAX SYSTEM

- The United States imposes an income tax on U.S. citizens and domestic businesses. U.S. Const. amend. XVI
- The United States imposes an income tax on foreign persons and businesses that earn income from sources within the United States

## FOREIGN INVESTMENT IN REAL PROPERTY TAX ACT OF 1980 (FIRPTA)

- When a foreign seller sells a **United States Real Property Interest**, the buyer must withhold and remit to the IRS a portion of the purchase price paid to the seller. IRC § 1445
- FIRPTA gain is taxed on net (not gross) income at capital gain rates. IRC § 897

## U.S. REAL PROPERTY INTEREST

- A **U.S. Real Property Interest** is an interest in real property located within the United States and Virgin Islands. IRC § 897(c)
  - Real Property includes land, real property improvements like buildings, leasehold interests, crops, timber (un-severed), mines, wells, moveable walls, furnishings

## U.S. REAL PROPERTY HOLDING CORPORATION

- An equity interest in a **U.S. Real Property Holding Corporation** is a **U.S. Real Property Interest** and is subject to withholdings. IRC § 897(c)(2)
  - **U.S. Real Property Holding Corporation**
    - Foreign or domestic corporation
    - Fair market value of **U.S. Real Property Interest** exceeds fair market value of all real property interests and assets used in its trade or business. Tres. Reg. § 1.897-2(b)

## PARTNERSHIPS AND PARTNERSHIP INTERESTS

- Domestic or foreign partnership with any foreign partners disposes of U.S. Real Property Interest gain is treated as **effectively connected income**
- Partnerships or withholding agent must collect and pay a withholding tax on the **effectively connected income** allocated to the foreign partner
- Foreign person disposes of an interest in a partnership in which 50% or more of the value of the partnership assets consist of **U.S. Real Property Interest**, the buyer must withhold

## TRUST AND ESTATES

- Trustees, fiduciaries and executives of trusts and estates with foreign beneficiaries are "withholding agents"
- Withholding at 21% on any distribution to a foreign beneficiary

## WITHHOLDING

- Generally
  - Buyer must withhold and remit taxes upon any "disposition" of a U.S. Real Property Interest by a foreign person. IRC § 1445
  - Disposition includes sale, exchange, liquidation, redemption, gift or transfer

## FORMS TO BE FILED

- 8288
  - U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests
- 8288-A
  - Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests
- Buyer must file 8288 and 8288-A by the 20<sup>th</sup> day after the transfer of the **U.S. Real Property Interest**. Treas. Reg. 1.1445-1(c)(1)

# FORM 8288

Form <b>8288</b> (Rev. April 2018) Department of the Treasury Internal Revenue Service	<b>U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests</b>	OMB No. 1545-0002
▶ Go to <a href="http://www.irs.gov/Form8288">www.irs.gov/Form8288</a> for instructions and the latest information.		
If this is an amended return, check here <input type="checkbox"/>		
Complete Part I or Part II. Also complete and attach Copies A and B of Form(s) 8288-A. Attach additional sheets if you need more space.		
<b>Part I To Be Completed by the Buyer or Other Transferee Required To Withhold Under Section 1445(a)</b>		
1	Name of buyer or other transferee responsible for withholding. See instructions.	Identifying number
Street address, apt. or suite no., or rural route. Do not use a P.O. box.		
City or town, province or state, country, and ZIP or foreign postal code		Phone number (optional)
2	Description and location of property acquired	
3	Date of transfer	4 Number of Forms 8288-A attached
5	Complete all items that apply. Enter dollar amounts on applicable lines.	
a	Amount subject to withholding at 15%	6 Total amount withheld
b	Amount subject to withholding at 10%	
c	Withholding is at a reduced rate. See instructions <input type="checkbox"/>	
<b>Part II To Be Completed by an Entity Subject to the Provisions of Section 1445(e)</b>		
1	Name of entity or fiduciary responsible for withholding. See instructions.	Identifying number
Street address, apt. or suite no., or rural route. Do not use a P.O. box.		
City or town, province or state, country, and ZIP or foreign postal code		Phone number (optional)
2	Description of U.S. real property interest transferred or distributed	
3	Date of transfer	4 Number of Forms 8288-A attached
5	Complete all items that apply. Enter dollar amounts on applicable lines.	
a	Amount subject to withholding at 15%	6 Total amount withheld
b	Amount subject to withholding at 10%	
c	Amount subject to withholding at 21%	
d	Withholding is at a reduced rate. See instructions <input type="checkbox"/>	
e	Large trust election to withhold at distribution <input type="checkbox"/>	
Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.		
<b>Sign Here</b>		
Signature of withholding agent, partner, fiduciary, or corporate officer		Title (if applicable)
Date		Date
<b>Paid Preparer Use Only</b>	Print/Type preparer's name	Preparer's signature
	Firm's name	Firm's EIN
	Firm's address	Phone no.
For Privacy Act and Paperwork Reduction Act Notice, see separate instructions.		

# FORM 8288-A

Withholding agent's name, street address, city, state, and ZIP code		1 Date of transfer	<p align="center"><b>Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests</b></p> <p align="center">OMB No. 1545-0002</p>	
		2 Federal income tax withheld		
Withholding agent's federal identification number	Identification number of foreign person subject to withholding (see instructions)	3 Amount realized	4 Gain recognized by foreign corporation	<p align="center"><b>Copy A For Internal Revenue Service Center</b></p> <p>For Privacy Act and Paperwork Reduction Act Notice, see the Instructions for Form 8288.</p>
Name of person subject to withholding		5 Description of property transferred		
Foreign address (number, street, and apt. or suite no.)		6 Person subject to withholding is: An individual <input type="checkbox"/> A corporation <input type="checkbox"/> Other (specify) ▶		
City, province or state, postal code, and country (not U.S.)	7 Country code	Mailing address of person subject to withholding (if different)		

Form **8288-A** (Rev. 4-2018)

Cat. No. 62261L

**Attach Copies A and B to Form 8288**

Department of the Treasury - Internal Revenue Service

## RATES

- Buyer must withhold and remit 15% of the "amount realized" (sales price) to the IRS. IRC § 1445(a)

## SPECIAL RULE FOR RESIDENTS

- If amount realized is less than \$300,000, then no withholding. IRC § 1445(b)(5)
- If amount realized is between \$300,000 and \$1,000,000, then buyer must withhold and remit 10% of the amount realized to the IRS. IRC § 1445(c)(4)
- If the amount realized exceeds \$1,000,000, then buyer must withhold and remit 15% of the amount realized. IRC § 1445(a)

## AMOUNT REALIZED

- Cash paid (or to be paid), FMV of other property transferred, liability assumed by buyer or to which the property is subject

## RESIDENCE

- Buyer has "definite plans" to reside in the home at least 50% of the time during the two twelve month periods following the sale

## EXCEPTIONS TO WITHHOLDING

- Sellers amount realized is zero
- FIRPTA certificate – seller is not a foreign person
- Buyer is a governmental entity or political subdivision
- IRS issues a "Withholding Certificate" IRC § 1445



## WITHHOLDING CERTIFICATE

- Buyer or seller may request the certificate on Form 8288-B
- Form 8288-B requires the taxpayer ID of the buyer and the seller
- Foreign individuals are generally ineligible to get a Social Security Number and must file Form W-7 for an Employer Identification Number

# FORM 8288-B

Form <b>8288-B</b> (Rev. February 2016) Department of the Treasury Internal Revenue Service	<b>Application for Withholding Certificate for Dispositions by Foreign Persons of U.S. Real Property Interests</b>	OMB No. 1545-1060
▶ <b>Please type or print.</b>		
<b>1</b> Name of transferor (attach additional sheets if more than one transferor)		Identification number
Street address, apt. or suite no., or rural route. Do not use a P.O. box.		
City, state or province, and country (if not U.S.). Include ZIP code or postal code where appropriate.		
<b>2</b> Name of transferee (attach additional sheets if more than one transferee)		Identification number
Street address, apt. or suite no., or rural route. Do not use a P.O. box.		
City, state or province, and country (if not U.S.). Include ZIP code or postal code where appropriate.		
<b>3</b> Applicant is: Transferor <input type="checkbox"/> Transferee <input type="checkbox"/>		
<b>4a</b> Name of withholding agent (see instructions)		<b>b</b> Identification number
<b>c</b> Name of estate, trust, or entity (if applicable)		<b>d</b> Identification number
<b>5</b> Address where you want withholding certificate sent (street address, apt. or suite no., P.O. box, or rural route number)		Phone number (optional)
City, state or province, and country (if not U.S.). Include ZIP code or postal code where appropriate.		
<b>6</b> Description of U.S. real property transaction:		
<b>a</b> Date of transfer (month, day, year) (see inst.) _____		<b>b</b> Contract price \$ _____
<b>c</b> Type of interest transferred: <input type="checkbox"/> Real property <input type="checkbox"/> Associated personal property <input type="checkbox"/> Domestic U.S. real property holding corporation		
<b>d</b> Use of property at time of sale: <input type="checkbox"/> Rental or commercial <input type="checkbox"/> Personal <input type="checkbox"/> Other (attach explanation)		
<b>e</b> Adjusted basis \$ _____		
<b>f</b> Location and general description of property (for a real property interest), description (for associated personal property), or the class or type and amount of the interest (for an interest in a U.S. real property holding corporation). See instructions.		
_____		
<b>g</b> For the 3 preceding tax years:		
<b>(1)</b> Were U.S. income tax returns filed relating to the U.S. real property interest? . . . . . <input type="checkbox"/> Yes <input type="checkbox"/> No If "Yes," when and where were those returns filed? ▶ _____		
<b>(2)</b> Were U.S. income taxes paid relating to the U.S. real property interest? . . . . . <input type="checkbox"/> Yes <input type="checkbox"/> No If "Yes," enter the amount of tax paid for each year ▶ _____		
<b>7</b> Check the box to indicate the reason a withholding certificate should be issued. See the instructions for information that must be attached to Form 8288-B.		
<b>a</b> <input type="checkbox"/> The transferor is exempt from U.S. tax or nonrecognition treatment applies.		
<b>b</b> <input type="checkbox"/> The transferor's maximum tax liability is less than the tax required to be withheld.		
<b>c</b> <input type="checkbox"/> The special installment sales rules described in section 7 of Rev. Proc. 2000-35 allow reduced withholding.		
<b>8</b> Does the transferor have any unsatisfied withholding liability under section 1445? . . . . . <input type="checkbox"/> Yes <input type="checkbox"/> No See the instructions for information required to be attached.		
<b>9</b> Is this application for a withholding certificate made under section 1445(e)? . . . . . <input type="checkbox"/> Yes <input type="checkbox"/> No If "Yes," check the applicable box in <b>a</b> and the applicable box in <b>b</b> below.		
<b>a</b> Type of transaction: <input type="checkbox"/> 1445(e)(1) <input type="checkbox"/> 1445(e)(2) <input type="checkbox"/> 1445(e)(3) <input type="checkbox"/> 1445(e)(5) <input type="checkbox"/> 1445(e)(6)		
<b>b</b> Applicant is: <input type="checkbox"/> Taxpayer <input type="checkbox"/> Other person required to withhold. Specify your title (e.g., trustee) ▶ _____		

Under penalties of perjury, I declare that I have examined this application and accompanying attachments, and, to the best of my knowledge and belief, they are true, correct, and complete.

\_\_\_\_\_  
Signature Title (if applicable) Date



## ISSUANCE OF THE CERTIFICATE

- Before closing
  - Buyer on notice that reduced or no withholding is required
- At closing
  - If the application is filed at closing, withholding is not required to be paid to the IRS until the 20<sup>th</sup> day after the IRS mails the withholding certificate or notice of denial. Tres. Reg. § 1.1445(c)(2)(i)

## WHEN TO REQUEST A WITHHOLDING CERTIFICATE

- Seller wants to apply for an early refund
- Foreign seller sells primary residence and gain is excluded under IRC § 121
- Foreign seller engages in a like-kind exchange under IRC § 1031
- Foreign seller invests in a "Qualified Opportunity Fund" under IRC § 1400Z-2
- Foreign seller is exempt from U.S. taxation (foreign governmental official)

## LIABILITY FOR WITHHOLDING

- Buyer (generally the buyer's attorney) is the "**withholding agent**" responsible for paying the seller's tax. Treas. Reg. § 1.1445-1(e)(1)-(3)
- Failure to remit withholding amount subjects the **withholding agent** to tax, interest and penalties of up to \$10,000 for willful failure to collect and pay over the tax. IRC § 7202
- Buyers agent may rely on FIRPTA affidavit to avoid taxes, interest and penalties unless the buyer or buyer's agent has knowledge that the seller is in fact a foreign person



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## SC BAR ANNUAL MEETING

### FIRPTA WITHHOLDING

#### I. Introduction to the U.S. Income Tax System – (Source and Residence)

- A. The United States imposes an income tax on U.S. citizens and domestic businesses. U.S. Const. amend. XVI. The tax on citizens is levied on “all income from whatever source derived.” I.R.C. § 61. U.S. citizens are taxed on worldwide income including “U.S. source income” and “foreign source income.” The taxation of U.S. citizens’ foreign source income is called “outbound taxation.”
- B. The United States also imposes an income tax on foreign persons and businesses that earn income from sources within the United States. The taxation of foreign persons’ U.S. source income is called “inbound taxation.”
- C. FIRPTA, the Foreign Investment in Real Property Tax Act of 1980, is an inbound tax regime that governs the taxation of foreign persons on income earned from selling a “U.S. Real Property Interest” (USRPI). I.R.C. § 897.

#### II. FIRPTA Introduction

When a foreign seller sells a USRPI the buyer (not the foreign seller who actually owes the tax) must withhold and remit to the I.R.S. some fixed amount of the price paid to the seller for the USRPI. I.R.C. § 1445.

Income earned upon the disposition of a USRPI by foreign persons is treated as income effectively connected with a U.S. trade or business (ECI). FIRPTA gain is taxed on a net—not a gross—basis, and is subject to favorable capital gain treatment. I.R.C. § 897.

#### III. US Real Property Interest

- A. A USRPI is an interest in real property located within the United States and Virgin Islands. I.R.C. § 897(c).

- (1) Real Property includes land, real property improvements like buildings, leasehold interests, and un-severed natural products of land (crops, timber, mines, wells, etc.). Real property also can include certain personal property “associated” with the use of real property like moveable walls, furnishings, mining equipment, tractors, etc. I.R.C. § 897(c)(6)(A).

B. U.S. Real Property Holding Corporation (USRPHC)

- (1) A USRPI also includes an equity interest in a corporation that is a “U.S. Real Property Holding Corporation.”
  - (a) Generally, a USRPHC is a foreign or domestic corporation holding significant amounts of USRPI. I.R.C. § 897(c)(2).

Specifically, a USRPHC is a foreign or domestic corporation in which the fair market value of its USRPI is at least 50 percent of the sum of the FMV of (1) its total USRPIs, (2) its total interest in real property located outside the United States (FRPI) and (3) any other assets used in a trade or business. Treas. Reg. 1.897-2(b).

- (b) A creditor or debtor position in U.S. real property is not considered to be a USRPI. I.R.C. § 897(c)(1)(A)(ii).

C. Partnerships & Partnership Interests

- (1) If a domestic or foreign partnership with any foreign partners disposes of a USRPI at a gain, the gain is treated as ECI and the partnership (or its withholding agent) must pay a withholding tax on the ECI allocable to its foreign partners. I.R.C. § 1446.
- (2) If a foreign person disposes of an interest in a partnership in which 50% or more of the

value of the gross assets consist of USRPI and 90% or more of the value of the gross assets consist of USRPI plus any cash (or cash equivalents), the buyer of the partnership interest must make withholding.

D. Trusts & Estates

Trustees, fiduciaries, and executors of trusts and estates with one or more foreign partners are “withholding agents.” Withholding agents must establish a USRPI account in which the withholding agent must account for all gains or losses realized during the tax year of the trust or estate from dispositions of USRPI. The agent must then withhold 21% on any distribution to a foreign beneficiary that is attributable to the balance in the USRPI account on the day of distribution. Any distribution from a trust or estate to a beneficiary is deemed to be attributable first to any balance in the USRPI account and then to other amounts.

IV. Withholding Overview

A. Withholding Generally

- (1) A buyer must withhold and remit taxes to the IRS upon any “disposition” of a USRPI by a foreign person. I.R.C. § 1445.

A “disposition” means disposition for any purpose under the IRC. This includes but is not limited to a sale or exchange, liquidation, redemption, gift, or transfer.

- (2) Forms to be Filed
  - (a) Form 8288, “U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests.” (See Exhibit A).
  - (b) Form 8288-A, “Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests.” (See Exhibit B).

- (3) A buyer must file the forms 8288 and 8288-A by the 20th day after the disposition of the USRPI. Interest and Penalties begin to accrue to the buyer on the 21st day after disposition. Treas. Reg. 1.1445(c)(1).

B. Withholding Rates

- (1) The “Residence Test”

- (a) A USRPI is a “residence” if the *buyer* or the buyer’s family will use the property for personal use for at least 50% of the time the property is occupied for the two 12 month periods after closing. Treas. Reg. 1.1445-2(d)(1).

- (b) A natural person can certainly satisfy the residence test. Treas. Reg. 1.1445-2(d)(1). Disregarded entities, like single-member limited liability companies and grantor trusts, owned by a natural person *should* also satisfy the residence test.

- (2) USRPI that is not a residence

- (a) Buyer must withhold and remit 15% of the “amount realized” (the sales price) on the disposition to the IRS. I.R.C. § 1445(a).

- (3) USRPI that is a residence

- (a) If amount realized is less than \$300,000 then no withholding. I.R.C. § 1445(b)(5).

- (b) If amount realized is between \$300,000 and \$1,000,000 then Buyer must withhold and remit 10% of the Amount Realized on the disposition to the IRS. I.R.C. § 1445(c)(4).

(c) If amount realized exceeds \$1,000,000 then Buyer must withhold and remit 15% of the Amount Realized on the disposition to the IRS. I.R.C. § 1445(a).

(4) Amount realized is the sum of cash paid (or to be paid), FMV of other property transferred, and the amount of any liability assumed by the Buyer or to which the property is subject immediately before and after the transfer.

#### C. Exceptions to Withholding

No withholding required if:

- (1) Seller's amount realized is zero (e.g. a gift).
- (2) Seller provides to buyer a certification (usually an affidavit) stating that, under penalty of perjury, the seller is not a foreign person. The certification must include the seller's name, TIN, and address. (See Exhibit C).
- (3) Buyer is the U.S. Government, a U.S. State or Possession, a U.S. Political subdivision (local government), or the District of Columbia.
- (4) The IRS issues a "Withholding Certificate" that excuses the withholding requirement.

#### D. The Withholding Certificate

- (1) A withholding certificate is issued by the IRS and can reduce or eliminate the amount that a buyer must withhold under I.R.C. § 1445.
- (2) Either a buyer or seller may request a withholding certificate by submitting a Form 8288-B, "Application for Withholding Certificate for Dispositions by Foreign Persons of U.S. Real Property Interests." Treas. Reg. 1.1445(c). (See Exhibit D).

- (a) The application for a withholding certificate must contain the U.S. taxpayer identification number (TIN) of all parties to the transaction for which the withholding certificate is issued. For U.S. individuals the TIN is a SSN. For all other entities the TIN is the employer identification number (EIN).

Taxpayers without an EIN may apply for one by filing a form SS-4. (See Exhibit E). Foreign individuals that are ineligible for a SSN (only noncitizens authorized to work in the U.S. by the Department of Homeland Security can get a SSN) and are ineligible for an EIN may apply for a TIN by filing a form W-7. (See Exhibit F).

(3) Timing

- (a) A certificate issued before closing notifies the buyer that that reduced withholding or no withholding is required.
- (b) A certificate issued after closing may authorize an early or normal refund. If, on the date of closing, an application for a withholding certificate is or has been submitted to the IRS, the applicable withholding is not required to be paid over to the IRS until the 20th day after the day that the IRS mails the withholding certificate or notice of denial. Treas. Reg. 1.1445(c)(2)(i).

- (4) Situations that warrant issuance of a withholding certificate. Treas. Reg. 1.1445-3.

- (a) Foreign seller sells her primary residence and gain is excluded under I.R.C. § 121.
- (b) Foreign seller engages in an I.R.C. § 1031 like-kind exchange transaction
- (c) Foreign seller invests in a “Qualified Opportunity Fund” under I.R.C. 1400Z-2
- (d) Foreign seller is exempt from U.S. taxation (e.g. foreign gov’t official)
- (e) Foreign seller’s maximum tax owed is less than the statutory amount to be withheld by the buyer
- (f) Foreign seller wants to accelerate receipt of their refund for overpayment of tax

V. Liability

The buyer (generally the buyer’s attorney) is the “withholding agent” responsible for paying the seller’s tax owed. Treas. Reg. 1.1445-1(e)(1)-(3). If the buyer does not properly remit payment to the IRS then the buyer is liable to the IRS for the tax, interest, and penalties owed by the seller. I.R.C. § 6651. Specifically, penalties apply for failure to file and for failure to pay the withholding when due. The buyer may also be subject to a penalty of up to \$10,000 for willful failure to collect and pay over the tax. I.R.C. § 7202.

If, however, the seller warrants to the buyer by a properly executed FIRPTA affidavit that the she is not a foreign person then the buyer is not liable for the seller’s tax owed unless the buyer has knowledge that the seller is, in fact, a foreign person.

**Exhibit List – FIRPTA WITHHOLDING (HSB 5520662 v. 4)**

Exhibit A – IRS Form 8288, “U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests”

Exhibit B – IRS Form 8288-A, “Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests”

Exhibit C – Seller’s Affidavit Example

Exhibit D – IRS Form 8288-B, “Application for Withholding Certificate for Dispositions by Foreign Persons of U.S. Real Property Interests”

Exhibit E – IRS Form SS-4, “Application for Employer Identification Number”

Exhibit F – IRS Form W-7, “Application for IRS Individual Taxpayer Identification Number”

# EXHIBIT A

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

OMB No. 1545-0902

▶ Go to [www.irs.gov/Form8288](http://www.irs.gov/Form8288) for instructions and the latest information.

If this is an amended return, check here

Complete Part I or Part II. Also complete and attach Copies A and B of Form(s) 8288-A.  
 Attach additional sheets if you need more space.

**Part I To Be Completed by the Buyer or Other Transferee Required To Withhold Under Section 1445(a)**

<b>1</b> Name of buyer or other transferee responsible for withholding. See instructions.	Identifying number
Street address, apt. or suite no., or rural route. Do not use a P.O. box.	
City or town, province or state, country, and ZIP or foreign postal code	Phone number (optional)
<b>2</b> Description and location of property acquired _____ _____ _____ _____ _____ _____ _____ _____	
<b>3</b> Date of transfer	<b>4</b> Number of Forms 8288-A attached
<b>5</b> Complete all items that apply. Enter dollar amounts on applicable lines. <b>a</b> Amount subject to withholding at 15% . . . . . ▶ _____ <b>b</b> Amount subject to withholding at 10% . . . . . ▶ _____ <b>c</b> Withholding is at a reduced rate. See instructions . . . . . ▶ <input type="checkbox"/>	<b>6</b> Total amount withheld

**Part II To Be Completed by an Entity Subject to the Provisions of Section 1445(e)**

<b>1</b> Name of entity or fiduciary responsible for withholding. See instructions.	Identifying number
Street address, apt. or suite no., or rural route. Do not use a P.O. box.	
City or town, province or state, country, and ZIP or foreign postal code	Phone number (optional)
<b>2</b> Description of U.S. real property interest transferred or distributed _____ _____ _____ _____ _____ _____ _____ _____	
<b>3</b> Date of transfer	<b>4</b> Number of Forms 8288-A attached
<b>5</b> Complete all items that apply. Enter dollar amounts on applicable lines. <b>a</b> Amount subject to withholding at 15% . . . . . ▶ _____ <b>b</b> Amount subject to withholding at 10% . . . . . ▶ _____ <b>c</b> Amount subject to withholding at 21% . . . . . ▶ _____ <b>d</b> Withholding is at a reduced rate. See instructions . . . . . ▶ <input type="checkbox"/> <b>e</b> Large trust election to withhold at distribution . . . . . ▶ <input type="checkbox"/>	<b>6</b> Total amount withheld

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

**Sign Here**

Signature of withholding agent, partner, fiduciary, or corporate officer \_\_\_\_\_ Title (if applicable) \_\_\_\_\_ Date \_\_\_\_\_

**Paid Preparer Use Only**

Print/Type preparer's name	Preparer's signature	Date	Check <input type="checkbox"/> if self-employed	PTIN
Firm's name ▶	Firm's EIN ▶			
Firm's address ▶	Phone no.			

# Instructions for Form 8288

(Rev. May 2018)

(Use with the April 2018 revision of Form 8288.)

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



Department of the Treasury  
Internal Revenue Service

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

### Future Developments

For the latest information about developments related to Form 8288 and its instructions, such as legislation enacted after they were published, go to [IRS.gov/form8288](http://IRS.gov/form8288).

### What's New

We made the following changes to the prior version of Form 8288.

- To meet your withholding, payment, and reporting requirements under new section 1446(f)(1), use Forms 8288 and 8288-A. Follow the instructions outlined in Notice 2018-29, 2018-16 I.R.B. 495 available at [IRS.gov/irb/2018-16\\_IRB#NOT-2018-29](http://IRS.gov/irb/2018-16_IRB#NOT-2018-29). New section 1446(f)(1) was added by section 13501 of P.L. 115-97.
- The withholding rate on Part II, Line 5c, has changed from 35% to 21% for distributions made after December 31, 2017.

### General Instructions

#### Purpose of Form

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

**TIP** *If an exception applies, you may be required to withhold at a reduced rate, or you may not be required to withhold. See [Exceptions](#), later.*

**Section 1446(f)(1) withholding.** When a transferor disposes of an interest in a partnership, section 1446(f)(1) imposes a withholding obligation on the buyer or other transferee of the interest if:

1. The transferor is a foreign person;

2. The transferor realized a gain on the sale; and

3. Any portion of the gain would be treated under section 864(c)(8) as effectively connected with the conduct of a trade or business within the United States.



*These instructions do not include the specific rules for withholding, payment, and reporting under section 1446(f)(1), nor do the instructions cover the specific exceptions to that withholding. See [Notice 2018-29](#) for these rules and the instructions for completing Forms 8288 and 8288-A.*

#### Who Must File

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

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

1. A distribution of effectively connected income by a publicly traded partnership is subject to the withholding requirements of section 1446.
2. A distribution with respect to gains from the disposition of a U.S. real property interest from a trust that is regularly traded on an established securities market is subject to section 1445, but is not reported on Forms 8288 and 8288-A.
3. A dividend distribution by a qualified investment entity to a nonresident alien or a foreign corporation that is attributable to gains from sales or exchanges by the qualified investment entity of U.S. real property interests is not subject to withholding under section 1445 as a gain from the sale or exchange of a U.S. real property interest if:
  - a. The distribution is on stock regularly traded on a securities market in the United States, and
  - b. The alien or corporation did not own more than 10% (for dispositions and distributions before December 17, 2015, did not own more than 5% of such stock in

the case of a real estate investment trust (REIT)) of that stock at any time during the 1-year period ending on the date of the distribution.

Use Form 1042, and Form 1042-S, to report and pay over the withheld amounts.

#### Section 1446(f)(1) withholding.

Transferees are required to report the section 1446(f)(1) tax withheld on Form 8288, and related information on Form 8288-A. Form more information, see [Notice 2018-29](#).

#### Amount To Withhold

Generally, you must withhold 15% of the amount realized on the disposition by the transferor (see [Definitions](#), later).

**Note.** Prior to February 17, 2016, the transferor was generally required to withhold 10% of the amount realized on the disposition.

For information about:

- Withholding at 21% (35% for distributions made before January 1, 2018), see [Entities Subject to Section 1445\(e\)](#), later.
- Withholding at a reduced amount, see [Purchase of residence for \\$1,000,000 or less](#).

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

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

1. Allocate the amount realized from the transfer among the transferors based on their capital contribution to the property. For this purpose, a husband and wife are treated as having contributed 50% each.
2. Withhold on the total amount allocated to foreign transferors.
3. Credit the amount withheld among the foreign transferors as they mutually agree. The transferors must request that the withholding be credited as agreed upon by the 10th day after the date of transfer. If no agreement is reached, credit

the withholding by evenly dividing it among the foreign transferors.

## When To File

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

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

**Installment payments.** You must withhold the full amount at the time of the first installment payment. If you cannot because the payment does not involve sufficient cash or other liquid assets, you may obtain a withholding certificate from the IRS. See the Instructions for Form 8288-B for more information.

## Where To File

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

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

## Forms 8288-A Must Be Attached

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

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

**Transferor's TIN missing.** If you do not have the transferor's taxpayer identification number (TIN), you still must file Forms 8288 and 8288-A. A stamped

copy of Form 8288-A will not be provided to the transferor if the transferor's TIN is not included on that form. The IRS will send a letter to the transferor requesting the TIN and providing instructions for how to get a TIN. When the transferor provides the IRS with a TIN, the IRS will provide the transferor with a stamped Copy B of Form 8288-A.

## Penalties

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

## Definitions

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

**Transferor.** For purposes of this withholding, this means any foreign person that disposes of a U.S. real property interest by sale, exchange, gift, or any other disposition. A disregarded entity cannot be the transferor for purposes of section 1445. Instead, the person considered as owning the assets of the disregarded entity for federal tax purposes is regarded as the transferor. A **disregarded entity** for these purposes means an entity that is disregarded as an entity separate from its owner under Regulations section 301.7701-3, a qualified real estate investment trust subsidiary as defined in section 856(i), or a qualified subchapter S subsidiary under section 1361(b)(3)(B).

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

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

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

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

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

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

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

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

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

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

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

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

2015) or 5% of such stock in case of a RIC, and even if such stock is domestically controlled.

For more information, see Pub. 515.

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

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

For purpose of determining whether a QIE is domestically controlled, the following rules apply.

1. A person holding less than 5% of any class of stock of a QIE which is regularly traded on an established securities market in the United States at all times during the testing period will be treated as a U.S. person unless the QIE has actual knowledge that such person is not a U.S. person.

2. Any stock in a QIE that is held by another QIE will be treated as held by a foreign person if:

- Any class of stock of such other QIE is regularly traded on an established securities market, or
- Such other QIE is a RIC that issues certain redeemable securities.

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

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

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

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

contract), a good-faith deposit, or any similar amount primarily intended to bind the parties to the contract and subject to forfeiture. A payment that is not forfeitable may also be considered earnest money, a good-faith deposit, or a similar sum.

## Exceptions

### Withholding At a Reduced Rate

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

- A property which is acquired by the transferee for use by the transferee as a residence, and
- The amount realized for the property is \$1,000,000 or less. However, see *Purchase of residence for \$300,000 or less* next.

### Withholding Not Required

**Purchase of residence for \$300,000 or less.** If one or more individuals acquire U.S. real property for use as a residence and the amount realized (in most cases the sales price) is \$300,000 or less, no withholding is required.

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

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

### Transferor not a foreign person.

Generally, no withholding is required if you receive a certification of nonforeign status from the transferor, signed under penalties of perjury, stating that the transferor is not a foreign person and containing the transferor's name, address, and identification number (social security number (SSN) or employer identification number (EIN)). The transferor can give the certification to a qualified substitute (defined on this page). The qualified substitute gives you a statement, under penalties of perjury, that the certification is in the qualified substitute's possession.

If you receive a certification (or statement), the withholding tax cannot be collected from you unless you knew that the certification (or statement) was false or you received a notice from your agent, the transferor's agent, or the qualified substitute that it was false. The certification must be signed by the individual, a responsible officer of a corporation, a general partner of a partnership, or the trustee, executor, or fiduciary of a trust or estate.

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

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

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

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

**Transferred property that is not a U.S. real property interest.** If you acquire an interest in property that is not a U.S. real property interest (defined under *U.S. real property interest*, earlier), withholding generally is not required. A U.S. real property interest includes certain interests in U.S. corporations, as well as direct interests in real property and certain associated personal property.

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

**Late notice of false statement.** If, after the date of transfer, you receive a notice indicating that the statement is false, see Late notice of false certification, earlier.

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

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

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

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

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

**Note.** A notice of nonrecognition cannot be used for the exclusion from income under section 121, like-kind exchanges that do not qualify for nonrecognition treatment in their entirety, and deferred like-kind exchanges that have not been completed when it is time to file Form 8288. In these cases, a withholding certificate issued by the IRS, as described next, must be obtained.

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

- Reduced withholding is appropriate because the 10%, 15%, or 21% (35% for distributions made before January 1, 2018) amount exceeds the transferor's maximum tax liability;
- The transferor is exempt from U.S. tax or nonrecognition provisions apply; or
- The transferee or transferor enters into an agreement with the IRS for the payment of the tax.

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

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

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

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

**Property acquired by a governmental unit.** If the property is acquired by the United States, a U.S. state or possession or political subdivision, or the District of Columbia, withholding is generally not required.

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

**Applicable wash sale transaction.** If a distribution from a domestically controlled qualified investment entity is treated as a

distribution of a U.S. real property interest only because an interest in the entity was disposed of in an applicable wash sale transaction, withholding generally is not required. See section 897(h)(5).

## Late Filing of Certification or Notices

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

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

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

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

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

## Liability of Agents

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

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

An "agent" is any person who represents the transferor or transferee in any negotiation with another person (or another person's agent) relating to the transaction or in settling the transaction. For purposes of section 1445(e), a transferor's or transferee's agent is any

person who represents or advises an entity, a holder of an interest in an entity, or a fiduciary with respect to the planning, arrangement, or completion of a transaction described in sections 1445(e)(1) through (4).

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

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

### Entities Subject to Section 1445(e)

Withholding is required on certain distributions and other transactions by domestic or foreign corporations, qualified investment entities, trusts, and estates. A domestic trust or estate must withhold 21% (35% for distributions made before January 1, 2018) of the amount distributed to a foreign beneficiary from a "U.S. real property interest account" that it is required to establish under Regulations section 1.1445-5(c)(1)(iii). A foreign corporation that has not made the election under section 897(i) must withhold 21% (35% for distributions made before January 1, 2018) of the gain it recognizes on the distribution of a U.S. real property interest to its shareholders. Certain domestic corporations are required to withhold tax on distributions to foreign shareholders.

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

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

may be collected from the entity or fiduciary.

### Section 1445(e)(1) Transactions

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

**Trusts and estates.** If a domestic trust or estate disposes of a U.S. real property interest, the amount of gain realized must be paid into a separate "U.S. real property interest account." For these purposes, a domestic trust is one that does not make the "large trust election" (explained below), is not a qualified investment entity, and is not publicly traded. The fiduciary must withhold 21% (35% for distributions made before January 1, 2018) of the amount distributed to a foreign person from the account during the tax year of the trust or estate in which the disposition occurred. The withholding must be paid over to the IRS within 20 days of the date of distribution. Special rules apply to grantor trusts. See Regulations section 1.1445-5 for more information and how to compute the amount subject to withholding.

**Large trust election.** Trusts with more than 100 beneficiaries may make an election to withhold upon distribution rather than at the time of transfer. The amount to be withheld from each distribution is 21% (35% for distributions made before January 1, 2018) of the amount attributable to the foreign beneficiary's proportionate share of the current balance of the trust's section 1445(e)(1) account. This election does not apply to any qualified investment entity or to any publicly traded trust. Special rules apply to large trusts that make recurring sales of growing crops and timber.

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

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

A foreign corporation that distributes a U.S. real property interest must generally

withhold 21% (35% for distributions made before January 1, 2018) of the gain recognized by the corporation. No withholding or reduced withholding is required if the corporation receives a withholding certificate from the IRS.

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

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

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

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

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

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

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

The transferee of a partnership interest must withhold 15% (10% for dispositions before February 17, 2016) of the amount realized on the disposition by a foreign partner of an interest in a domestic or foreign partnership in which at least 50% of the value of the gross assets consists of U.S. real property interests and at least 90% of the value of the gross assets consists of U.S. real property, interests plus any cash or cash equivalents. However, no withholding is required under section 1445(e)(5) for dispositions of interests in other partnerships, trusts, or estates until the effective date of a Treasury Decision under section 897(g). No withholding is required if, no earlier than 30 days before the transfer, the transferee receives a statement signed by a general partner under penalties of perjury that at least 50% of the value of the gross assets of the partnership does not consist of U.S. real property interests or that at least 90% of the value of the gross assets does not consist of U.S. real property interests, plus cash or cash equivalents. The transferee may rely on the statement unless the transferee knows

it is false or the transferee receives a false statement notice pursuant to Regulations section 1.1445-4.

## Section 1445(e)(6) Transactions

A qualified investment entity must withhold 21% (35% for distributions made before January 1, 2018) of a distribution to a nonresident alien or a foreign corporation that is treated as gain realized from the sale or exchange of a U.S. real property interest. No withholding under section 1445 is required on a distribution to a nonresident alien or foreign corporation if the distribution is on stock regularly traded on a securities market in the United States and the alien or corporation did not own more than 10% (for distributions before December 17, 2015, did not own more than 5% of such stock in case of a REIT) of that stock at any time during the 1-year period ending on the date of distribution.

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

## Specific Instructions

**Note.** If you are using Forms 8288 and 8288-A to meet the withholding, payment, and reporting requirements under new section 1446(f)(1), you must write **Section 1446(f)(1) withholding** at the top of both Forms 8288 and 8288-A. For additional specific instructions related to the reporting of section 1446(f)(1) withholding, see *Notice 2018-29*.

**Amended return.** Check the box at the top of the page to indicate the Form 8288 you are filing is an amended return.



*Complete Part I or Part II, but not both. Also, you must complete and attach Copies A and B of Form(s) 8288-A. Attach additional sheets if you need more space.*

### Part I, To Be Completed By The Buyer or Other Transferee Required to Withhold Under Section 1445(a)

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

In Part II, enter the name, address, and identifying number of the entity or fiduciary responsible for withholding under section 1445(e). Do not enter the name, address,

and identifying number of a title company, mortgage company, etc. unless it happens to be the actual entity responsible for withholding under section 1445(e).



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

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

**Identifying number.** For a U.S. individual, the identifying number is a social security number (SSN). For any entity other than an individual (for example, corporation, QIE, estate, or trust), the identifying number is an employer identification number (EIN). If you do not have an EIN, you can apply for one online at [IRS.gov/businesses/small-businesses-self-employed/apply-for-an-employer-identification-number-ein-online](https://www.irs.gov/businesses/small-businesses-self-employed/apply-for-an-employer-identification-number-ein-online) or by telephone at 1-800-829-4933. Also, you can file Form SS-4 by fax or mail.

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

**Line 2.** Enter the location and a description of the property, including any substantial improvements (for example, "12-unit apartment building"). For an interest in a corporation that constitutes a U.S. real property interest, enter the class or type and amount of the interest (for example, "10,000 shares Class A Preferred Stock XYZ Corporation"). For an interest in a partnership, enter the class or type and amount of the partnership interest (for example, "40% of the capital interest in the ABC Partnership").

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

**Line 5a.** Enter amounts subject to withholding at 15%. Generally, this is the rate of withholding for transactions required to be reported under section 1445(a) in Part I.

Include withholding for the purchase of a residence with an amount realized of more than \$1,000,000.

**Line 5b.** Enter amounts subject to withholding at 10%. Amounts entered on line 5b, include the following.

- Withholding for the purchase of a residence with an amount realized of more than \$300,000, but less than or equal to \$1,000,000. Generally, no withholding is required for the purchase of a residence if the amount realized is \$300,000 or less. For more information, see *Exceptions*, earlier.

- Any dispositions of property prior to February 17, 2016, subject to a 10% rate of withholding under section 1445(a).

**Line 5c.** If withholding is at a reduced rate, check the box. See *Exceptions*, earlier. Include the amount withheld in the total reported on line 6, Part I.

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

### Part II, To Be Completed By an Entity Subject to The Provisions of Section 1445(e)

**Line 3.** If you are a qualified investment entity, domestic trust or estate, or you make the large trust election, enter the date of distribution for the date of transfer.

**Line 5a.** Enter amounts subject to withholding at 15%. Generally, this is the rate of withholding for transactions required to be reported under section 1445(e) in Part II. However, see the discussion of various section 1445(e) transactions under *Entities Subject to Section 1445(e)*, earlier.

**Line 5b.** Enter amounts subject to withholding at 10%. Report on line 5b withholding for any dispositions of property prior to February 17, 2016, subject to a 10% rate of withholding under section 1445(e).

**Line 5c.** Enter amounts subject to withholding at 21% (35% for distributions made before January 1, 2018). See the discussion of various section 1445(e) transactions under *Entities Subject to Section 1445(e)*, earlier.

**Line 5d.** If withholding is at a reduced rate, check the box. Include the amount withheld in the total reported on line 6, Part II. See the discussion of various section 1445(e) transactions under *Entities Subject to Section 1445(e)*, earlier.

**Line 5e.** If withholding is from a large trust election to withhold upon distribution, check the box, and include the amount withheld in the total reported on line 6, Part II. See *Large trust election*, under *Section 1445(e)(1) Transactions*, earlier.

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

**Paid Preparer**

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

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

form is used to report and transmit the amount withheld.

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

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

The time needed to complete and file these forms will vary depending on individual circumstances. The estimated burden for business taxpayers filing this form is approved under OMB control number 1545-0123. The estimated burden for all other taxpayers who file these forms is shown below.

	Form 8288	Form 8288-A
<b>Recordkeeping</b>	5 hr., 30 min.	2 hr., 52 min.
<b>Learning about the law or the form</b>	5 hr., 13 min.	30 min.
<b>Preparing and sending the form to the IRS</b>	6 hr., 44 min.	34 min.

If you have comments concerning the accuracy of these time estimates or suggestions for making these forms simpler, we would be happy to hear from you. You can send us comments from [IRS.gov/FormComments](https://www.irs.gov/FormComments). You can write to the Internal Revenue Service, Tax Forms and Publications, 1111 Constitution Ave. NW, IR-6526, Washington, DC 20224. Do not send the form to this address. Instead, see *Where To File*, earlier.

# EXHIBIT B

Withholding agent's name, street address, city, state, and ZIP code		1 Date of transfer	<b>Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests</b> OMB No. 1545-0902	
		2 Federal income tax withheld		
Withholding agent's federal identification number	Identification number of foreign person subject to withholding (see instructions)	3 Amount realized	4 Gain recognized by foreign corporation	<b>Copy A For Internal Revenue Service Center</b>  For Privacy Act and Paperwork Reduction Act Notice, see the Instructions for Form 8288.
Name of person subject to withholding		5 Description of property transferred		
Foreign address (number, street, and apt. or suite no.)		6 Person subject to withholding is: An individual <input type="checkbox"/> A corporation <input type="checkbox"/> Other (specify) ▶		
City, province or state, postal code, and country (not U.S.)	7 Country code	Mailing address of person subject to withholding (if different)		

Withholding agent's name, street address, city, state, and ZIP code		1 Date of transfer	<b>Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests</b> OMB No. 1545-0902		
		2 Federal income tax withheld			
Withholding agent's federal identification number	Identification number of foreign person subject to withholding (see instructions)	3 Amount realized	4 Gain recognized by foreign corporation	<b>Copy B Send to Internal Revenue Service Center (For Use by Person Subject to Withholding)</b>  This information is being furnished to the Internal Revenue Service.	
Name of person subject to withholding		5 Description of property transferred			
Foreign address (number, street, and apt. or suite no.)		6 Person subject to withholding is:      An individual <input type="checkbox"/> A corporation <input type="checkbox"/> Other (specify) ▶			
City, province or state, postal code, and country (not U.S.)	7 Country code	Mailing address of person subject to withholding (if different)			

## Instructions for the Person Subject to Withholding

**Note.** A transferee required to withhold under section 1446(f)(1) must write "Section 1446(f)(1) withholding" at the top of Copies A and B of Form 8288-A before sending them to the IRS. See section 5 of Notice 2018-29 for more information.

Generally, if you are a foreign person that disposes of real property located in the United States as seller or transferor, the buyer or other transferee must withhold 15% of the amount realized. Certain foreign interest holders that are beneficiaries or shareholders are subject to federal income tax withholding at a rate of 21% (35% for distributions made before January 1, 2018).

You must file a U.S. tax return (Form 1040NR, 1041, 1065, 1065-B, or 1120-F) to report the sale or other disposition as effectively connected with the conduct of a trade or business in the United States. To receive credit for any federal income tax withheld shown in box 2, attach Form 8288-A to your tax return, unless you make a request for early refund. Foreign partnerships, other than publicly traded partnerships (PTPs), should report the withholding on Form 8804, and attach Form 8288-A. PTPs and their nominees should use Forms 1042 and 1042-S to report the withholding. See Pub. 515 and Pub. 519 for more information.

If the amount shown in box 2 is greater than your maximum tax liability, you may apply for an early refund. However, you must still file your tax return when due. To apply for an early refund, you must first get a withholding certificate. No particular form is required for an application for early refund, but it must include the following information in separate paragraphs numbered as shown below:

1. Your name, address, and U.S. taxpayer identification number;
2. The amount required to be withheld as stated in the withholding certificate issued by the IRS;
3. The amount withheld shown in box 2 (attach a copy of this Form 8288-A); and
4. The amount to be refunded.

Send your application for a withholding certificate and/or application for early refund to Ogden Service Center, P.O. Box 409101, Ogden, UT 84409.

**Note.** The early refund procedures discussed above are not available for withholding under section 1446(f)(1).

See Pub. 515 and Form 8288-B for information about withholding certificates.

Withholding agent's name, street address, city, state, and ZIP code		1 Date of transfer	<b>Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests</b> OMB No. 1545-0902	
		2 Federal income tax withheld		
Withholding agent's federal identification number	Identification number of foreign person subject to withholding (see instructions)	3 Amount realized	4 Gain recognized by foreign corporation	<b>Copy C For Withholding Agent</b>  For Privacy Act and Paperwork Reduction Act Notice, see the Instructions for Form 8288.
Name of person subject to withholding		5 Description of property transferred		
Foreign address (number, street, and apt. or suite no.)		6 Person subject to withholding is: An individual <input type="checkbox"/> A corporation <input type="checkbox"/> Other (specify) ▶		
City, province or state, postal code, and country (not U.S.)	7 Country code	Mailing address of person subject to withholding (if different)		

Form **8288-A** (Rev. 4-2018)

**Keep for your records**

Department of the Treasury - Internal Revenue Service

## Instructions for the Withholding Agent

Prepare Form 8288-A for each foreign person subject to withholding. Attach Copies A and B to Form 8288, U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests. Copy B will be stamped by the IRS and sent to the person subject to withholding if the form is complete, including the transferor's identification number. Retain Copy C for your records. You do not have to give a copy of this form to the person subject to withholding.

**Identification number.** A U.S. taxpayer identification number (TIN) is a social security number (SSN), employer identification number (EIN), or IRS individual taxpayer identification number (ITIN). For more information, see *Forms 8288-A Must Be Attached and Identifying number* in the Instructions for Form 8288.

**Address.** You must enter the foreign home address (for an individual) or the foreign office address (for other than an individual) of the person subject to withholding. You may enter a separate mailing address in the space provided. If provided, the IRS will use the separate mailing address to forward Copy B to the person subject to withholding.

**Note.** The home or office address of the person subject to withholding must be an address outside the United States. If the person does not

have an address outside the United States, enter the country of residence of the foreign person in this section and provide a complete mailing address.

**Box 1.** Enter the date of transfer. However, enter the date of distribution if you withheld under section 1445(e)(2), (e)(3), or (e)(6), or if you made the large trust election to withhold at the date of distribution.

**Box 2.** Enter the federal income tax you withheld for the foreign person whose name appears on this form.

**Box 3.** Enter the amount realized by the foreign person whose name appears on this form.

**Box 4.** Complete only if you are a foreign corporation required to withhold under section 1445(e)(2).

**Box 6.** Check the applicable box to indicate whether the foreign person subject to withholding is an individual or a corporation. If "other," specify whether the person is a partnership, trust, or estate.

**Box 7.** Enter the applicable two-letter code from the list at [www.irs.gov/countrycodes](http://www.irs.gov/countrycodes) for the foreign home address or foreign office address of the person subject to withholding.

See the Instructions for Form 8288 for more information.

# EXHIBIT C



# EXHIBIT D

## Application for Withholding Certificate for Dispositions by Foreign Persons of U.S. Real Property Interests

▶ Please type or print.

<b>1</b> Name of transferor (attach additional sheets if more than one transferor)	<b>Identification number</b>
Street address, apt. or suite no., or rural route. Do not use a P.O. box.	
City, state or province, and country (if not U.S.). Include ZIP code or postal code where appropriate.	
<b>2</b> Name of transferee (attach additional sheets if more than one transferee)	<b>Identification number</b>
Street address, apt. or suite no., or rural route. Do not use a P.O. box.	
City, state or province, and country (if not U.S.). Include ZIP code or postal code where appropriate.	
<b>3</b> Applicant is: Transferor <input type="checkbox"/> Transferee <input type="checkbox"/>	
<b>4a</b> Name of withholding agent (see instructions)	<b>b Identification number</b>
<b>c</b> Name of estate, trust, or entity (if applicable)	<b>d Identification number</b>
<b>5</b> Address where you want withholding certificate sent (street address, apt. or suite no., P.O. box, or rural route number)	Phone number (optional)
City, state or province, and country (if not U.S.). Include ZIP code or postal code where appropriate.	
<b>6</b> Description of U.S. real property transaction:	
<b>a</b> Date of transfer (month, day, year) (see inst.) _____ <b>b</b> Contract price \$ _____	
<b>c</b> Type of interest transferred: <input type="checkbox"/> Real property <input type="checkbox"/> Associated personal property	
<input type="checkbox"/> Domestic U.S. real property holding corporation	
<b>d</b> Use of property at time of sale: <input type="checkbox"/> Rental or commercial <input type="checkbox"/> Personal <input type="checkbox"/> Other (attach explanation)	
<b>e</b> Adjusted basis \$ _____	
<b>f</b> Location and general description of property (for a real property interest), description (for associated personal property), or the class or type and amount of the interest (for an interest in a U.S. real property holding corporation). See instructions.	
-----	
<b>g</b> For the 3 preceding tax years:	
<b>(1)</b> Were U.S. income tax returns filed relating to the U.S. real property interest? . . . . . <input type="checkbox"/> Yes <input type="checkbox"/> No	
If "Yes," when and where were those returns filed? ▶ _____	
<b>(2)</b> Were U.S. income taxes paid relating to the U.S. real property interest? . . . . . <input type="checkbox"/> Yes <input type="checkbox"/> No	
If "Yes," enter the amount of tax paid for each year ▶ _____	
-----	
<b>7</b> Check the box to indicate the reason a withholding certificate should be issued. See the instructions for information that must be attached to Form 8288-B.	
<b>a</b> <input type="checkbox"/> The transferor is exempt from U.S. tax or nonrecognition treatment applies.	
<b>b</b> <input type="checkbox"/> The transferor's maximum tax liability is less than the tax required to be withheld.	
<b>c</b> <input type="checkbox"/> The special installment sales rules described in section 7 of Rev. Proc. 2000-35 allow reduced withholding.	
<b>8</b> Does the transferor have any unsatisfied withholding liability under section 1445? . . . . . <input type="checkbox"/> Yes <input type="checkbox"/> No	
See the instructions for information required to be attached.	
<b>9</b> Is this application for a withholding certificate made under section 1445(e)? . . . . . <input type="checkbox"/> Yes <input type="checkbox"/> No	
If "Yes," check the applicable box in <b>a</b> and the applicable box in <b>b</b> below.	
<b>a</b> Type of transaction: <input type="checkbox"/> 1445(e)(1) <input type="checkbox"/> 1445(e)(2) <input type="checkbox"/> 1445(e)(3) <input type="checkbox"/> 1445(e)(5) <input type="checkbox"/> 1445(e)(6)	
<b>b</b> Applicant is: <input type="checkbox"/> Taxpayer <input type="checkbox"/> Other person required to withhold. Specify your title (e.g., trustee) ▶ _____	

Under penalties of perjury, I declare that I have examined this application and accompanying attachments, and, to the best of my knowledge and belief, they are true, correct, and complete.

Signature	Title (if applicable)	Date
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Section references are to the Internal Revenue Code unless otherwise noted.

## Future Developments

For the latest information about developments related to Form 8288 and its instructions, such as legislation enacted after they were published, go to [www.irs.gov/form8288](http://www.irs.gov/form8288).

## General Instructions

**Purpose of form.** Use Form 8288-B to apply for a withholding certificate to reduce or eliminate withholding on dispositions of U.S. real property interests by foreign persons, but **only** if the application is based on:

1. A claim that the transferor is entitled to nonrecognition treatment or is exempt from tax,
2. A claim solely on a calculation that shows the transferor's maximum tax liability is less than the tax otherwise required to be withheld, or
3. A claim that the special installment sales rules described in section 7 of Rev. Proc. 2000-35 allowed reduced withholding.

Do not use this form for applications:

- Based on an agreement for the payment of tax with conforming security,
- For blanket withholding certificates under Rev. Proc. 2000-35, or
- Other than the three types described above.

See Regulations sections 1.1445-3 and 1.1445-6 and Rev. Proc. 2000-35 for information and procedures for applying for a withholding certificate.

**Who can apply for a withholding certificate.** Either the transferee or the transferor (or other authorized person) can file this application.

**Withholding certificate.** The IRS can issue a withholding certificate to reduce or eliminate withholding under section 1445. A certificate issued before the transfer notifies the transferee that reduced withholding or no withholding is required. A certificate issued after the transfer may authorize an early or a normal refund. If, on the date of transfer, an application for a withholding certificate is or has been submitted to the IRS, the applicable withholding is not required to be paid over to the IRS until the 20th day after the day that the IRS mails the withholding certificate or notice of denial. A transferor that applies for a withholding certificate must notify the transferee in writing that the certificate has been applied for on the day of or prior to the transfer.

The IRS will normally act on an application within 90 days of receipt of all information necessary to make a proper determination. The IRS will determine whether withholding should be reduced or eliminated or whether a withholding certificate should not be issued.

**Identification number.** The U.S. taxpayer identification number (TIN) of all parties to the transaction must be on the application for a withholding certificate. For U.S. individuals, the TIN is a social security number (SSN). For all other entities, it is an employer identification number (EIN). If you do not have an EIN, you can apply for one online at [www.irs.gov/smallbiz](http://www.irs.gov/smallbiz) or by telephone at 1-800-829-4933. Also, you can file Form SS-4, Application for Employer Identification Number, by fax or mail.

If you are a nonresident alien individual who is required to have a TIN, but is not eligible to obtain an SSN, you must apply for an IRS individual taxpayer identification number (ITIN). If you do not have a TIN and are eligible for an ITIN, you can apply for an ITIN by attaching the completed Form 8288-B to a completed Form W-7 and forwarding the package to the IRS at the address given in the Form W-7 instructions. Get Form W-7, Application for IRS Individual Taxpayer Identification Number, for more information.

Any withholding certificate issued by the IRS applies only for the limited purpose of determining the withholding obligation under section 1445 and does not apply to any substantive issue that may arise in connection with the transfer. The acceptance by the IRS of any evidence submitted in connection with this application is not binding on the IRS for any purpose other than issuing the withholding certificate. The information submitted in support of the application may be subject to verification by the IRS prior to issuance of a withholding certificate.

If you receive a withholding certificate from the IRS and withholding is still required, a copy of the withholding certificate must be attached to Form 8288, U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests.

**Installment sales.** A transferee is required to withhold on the full sales price regardless of the amount of the payment. However, if the transferor is not a dealer and will report gain using the installment method under section 453, a withholding certificate allowing reduced withholding may be obtained. Any withholding certificate based on the installment sale method will provide for payment of interest on the deferred tax liability under section 453A(c) when applicable.

For installment sales subject to withholding under section 1445(a) or (e), the IRS will consider applications for a withholding certificate based on the transferee's (or entity's or fiduciary's) agreement to all of the following:

1. Withhold and pay over 15% or lower amount determined by the IRS (or the amount the IRS determines to be appropriate under section 1445(e)) of the down payment. The amount of the down payment includes any liabilities of the transferor (entity in the case of section 1445(e)) assumed by the transferee, or liabilities to which the U.S. real property interest was subject immediately before and after the transfer.

2. Withhold 15% or lower amount determined by the IRS (or the amount the IRS determines to be appropriate under section 1445(e)) of each subsequent payment and the interest on the deferred tax liability.

3. Use Forms 8288 and 8288-A (relating to withholding on dispositions by foreign persons of U.S. real property interests) to pay over all amounts withheld. The identification number of the transferor (or interest holder subject to withholding under section 1445(e)) must be included on Forms 8288 and 8288-A.

4. Notify the IRS before the disposition or encumbrance of the U.S. real property interest (of the installment obligation under section 1445(e)), and when it occurs, pay over the remaining amount to be withheld.

5. Continue to withhold under a reduced withholding certificate until an amended certificate is issued, even if the transferor pledges the installment obligation in exchange for all or part of the proceeds due on the obligation and includes in gross income under section 453A(d) the net proceeds of the secured indebtedness.

**Where to send applications for a withholding certificate.** Form 8288-B and other applications for a withholding certificate must be sent to Internal Revenue Service, P.O. Box 409101, Ogden, UT 84409.

## Specific Instructions

Complete all information for each line. An application that is not substantially complete when submitted will be rejected. For example, an application without a specific or estimated date of transfer will not be considered to be substantially complete.

**Line 1.** Enter the name, street address, and identification number of the transferor. If there are multiple transferors, attach additional sheets giving the required information about each one. For a transaction under section 1445(e), enter the required information for each foreign person for whom you are requesting reduced withholding.

**Line 2.** Enter the name, street address, and identification number of the transferee. If there are multiple transferees, attach additional sheets giving the required information about each one.

**Line 4a.** The withholding agent will normally be the buyer or other transferee as described in section 1445(d)(4). For distributions under section 1445(e), the withholding agent also includes a trustee, executor, or other authorized person.

**Line 4b.** If you are not applying for this withholding certificate in your personal capacity, enter your SSN or ITIN (see *Identification number* on this page for more information).

**Line 4c.** If you are acting on behalf of an estate or trust, or are signing as an authorized person for an entity other than an individual (for example, a corporation, qualified investment entity, or partnership), enter the name of the estate, trust, or entity.

**Line 4d.** Enter the EIN of the estate, trust, or entity.

**Line 5.** Enter the address you want the IRS to use for purposes of returning the withholding certificate.

**Line 6a.** Enter the year as a four-digit number (for example, "2013").

**Line 6c.** "Associated personal property" means property (for example, furniture) sold with a building. See Regulations section 1.897-1.

**Line 6d.** Check "Other" if the property was used for both personal and rental use and attach an explanation.

**Line 6f.** Enter the address and description of the property (for example, "10-story, 100-unit luxury apartment building"). For a real estate holding corporation interest transferred, enter the class or type and amount of the interest (for example, "10,000 shares Class A Preferred Stock XYZ Corporation"). You may attach additional sheets. Be sure to include your name and TIN on each sheet you attach.

**Line 6g.** A U.S. income tax return includes Forms 1040NR, and 1120-F.

**Line 7a.** If you checked 7a, attach:

1. A brief description of the transfer,
2. A summary of the law,
3. Facts supporting the claim of exemption or nonrecognition,
4. Evidence that the transferor has no unsatisfied withholding liability, and
5. The most recent assessed value for state or local property tax purposes of the interest to be transferred, or other estimate of its fair market value. You need not submit supporting evidence of the value of the property.

A nonresident alien or foreign corporation must also attach a statement of the adjusted basis of the property immediately before the distribution or transfer.

**Line 7b.** If you checked 7b, attach a calculation of the maximum tax that can be imposed on the disposition. You must also include a statement signed by the transferor under penalties of perjury that the calculation and all supporting evidence is true and correct to the best knowledge of the transferor.

The calculation of the maximum tax that can be imposed must include:

1. Evidence of the amount to be realized by the transferor, such as a copy of the signed contract of transfer;

2. Evidence of the adjusted basis of the property, such as closing statements, invoices for improvements, and depreciation schedules, or if no depreciation schedules are submitted, a statement of the nature of the use of the property and why depreciation was not allowed;

3. Amounts to be recaptured for depreciation, investment credit, or other items subject to recapture;

4. The maximum capital gain and/or ordinary income tax rates applicable to the transfer;

5. The tentative tax owed; and

6. Evidence showing the amount of any increase or reduction of tax to which the transferor is subject, including any reduction to which the transferor is entitled under a U.S. income tax treaty.

If you have a net operating loss, see Rev. Proc. 2000-35, section 4.06, for special rules about the maximum tax calculation.

If the purchase price includes personal property not subject to tax under section 897, for the calculation of maximum tax, the transferor must also include a statement listing each such item of personal property transferred and the fair market value attributable to each item. The fair market value claimed should be supported by an independent appraisal or other similar documentation.

**Line 7c.** If you checked 7c, see *Installment sales*, earlier.

**Line 8.** You must provide a calculation of the transferor's unsatisfied withholding liability or evidence that it does not exist. This liability is the amount of any tax the transferor was required to, but did not, withhold and pay over under section 1445 when the U.S. real property interest now being transferred was acquired, or upon a prior acquisition. The transferor's unsatisfied withholding liability is included in the calculation of maximum tax liability so that it can be satisfied by the withholding on the current transfer.

Evidence that there is no unsatisfied withholding liability includes any of the following:

1. Evidence that the transferor acquired the subject or prior real property interest before 1985;
2. A copy of Form 8288 filed and proof of payment;
3. A copy of a withholding certificate issued by the IRS plus a copy of Form 8288 and proof of payment of any amount required by that certificate;
4. A copy of the nonforeign certificate furnished by the person from whom the U.S. real property interest was acquired (the certificate must be executed at the time of acquisition);
5. Evidence that the transferor purchased the subject or prior real property interest for \$300,000 or less and a statement, signed by the transferor under penalties of perjury, that the transferor purchased the property for use as a residence within the meaning of Regulations section 1.1445-2(d)(1);

6. Evidence that the person from whom the transferor acquired the subject or prior U.S. real property interest fully paid any tax imposed on that transaction under section 897;

7. A copy of a notice of nonrecognition treatment provided to the transferor under Regulations section 1.1445-2(d)(2) by the person from whom the transferor acquired the subject or prior U.S. real property interest; or

8. A statement, signed by the transferor under penalties of perjury, explaining why the transferor was not required to withhold under section 1445(a) with regard to the transferor's acquisition of the subject or prior real property interest.

**Line 9a.** If the transaction is subject to withholding under section 1445(e), check the box to indicate which provision of section 1445(e) applies.

**Line 9b.** Indicate whether the applicant is the taxpayer or the person required to withhold, and in what capacity that person is required to withhold.

**Signature.** The application must be signed by an individual, a responsible corporate officer, a general partner of a partnership, or a trustee, executor, or other fiduciary of a trust or estate. The application may also be signed by an authorized agent with a power of attorney. Form 2848, Power of Attorney and Declaration of Representative, can be used for this purpose.

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

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

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

The time needed to complete and file this form will vary depending on individual circumstances. The estimated average time is:  
**Recordkeeping** . . . . . 2 hr., 4 min.  
**Learning about the law or the form** . . . . . 2 hr., 7 min.  
**Preparing the form** . . . . . 1 hr., 7 min.  
**Copying, assembling, and sending the form to the IRS** . . . . . 20 min.

If you have comments concerning the accuracy of these time estimates or suggestions for making this form simpler, we would be happy to hear from you. You can send your comments to the Internal Revenue Service, Tax Forms and Publications, SE:W:CAR:MP:TFP, 1111 Constitution Ave. NW, IR-6526, Washington, DC 20224. Do not send this form to this office. Instead, see *Where to send applications for a withholding certificate*, earlier.

# EXHIBIT E

**Application for Employer Identification Number**  
 (For use by employers, corporations, partnerships, trusts, estates, churches,  
 government agencies, Indian tribal entities, certain individuals, and others.)  
 ▶ Go to [www.irs.gov/FormSS4](http://www.irs.gov/FormSS4) for instructions and the latest information.  
 ▶ See separate instructions for each line. ▶ Keep a copy for your records.

OMB No. 1545-0003

EIN \_\_\_\_\_

Type or print clearly.	1 Legal name of entity (or individual) for whom the EIN is being requested	
	2 Trade name of business (if different from name on line 1)	3 Executor, administrator, trustee, "care of" name
	4a Mailing address (room, apt., suite no. and street, or P.O. box)	5a Street address (if different) (Do not enter a P.O. box.)
	4b City, state, and ZIP code (if foreign, see instructions)	5b City, state, and ZIP code (if foreign, see instructions)
	6 County and state where principal business is located	
	7a Name of responsible party	7b SSN, ITIN, or EIN

8a Is this application for a limited liability company (LLC) (or a foreign equivalent)?  Yes  No

8b If 8a is "Yes," enter the number of LLC members \_\_\_\_\_ ▶

8c If 8a is "Yes," was the LLC organized in the United States?  Yes  No

9a **Type of entity** (check only one box). **Caution.** If 8a is "Yes," see the instructions for the correct box to check.

<input type="checkbox"/> Sole proprietor (SSN) _____	<input type="checkbox"/> Estate (SSN of decedent) _____
<input type="checkbox"/> Partnership	<input type="checkbox"/> Plan administrator (TIN) _____
<input type="checkbox"/> Corporation (enter form number to be filed) ▶ _____	<input type="checkbox"/> Trust (TIN of grantor) _____
<input type="checkbox"/> Personal service corporation	<input type="checkbox"/> Military/National Guard <input type="checkbox"/> State/local government
<input type="checkbox"/> Church or church-controlled organization	<input type="checkbox"/> Farmers' cooperative <input type="checkbox"/> Federal government
<input type="checkbox"/> Other nonprofit organization (specify) ▶ _____	<input type="checkbox"/> REMIC <input type="checkbox"/> Indian tribal governments/enterprises
<input type="checkbox"/> Other (specify) ▶ _____	Group Exemption Number (GEN) if any ▶ _____

9b If a corporation, name the state or foreign country (if applicable) where incorporated

State	Foreign country
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10 **Reason for applying** (check only one box)

<input type="checkbox"/> Started new business (specify type) ▶ _____	<input type="checkbox"/> Banking purpose (specify purpose) ▶ _____
<input type="checkbox"/> Hired employees (Check the box and see line 13.)	<input type="checkbox"/> Changed type of organization (specify new type) ▶ _____
<input type="checkbox"/> Compliance with IRS withholding regulations	<input type="checkbox"/> Purchased going business
<input type="checkbox"/> Other (specify) ▶ _____	<input type="checkbox"/> Created a trust (specify type) ▶ _____
	<input type="checkbox"/> Created a pension plan (specify type) ▶ _____

11 Date business started or acquired (month, day, year). See instructions.

12 Closing month of accounting year

13 Highest number of employees expected in the next 12 months (enter -0- if none). If no employees expected, skip line 14.

Agricultural	Household	Other
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14 If you expect your employment tax liability to be \$1,000 or less in a full calendar year **and** want to file Form 944 annually instead of Forms 941 quarterly, check here. (Your employment tax liability generally will be \$1,000 or less if you expect to pay \$4,000 or less in total wages.) If you do not check this box, you must file Form 941 for every quarter.

15 First date wages or annuities were paid (month, day, year). **Note:** If applicant is a withholding agent, enter date income will first be paid to nonresident alien (month, day, year) \_\_\_\_\_ ▶

16 Check **one** box that best describes the principal activity of your business.

<input type="checkbox"/> Construction	<input type="checkbox"/> Rental & leasing	<input type="checkbox"/> Transportation & warehousing	<input type="checkbox"/> Health care & social assistance	<input type="checkbox"/> Wholesale-agent/broker
<input type="checkbox"/> Real estate	<input type="checkbox"/> Manufacturing	<input type="checkbox"/> Finance & insurance	<input type="checkbox"/> Accommodation & food service	<input type="checkbox"/> Wholesale-other
			<input type="checkbox"/> Other (specify) ▶ _____	<input type="checkbox"/> Retail

17 Indicate principal line of merchandise sold, specific construction work done, products produced, or services provided.

18 Has the applicant entity shown on line 1 ever applied for and received an EIN?  Yes  No

If "Yes," write previous EIN here ▶ \_\_\_\_\_

Complete this section **only** if you want to authorize the named individual to receive the entity's EIN and answer questions about the completion of this form.

<b>Third Party Designee</b>	Designee's name	Designee's telephone number (include area code)
	Address and ZIP code	Designee's fax number (include area code)

Under penalties of perjury, I declare that I have examined this application, and to the best of my knowledge and belief, it is true, correct, and complete.

Name and title (type or print clearly) ▶ \_\_\_\_\_

Applicant's telephone number (include area code) \_\_\_\_\_

Applicant's fax number (include area code) \_\_\_\_\_

Signature ▶ \_\_\_\_\_ Date ▶ \_\_\_\_\_

## Do I Need an EIN?

File Form SS-4 if the applicant entity does not already have an EIN but is required to show an EIN on any return, statement, or other document.<sup>1</sup> See also the separate instructions for each line on Form SS-4.

IF the applicant...	AND...	THEN...
Started a new business	Does not currently have (nor expect to have) employees	Complete lines 1, 2, 4a-8a, 8b-c (if applicable), 9a, 9b (if applicable), and 10-14 and 16-18.
Hired (or will hire) employees, including household employees	Does not already have an EIN	Complete lines 1, 2, 4a-6, 7a-b (if applicable), 8a, 8b-c (if applicable), 9a, 9b (if applicable), 10-18.
Opened a bank account	Needs an EIN for banking purposes only	Complete lines 1-5b, 7a-b (if applicable), 8a, 8b-c (if applicable), 9a, 9b (if applicable), 10, and 18.
Changed type of organization	Either the legal character of the organization or its ownership changed (for example, you incorporate a sole proprietorship or form a partnership) <sup>2</sup>	Complete lines 1-18 (as applicable).
Purchased a going business <sup>3</sup>	Does not already have an EIN	Complete lines 1-18 (as applicable).
Created a trust	The trust is other than a grantor trust or an IRA trust <sup>4</sup>	Complete lines 1-18 (as applicable).
Created a pension plan as a plan administrator <sup>5</sup>	Needs an EIN for reporting purposes	Complete lines 1, 3, 4a-5b, 9a, 10, and 18.
Is a foreign person needing an EIN to comply with IRS withholding regulations	Needs an EIN to complete a Form W-8 (other than Form W-8ECI), avoid withholding on portfolio assets, or claim tax treaty benefits <sup>6</sup>	Complete lines 1-5b, 7a-b (SSN or ITIN optional), 8a, 8b-c (if applicable), 9a, 9b (if applicable), 10, and 18.
Is administering an estate	Needs an EIN to report estate income on Form 1041	Complete lines 1-6, 9a, 10-12, 13-17 (if applicable), and 18.
Is a withholding agent for taxes on non-wage income paid to an alien (i.e., individual, corporation, or partnership, etc.)	Is an agent, broker, fiduciary, manager, tenant, or spouse who is required to file Form 1042, Annual Withholding Tax Return for U.S. Source Income of Foreign Persons	Complete lines 1, 2, 3 (if applicable), 4a-5b, 7a-b (if applicable), 8a, 8b-c (if applicable), 9a, 9b (if applicable), 10, and 18.
Is a state or local agency	Serves as a tax reporting agent for public assistance recipients under Rev. Proc. 80-4, 1980-1 C.B. 581 <sup>7</sup>	Complete lines 1, 2, 4a-5b, 9a, 10, and 18.
Is a single-member LLC (or similar single-member entity)	Needs an EIN to file Form 8832, Classification Election, for filing employment tax returns and excise tax returns, or for state reporting purposes <sup>8</sup> , or is a foreign-owned U.S. disregarded entity and needs an EIN to file Form 5472, Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business (Under Sections 6038A and 6038C of the Internal Revenue Code)	Complete lines 1-18 (as applicable).
Is an S corporation	Needs an EIN to file Form 2553, Election by a Small Business Corporation <sup>9</sup>	Complete lines 1-18 (as applicable).

<sup>1</sup> For example, a sole proprietorship or self-employed farmer who establishes a qualified retirement plan, or is required to file excise, employment, alcohol, tobacco, or firearms returns, must have an EIN. A partnership, corporation, REMIC (real estate mortgage investment conduit), nonprofit organization (church, club, etc.), or farmers' cooperative must use an EIN for any tax-related purpose even if the entity does not have employees.

<sup>2</sup> However, do not apply for a new EIN if the existing entity only (a) changed its business name, (b) elected on Form 8832 to change the way it is taxed (or is covered by the default rules), or (c) terminated its partnership status because at least 50% of the total interests in partnership capital and profits were sold or exchanged within a 12-month period. The EIN of the terminated partnership should continue to be used. See Regulations section 301.6109-1(d)(2)(iii).

<sup>3</sup> Do not use the EIN of the prior business unless you became the "owner" of a corporation by acquiring its stock.

<sup>4</sup> However, grantor trusts that do not file using Optional Method 1 and IRA trusts that are required to file Form 990-T, Exempt Organization Business Income Tax Return, must have an EIN. For more information on grantor trusts, see the Instructions for Form 1041.

<sup>5</sup> A plan administrator is the person or group of persons specified as the administrator by the instrument under which the plan is operated.

<sup>6</sup> Entities applying to be a Qualified Intermediary (QI) need a QI-EIN even if they already have an EIN. See Rev. Proc. 2000-12.

<sup>7</sup> See also *Household employer* on page 4 of the instructions. **Note:** State or local agencies may need an EIN for other reasons, for example, hired employees.

<sup>8</sup> See *Disregarded entities* on page 4 of the instructions for details on completing Form SS-4 for an LLC.

<sup>9</sup> An existing corporation that is electing or revoking S corporation status should use its previously-assigned EIN.

# EXHIBIT F

## Application for IRS Individual Taxpayer Identification Number

OMB No. 1545-0074

▶ **For use by individuals who are not U.S. citizens or permanent residents.**  
 ▶ See separate instructions.

**An IRS individual taxpayer identification number (ITIN) is for federal tax purposes only.**

**Before you begin:**

- **Don't submit this form if you have, or are eligible to get, a U.S. social security number (SSN).**
- **Getting an ITIN doesn't change your immigration status or your right to work in the United States and doesn't make you eligible for the earned income credit.**

Application Type (Check one box):

- Apply for a New ITIN  
 Renew an Existing ITIN

**Reason you're submitting Form W-7.** Read the instructions for the box you check. **Caution:** If you check box **b, c, d, e, f, or g, you must file a U.S. federal tax return with Form W-7 unless you meet one of the exceptions** (see instructions).

- a  Nonresident alien required to get an ITIN to claim tax treaty benefit
- b  Nonresident alien filing a U.S. federal tax return
- c  U.S. resident alien (**based on days present in the United States**) filing a U.S. federal tax return
- d  Dependent of U.S. citizen/resident alien } Enter name and SSN/ITIN of U.S. citizen/resident alien (see instructions) ▶ \_\_\_\_\_
- e  Spouse of U.S. citizen/resident alien } \_\_\_\_\_
- f  Nonresident alien student, professor, or researcher filing a U.S. federal tax return or claiming an exception
- g  Dependent/spouse of a nonresident alien holding a U.S. visa
- h  Other (see instructions) ▶ \_\_\_\_\_

Additional information for **a** and **f**: Enter treaty country ▶ \_\_\_\_\_ and treaty article number ▶ \_\_\_\_\_

<b>Name</b> (see instructions)	1a First name	Middle name	Last name
	1b First name	Middle name	Last name

**Applicant's mailing address**

2 Street address, apartment number, or rural route number. **If you have a P.O. box, see separate instructions.**

City or town, state or province, and country. Include ZIP code or postal code where appropriate.

**Foreign (non-U.S.) address**  
(if different from above)  
(see instructions)

3 Street address, apartment number, or rural route number. **Don't use a P.O. box number.**

City or town, state or province, and country. Include ZIP code or postal code where appropriate.

**Birth information**

4 Date of birth (month / day / year)	Country of birth	City and state or province (optional)	5 <input type="checkbox"/> Male <input type="checkbox"/> Female
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**Other information**

6a Country(ies) of citizenship

6b Foreign tax I.D. number (if any)

6c Type of U.S. visa (if any), number, and expiration date

6d Identification document(s) submitted (see instructions)  Passport  Driver's license/State I.D.  
 USCIS documentation  Other \_\_\_\_\_

Issued by: \_\_\_\_\_ No.: \_\_\_\_\_ Exp. date: \_\_\_\_ / \_\_\_\_ / \_\_\_\_ Date of entry into the United States (MM/DD/YYYY): \_\_\_\_ / \_\_\_\_ / \_\_\_\_

6e Have you previously received an ITIN or an Internal Revenue Service Number (IRSIN)?  
 **No/Don't know.** Skip line 6f.  
 **Yes.** Complete line 6f. If more than one, list on a sheet and attach to this form (see instructions).

6f Enter ITIN and/or IRSIN ▶ ITIN -- IRSIN -- and name under which it was issued ▶ \_\_\_\_\_  
First name Middle name Last name

6g Name of college/university or company (see instructions) \_\_\_\_\_  
 City and state \_\_\_\_\_ Length of stay \_\_\_\_\_

**Sign Here**

Under penalties of perjury, I (applicant/delegate/acceptance agent) declare that I have examined this application, including accompanying documentation and statements, and to the best of my knowledge and belief, it is true, correct, and complete. I authorize the IRS to share information with my acceptance agent in order to perfect this Form W-7, Application for IRS Individual Taxpayer Identification Number.

<b>Keep a copy for your records.</b>	Signature of applicant (if delegate, see instructions)	Date (month / day / year)	Phone number
	Name of delegate, if applicable (type or print)	Delegate's relationship to applicant	<input type="checkbox"/> Parent <input type="checkbox"/> Court-appointed guardian <input type="checkbox"/> Power of Attorney

**Acceptance Agent's Use ONLY**

Signature	Date (month / day / year)	Phone	Fax
Name and title (type or print)	Name of company	EIN	PTIN
		Office Code	

## SC BAR ANNUAL MEETING

### SC WITHHOLDING TAX ON SALES OF REAL ESTATE BY NONRESIDENTS

For official guidance see SC Revenue Ruling #09-13

#### I. Introduction

South Carolina Code Section 12-8-580 requires a person who purchases real property from a nonresident seller to withhold South Carolina income taxes from the Seller. The buyer is responsible for collecting and remitting the withholding to the DOR on Form I-290. (See Exhibit A). The seller must report gain or loss on the sale on a timely filed South Carolina income Tax Return. Assuming a return is filed, any excess withholding is later refunded.

#### II. Nonresident Seller Subject to Withholding

##### A. Nonresident Seller

- (1) An individual whose permanent home is outside of SC on the date of closing
- (2) A corporation incorporated outside of SC
- (3) A partnership whose principal place of business is outside of SC
- (4) A trust administered outside of SC
- (5) An estate of a decedent whose permanent home was outside of SC at the time of death

##### B. The Deemed Resident Exception

- (1) A nonresident seller is not subject to withholding if they are a “deemed resident.”
- (2) A nonresident seller is a deemed resident if:
  - (a) The seller is a corporation incorporated outside of SC but has its principal place of business in SC and does no business in its state of incorporation,

OR

The seller (i) has been in business in South Carolina during the last two taxable years, including the year of sale, (ii) will continue substantially the same business in South Carolina after the sale, (iii) is not delinquent with respect to filing any South Carolina income tax returns, (iv) has filed at least one South Carolina income tax return, and (v) has a certificate of authority to do business in South Carolina or is registered to do business in South Carolina,

AND

- (b) The seller provides the buyer with an affidavit certifying (a) the “deemed resident” requirements, and (b) that the seller agrees to report the sale on a timely filed South Carolina income tax return.

III. Sales of Property Subject to Withholding

- A. A sale is any taxable sale or exchange under to I.R.C. § 1001.
- B. The sale of any interest in real estate is subject to South Carolina withholding tax (including time shares, leases, and minerals in place).
- C. Tangible personal property sold as part of a transaction involving the sale of an interest in real estate is also subject to withholding.
- D. A contract for the sale of timber and the underlying land is a contract for the sale of real property. Both the standing timber and the land are subject to withholding.

The sale of timber to cut, however, is not subject to withholding since it is the sale of personal property.

South Carolina Information Letter #94-31  
(Administrative Pronouncement).

IV. Sales Exempt from Withholding

- A. Sales of a principal residence where the seller's entire gain is excluded under I.R.C. § 121.
- B. Gifts and inheritances that are tax free under I.R.C. § 102.
- C. Tax deferred like kind exchanges under I.R.C. § 1031.
- D. Transactions where seller invests all proceeds into a "Qualified Opportunity Fund under I.R.C. § 1400Z-2.
- E. Sales by the government or an instrumentality of the United States or South Carolina.
- F. Transfers from organizations exempt from income tax under I.R.C. § 501(a) and exempt insurance companies.

V. Seller's Affidavit

- A. Filed on SC Form I-295. (See Exhibit B).
- B. An affidavit of fact provided from seller to buyer will relieve the buyer from any withholding requirement if seller attests, under penalty of perjury, that seller is a resident, a deemed resident, or that the sale is tax exempt.
- C. A Seller's Affidavit can also reduce the amount that a buyer must withhold as the affidavit permits the seller to account for their basis in property sold.

VI. Determining the Withholding Amount

- A. If withholding is based on the reported gain recognized in a Seller's Affidavit then the withholding amount is:

(1) 7% of the amount reported in the affidavit in the case of individuals, partnerships, trusts, and estates.

OR

(2) 5% of the amount reported in the affidavit in the case of corporations.

B. If withholding is based on the seller's amount realized (i.e. the seller did not file an affidavit) then the withholding amount is:

(1) 7% of the seller's amount realized in the case of individuals, partnerships, trusts, and estates.

OR

(2) 5% of the seller's amount realized in the case of a corporation.

C. If withholding is based on the seller's net proceeds (i.e. the seller pays off a mortgage or lien on the property sold and the money used by the seller to pay off the note was not given to the seller by the buyer in contemplation of the sale) then the withholding amount is 100% of the entire net proceeds payable to the seller if her gain recognized or amount realized exceeds the net proceeds payable to seller.

D. See Exhibit C for Withholding Examples.

## VII. Liable Party

A. The buyer or the buyer's lawyer is liable for collecting and remitting the withholding to the South Carolina Department of Revenue (SCDOR). If the buyer or his agent does not properly remit payment to the SCDOR then the buyer is liable to the SCDOR for the tax, interest, and penalties owed by the seller.

If, however, the seller warrants to the buyer by a properly executed seller's affidavit that the she is a resident or deemed resident (or that a company is a resident or deemed resident company) then the buyer

is not liable for the seller's tax owed unless the buyer has knowledge that the seller is, in fact, a nonresident.

VIII. Remittance Tax Forms and Due Date

- A. Buyer remits withholding to the SCDOR together with a Form I-290, "Nonresident Real Estate Withholding," on or before the 15<sup>th</sup> day of the month following the month in which the sale takes place.
- B. Seller should file a South Carolina income tax return to report the gain or loss on the sale. Any excess withholding will be refunded to the seller.

IX. Special Rules for Like Kind Exchanges

- A. Simultaneous transfers are not subject to withholding if seller provides a Seller's Affidavit reporting no income under I.R.C. § 1031.
- B. Deferred transfers
  - (1) Option 1 – The seller may choose to use personal funds to pay the South Carolina withholding so that all of the funds could be reinvested in the like kind exchange. The buyer remits the withholding to the SCDOR on Form I-290 on or before the 15<sup>th</sup> day of the month following the month the first property is transferred. If the like kind exchange does occur, the seller can revise the amount of withholding originally remitted to the Department on Form I-290X (see Exhibit D) to request a refund of withholding since it has been determined the transaction qualifies as a nontaxable exchange.
  - (2) Option 2 – If the buyer and seller agree to use a qualified intermediary, then the withholding requirements may be satisfied as follows:
    - (a) The seller furnishes the buyer a Seller's Affidavit stating it is intended

that the transfer qualify as a nontaxable like kind exchange under I.R.C. § 1031. If using South Carolina Form I-295 as the Seller's Affidavit, box 16c would be marked to indicate the seller's intent.

- (b) Form I-290 is completed as if the sale is taxable and given to a qualified intermediary along with the amount necessary to pay the withholding.
- (c) The buyer enters into a contract with the qualified intermediary that provides that the qualified intermediary will file Form I-290 and pay the withholding for the buyer if the transaction does not qualify. (The buyer remains liable for the payment.) The payment must be made by the 15th day of the month following the month it is first apparent that the transaction will not qualify. It will be apparent that the transaction will not qualify on the earlier of the date the exchange is abandoned, or the time for the exchange expires.
- (d) If the transaction qualifies as a nontaxable like kind exchange, Form I-290 is not filed and no payment is made to the SCDOR. The buyer should retain the "Seller's Affidavit" and the contract with the qualified intermediary and provide them if requested during an audit. These documents are not sent to the SCDOR.
- (e) If a portion, but not all, of the proceeds are used to purchase qualifying replacement property, the buyer in signing the original Form I-290 (see 2 above) authorizes the qualified intermediary to submit a

“modified” Form I-290 to the SCDOR indicating the revised amount realized or gain and actual amount of withholding to be remitted based on the transaction as completed. The qualified intermediary submits the withholding to the SCDPR with the “modified” Form I-290. The original Form I-290 provided in #2 above should be retained, but does not need to be submitted to the SCDOR. The qualified intermediary sends one copy of the “modified” Form I-290 to the buyer and seller.

X. Special Rules for Installment Sales

- A. In general, the buyer must withhold on each payment to the seller. The buyer must complete and provide Form I-290 to the seller and the SCDOR each time a withholding payment is remitted to the SCDOR.
- B. The buyer may withhold on a lesser amount based upon one of the following methods:
  - (1) Amortization Schedule – If the seller gives the buyer an amortization schedule stating the principal and interest portion of each payment, then the buyer will use the “principal payment amount” of each payment to compute withholding.
    - (a) Note: The total amount of debt assumed or taken subject to by the buyer is deemed to be a principal payment at the time of the sale.
  - (2) Gain – If the seller gives the buyer a Seller’s Affidavit stating the gain to be recognized for each payment, then the buyer will use the “gain” of each payment to compute withholding.
  - (3) Elect Out of Installment Sale Treatment for South Carolina Purposes – If the seller gives

the buyer a “Seller’s Affidavit” stating that, for South Carolina income tax purposes, he will elect out of installment sales treatment, as defined by I.R.C. § 453, then the buyer will remit the entire amount of withholding tax in one payment.

C. Installment Sale Due Date Exceptions

- (1) Withholding on a payment is under \$500. The buyer may wait to remit the withholding to the SCDOR on any withholding payment that is less than \$500 until the 15th day of the month following the month when the withholding totals \$500 or more. The withholding must be remitted by January 15th of the following year, however, if the withholding during a calendar year is less than \$500.
- (2) Withholding for the year is under \$350. Withholding is not required for any year where the total amount to be withheld for the calendar year is less than \$350. Sales to a single buyer or to a related group of buyers are aggregated to determine if this limitation has been exceeded.
- (3) Seller reports sale. No further withholding. A seller who reports the entire gain or loss on the installment sale on a South Carolina income tax return may request the Department’s Withholding Section provide a letter exempting future principal payments from withholding. The SCDOR will send a copy of the exemption to both the seller and the buyer; the buyer is relieved of withholding on future payments upon notification by the Department.

**Exhibit List – SC WITHHOLDING TAX ON SALES OF REAL ESTATE BY NONRESIDENTS (HSB 5532477 v. 3)**

Exhibit A – South Carolina Form I-290, “Nonresident Real Estate Withholding”

Exhibit B – South Carolina Form I-295, “Seller’s Affidavit Nonresident Seller Withholding”

Exhibit C – Withholding Examples

Exhibit D – South Carolina Form I-290X, “Amended Nonresident Real Estate Withholding”

# EXHIBIT A



STATE OF SOUTH CAROLINA  
DEPARTMENT OF REVENUE

**I-290**  
(Rev. 10/5/17)  
3271

### NONRESIDENT REAL ESTATE WITHHOLDING

Mail to: South Carolina Department of Revenue, Real Estate Withholding, Columbia, SC 29214-0024  
Return and payment are both due by 15th day of month following month of sale.  
I-290 must be completed for each seller.

**AMENDED**

<b>County</b> _____	<b>Location of Property</b> Tax Map No. _____	<b>Date of Withholding (PD CVD)</b> Month _____ Date _____ Year _____
<b>Seller's First Name</b> _____ <small>(More than one seller? See instructions.)</small> <b>Seller's Last Name</b> _____ <b>Address</b> _____ _____ <b>Phone</b> _____		<b>Buyer's First Name</b> _____ <b>Buyer's Last Name</b> _____ <b>Address</b> _____ _____ <b>Phone</b> _____
<b>Seller's</b> <input type="checkbox"/> <b>SSN</b> _____ <input type="checkbox"/> <b>FEIN</b> _____		<b>Buyer's</b> <input type="checkbox"/> <b>SSN</b> _____ <input type="checkbox"/> <b>FEIN</b> _____
<b>Withholding by Third Party (check one):</b> <input type="checkbox"/> Lending Institution <input type="checkbox"/> Real Estate Agent <input type="checkbox"/> Closing Attorney <input type="checkbox"/> Other _____		<b>Third Party's Name</b> _____ <b>Address</b> _____ <b>Phone</b> _____ <b>FEIN or SSN</b> _____
<b>1. The amount withheld is based on (check one):</b> <input type="checkbox"/> Gain, if seller provides affidavit of gain (if installment sale, see reverse side) <input type="checkbox"/> Amount realized, if no affidavit of gain is provided (if installment sale, see reverse side)		<b>Date of Closing</b> Month _____ Date _____ Year _____ 1. _____
<b>2. Check appropriate % and multiply by amount on line 1.</b> 7% <input type="checkbox"/> If seller is not a corporation 5% <input type="checkbox"/> If seller is a corporation		2. _____
<b>3. Total payment to seller (gross sales price less selling expenses less certain mortgages paid or assumed).</b>		3. _____
<b>4. Compare lines 2 and 3, enter the smaller amount.</b>		4. _____
<b>5. For late payments, calculate penalty and interest due.</b>		5. _____ (Total Penalty and Interest Due)
<b>6. Total tax, penalty and interest due.</b>		6. _____
<b>7. <input type="checkbox"/> The Seller has elected out of installment sales treatment for South Carolina purposes. (See reverse side.)</b>		
<b>8. Due date of first installment</b>		
<b>9. The seller is to receive payment in the following manner:</b> <input type="checkbox"/> Monthly <input type="checkbox"/> Annually <input type="checkbox"/> Other - Attach an explanation		
The buyer must give two copies of this form to each seller each time the buyer remits a withholding payment to the South Carolina Department of Revenue. Missing or incomplete information on this form will cause processing delays and you may receive additional correspondence. <b>I-290 must be completed for each seller.</b>		

When signing this form, it is important that the information contained in your report be correct and complete. To wilfully furnish a false or fraudulent statement to the SC Department of Revenue is a crime.

Buyer's Signature \_\_\_\_\_ Name \_\_\_\_\_ Date \_\_\_\_/\_\_\_\_/\_\_\_\_  
Title \_\_\_\_\_ Telephone (\_\_\_\_) \_\_\_\_\_ Email \_\_\_\_\_

## INSTRUCTIONS FOR FILING FORM I-290

Anyone making payment to a nonresident seller for the purchase of real property or real and associated tangible personal property must deduct and withhold on the sale. See **SC Revenue Ruling #09-13** or any subsequent advisory opinion regarding Nonresident Seller Withholding on our website [dor.sc.gov](http://dor.sc.gov) under **News & Resources, Law & Policy**.

You must complete information concerning the location of property, date of withholding (date of payment), the seller's name, and address, **seller's social security number (SSN) or federal identification number (FEIN)**, buyer's name and address, and **buyer's SSN or FEIN**, and the date of closing (date of sale of property). If the seller is a partnership, subchapter S corporation, estate, or trust, enter the entity name in the seller's first name field. Only in the case of installment sales will the date of withholding and the date of closing be a different date. Four copies must be completed for each sale. The buyer must receive two copies, one for his or her records and one to send to the Department of Revenue with his or her withholding payment. The seller must receive two copies, one to be sent in with his or her income tax return reporting the sale and one for his or her records. **Missing or incomplete information on this form will cause processing delays and you may receive additional correspondence.**

### How do nonresidents claim credit for or request a refund for the amount withheld?

Nonresidents must file an income tax return during the appropriate filing season, reporting the capital gain from the sale and take credit for the nonresident real estate withholding. File the I-290, marking the Amended check box, to claim credit for or request a refund **prior** to the end of the tax year of the sale. **After** year end, the appropriate income tax return must be used.

### Is there more than one seller?

If there is more than one seller (filing separate individual income tax returns), then separate I-290 forms must be filed. If the seller is a partnership, subchapter S corporation, estate or trust, the buyer must issue one I-290 to the entity, reporting the total amount of withholding (using the FEIN). The entity will then allocate the tax withheld to each partner, shareholder or beneficiary in proportion to their percent of ownership in the property sold.

### What if the buyer or seller has no SSN?

In the case of a nonresident alien who cannot obtain a social security number (SSN), contact the Internal Revenue Service to apply for and obtain an individual taxpayer identification number (ITIN) by using federal Form W-7.

**Line 1** - Enter the amount of gain or amount realized from the sale. The amount realized on the sale is the selling price less selling expenses, as defined in Internal Revenue Code Section 1001(b). Amount realized is the figure used for computing gain or loss by subtracting the basis of the property. Or, if the seller provides the buyer with an affidavit (I-295) stating the amount of gain he is required to recognize on the sale, enter the amount of gain. I-295 can be obtained from our website: [dor.sc.gov](http://dor.sc.gov)

If the transaction reported is an installment sale, enter on line 1 only the portion of gain (if the seller provided an affidavit of gain) or the portion of the amount realized (if the seller does not provide an affidavit of gain) the withholding payment is based upon. If the election on line 7 is made, line 1 must indicate the entire gain if an affidavit of gain is provided by seller.

**Line 2** - Check the appropriate box and multiply by the amount on line 1.

**Line 3** - Selling expenses include real estate commissions, advertising fees, legal fees, deed recording fees and termite or heat/air letter fees. The net proceeds payable to the seller is computed by reducing the sales price by mortgages or liens paid at closing on the property being sold and selling expenses. Mortgages, liens, advances on credit lines, and other debt secured by the properties assumed by the buyer in contemplation of the sale may not be deducted from the sales price. Loans or advances where the entire proceeds are used to purchase or improve the property being sold are not loans in contemplation of the sale. Unless the buyer knows otherwise, the buyer can presume that any liens, mortgages, or advances on credit lines made more than one year before the closing are not in contemplation of the sale and may be deducted. If the lien, mortgage, or credit line advance is made less than one year prior to the closing, the buyer cannot deduct the mortgage, lien, or credit line advance unless the buyer obtains an affidavit from the seller, which states that the loan or advance was not made in contemplation of the sale.

**Line 5** - A Penalty and Interest Calculator is available on our website [MyDORWAY.dor.sc.gov](http://MyDORWAY.dor.sc.gov) as a reference tool.

**Line 7** - The seller may give the buyer an affidavit (I-295) stating that, for South Carolina income tax purposes, he elects out of the installment sales treatment and chooses to remit the amount of tax due on the entire gain by its due date.

**Remitting the tax** - I-290 must be completed for each seller. The withholding must be sent to the SC Department of Revenue on or before the fifteenth day of the month following the month in which the sale took place. Withholding on an installment sale, however, is not required where the total amount required to be withheld for the entire year would be less than \$350. Also, withholding on installment sales when the amount to be withheld is less than \$500 the buyer may wait to remit the amounts withheld to the SC Department of Revenue until the 15th day of the month following the month when the amounts withheld equals \$500 or more. However, if amounts withheld during a calendar year do not equal \$500 they must be remitted to the SC Department of Revenue by January 15th of the following year. See **SC Revenue Ruling #09-13** regarding installment sales.

**Amended** - If filing an amended I-290, check the "amended" box. Note: Form I-290X is no longer used for filing an amended return.

## INSTRUCTIONS FOR FILING AMENDED FORM I-290

You must complete information concerning the location of property, date of withholding (date of payment), the seller's name, and address, **seller's SSN or FEIN**, buyer's name and address, and **buyer's SSN or FEIN**, and the date of closing (date of sale of property). Only in the case of installment sales will the date of withholding and the date of closing be a different date.

An amended I-290 is used to correct the amount of withholding remitted to the South Carolina Department of Revenue from a sale of real and tangible personal property by a nonresident of South Carolina.

An amended I-290 can be filed only after an original I-290 has been filed. When items are in question, refer to instructions for preparing I-290. Attach the original I-290 to the amended I-290.

An amended I-290 can only be used to request a refund prior to the filing period for the individual income tax return. Once an individual income tax return is filed, we can no longer consider a refund from an amended I-290. An amended I-290 must be attached to the individual income tax return if there is an amount on line 8 of the amended I-290. **Do Not Attach Form I-290.**

### REASONS FOR FILING AN AMENDED FORM I-290

**No Affidavit (I-295)** - A refund can be issued from an amended I-290 if the seller does not file an affidavit (I-295) with the buyer stating the amount of gain the seller is required to recognize.

**Overstatement of Gain** - A refund can be issued from an amended I-290 if the seller overestimated the gain as well as the tax due at the time of the sale.

**Please Note:** The net capital gain calculation is not taken into consideration when figuring the 7% nonresident seller withholding. The capital gain is only reported with the filing of the individual income tax return.

**Previous Computation Error** - A refund can be issued from an amended I-290 if the amount withheld and remitted to the SC Department of Revenue was incorrect due to an error in computing the amount to withhold **OR** at the time of the closing, the seller and buyer were not aware of the exceptions to the withholding (then part of the withholding may be refunded to the seller). **Attach supporting computations.**

**Social Security Privacy Act** It is mandatory that you provide your social security number on this tax form. 42 U.S.C 405(c)(2)(C)(i) permits a state to use an individual's social security number as means of identification in administration of any tax. SC Regulation 117-201 mandates that any person required to make a return to the SC Department of Revenue shall provide identifying numbers, as prescribed, for securing proper identification. Your social security number is used for identification purposes.

**The Family Privacy Protection Act** Under the Family Privacy Protection Act, the collection of personal information from citizens by the Department of Revenue is limited to the information necessary for the Department to fulfill its statutory duties. In most instances, once this information is collected by the Department, it is protected by law from public disclosure. In those situations where public disclosure is not prohibited, the Family Privacy Protection Act prevents such information from being used by third parties for commercial solicitation purposes.

### Mail Requests For Refunds To:

**SC Department of Revenue  
Real Estate Withholding  
Columbia, SC 29214-0024**

# EXHIBIT B



**This is an affidavit of facts. Whether or not this affidavit is sufficient to relieve the buyer of the responsibility to withhold is governed by SC Revenue Ruling #09-13. Please read this affidavit carefully in conjunction with this Advisory Opinion. SC Revenue Ruling #09-13 can be found on our website [www.dor.sc.gov](http://www.dor.sc.gov) under News & Resources, Law & Policy.**

The undersigned on oath, being first duly sworn, hereby certifies as follows:

1. This affidavit is being given in connection with a sale of real estate pursuant to SC Revenue Ruling #09-13.
2. I have attached to this affidavit a description of the real property and any tangible personal property being sold as a part of this sale. The real property is located in the county of \_\_\_\_\_ and its tax map number(s) is \_\_\_\_\_.
3. The undersigned is the seller of the property described in the attached description.
4. The closing date of this sale is \_\_\_\_\_
5. The Seller's name is \_\_\_\_\_
6. The Seller's address is \_\_\_\_\_  

(number, street or rural route)

---

(city, state and zip code)
7. The Seller's social security number (SSN) or federal employer identification number (FEIN) is \_\_\_\_\_
8. The undersigned acknowledges his obligation to file a South Carolina income tax return for the year of sale.
9.  **Resident.** The seller is a resident of South Carolina, as that term is defined in the South Carolina income tax laws (SC Code Section 12-6-30 et seq.).
10.  **Deemed Resident (must be a business).** Pursuant to SC Code Section 12-8-580(C) and SC Revenue Ruling #09-13, the seller is deemed to be a resident of South Carolina because:
  1. a. The seller is a corporation incorporated outside South Carolina, has its principal place of business in South Carolina, and does no business in its state of incorporation, **or**
  - b. The seller (i) has been in business in South Carolina during the last two taxable years, including the year of sale, (ii) will continue substantially the same business in South Carolina after the sale, (iii) is not delinquent with respect to filing any South Carolina income tax returns, (iv) has filed at least one South Carolina income tax return, and (v) has a certificate of authority to do business in South Carolina or is registered to do business in South Carolina **and**
  2. The seller agrees to report the sale on a timely filed South Carolina income tax return.
11.  **Tax-Exempt Organizations.** The seller is an organization exempt from income taxes under Internal Revenue Code Section 501(a) or is an insurance company exempt from South Carolina taxes on income.
12.  **Gain Amount.** The seller affirms pursuant to SC Code Section 12-8-580(B) that the amount of gain required to be recognized on this transaction and on which buyer is to make the requisite withholding will not exceed \$ \_\_\_\_\_
13.  **Withholding Amount Equals Entire Net Proceeds.** If the withholding amount is limited to the entire net proceeds, any lien, mortgage or credit line advance which was made within one year prior to the closing was not made in contemplation of the sale. See Question and Answer 15 in SC Revenue Ruling #09-13 for a discussion of loans made in contemplation of the sale.
- Installment Sale.**
  14.  The seller will report this sale on the installment method for South Carolina income tax purposes, and has attached an amortization schedule correctly designating the principal and interest portions of the payments. If withholding is to be limited to the gain, the seller has entered the gain amount in item 12.
  - The seller elects out of the installment sale method for South Carolina purposes and will report the entire withholding in one payment. If withholding is to be limited to the gain, the seller has entered the gain amount in item 12.

**Retain for your records. DO NOT mail to the Department of Revenue.**



15.  **Principal Residence or Involuntary Conversion - Nonrecognition of Gain.** The sale of the property will not be subject to taxes because of Internal Revenue Code Section 121 (sale of a principal residence) or Internal Revenue Code Section 1033 (involuntary conversions.) If the seller fails to comply with Section 1033, the seller acknowledges an obligation to file an amended South Carolina income tax return for the year of the sale.

**Like Kind Exchange.**

16.  In a simultaneous exchange, the entire gain is deferred under Internal Revenue Code Section 1031.
- A gain will be partially recognized. Enter the gain amount in item 12.
- The gain is intended to be deferred under Internal Revenue Code Section 1031 using a qualified intermediary and the steps required by SC Revenue Ruling #09-13 have been completed. The seller authorizes the qualified intermediary to release modified forms and any other information relevant to the withholding, including information otherwise confidential in SC Code Section 12-54-240 as described in SC Revenue Ruling #09-13, Question 22, Option 2.

17.  **Employee Relocation.** The transaction involves the sale of an employee's property which is being sold by an employer or relocation company in connection with the employee's transfer. For income tax purposes the sale is treated as a sale by the employer or relocation company.

The undersigned understands that this affidavit may be disclosed to the Department and that any false statement contained herein could be punished by fine, imprisonment, or both.

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Name - Please Print)

If the person making the affidavit is not the Seller, complete the following:

\_\_\_\_\_  
(Affiant's SSN or FEIN)

\_\_\_\_\_  
(Affiant's number, street or rural route)

\_\_\_\_\_  
(Affiant's city, state and zip code)

SUBSCRIBED AND SWORN to

Before me this \_\_\_\_\_ day of

\_\_\_\_\_, year of \_\_\_\_\_

\_\_\_\_\_  
(Notary Public)

My Commission Expires: \_\_\_\_\_

**Social Security Privacy Act Disclosure**

It is mandatory that you provide your social security number on this tax form if you are an individual taxpayer. 42 U.S.C 405(c)(2)(C)(i) permits a state to use an individual's social security number as means of identification in administration of any tax. SC Regulation 117-201 mandates that any person required to make a return to the SC Department of Revenue shall provide identifying numbers, as prescribed, for securing proper identification. Your social security number is used for identification purposes.

**The Family Privacy Protection Act**

Under the Family Privacy Protection Act, the collection of personal information from citizens by the Department of Revenue is limited to the information necessary for the Department to fulfill its statutory duties. In most instances, once this information is collected by the Department, it is protected by law from public disclosure. In those situations where public disclosure is not prohibited, the Family Privacy Protection Act prevents such information from being used by third parties for commercial solicitation purposes.



# EXHIBIT C

WITHHOLDING EXAMPLES

**EXAMPLE A**

The two sales in this example are based on the following facts, unless otherwise indicated.

- The cash sales price of real property sold on May 1 is \$250,000.
- Selling expenses are \$20,000
- The adjusted basis of the property is \$60,000.
- The nonresident seller is a corporation subject to withholding at 5%.
- The closing date of the transaction is May 10.
- The seller provides a "Seller's Affidavit" in Sale 2 only.

<b>Sale 1 Withholding Based on Amount Realized</b>		<b>Sale 2 Withholding Based on Gain Stated in Seller's Affidavit</b>	
Sales Price	\$250,000	Amount Realized	\$230,000
Less: Selling expenses	\$ 20,000	Less: Adjusted Basis	\$ 60,000
Amount Realized	\$230,000	Gain (loss)	\$170,000
Rate	5%	Rate	5%
Amount to Withhold	\$ 11,500	Amount to Withhold	\$ 8,500

**Sale 1** – This illustrates the computation of withholding based on the amount realized since the seller did not provide the buyer with a "Seller's Affidavit" stating the gain. The buyer must remit the \$11,500 withheld to the Department by June 15.

**Sale 2** – This illustrates the computation of withholding based on the gain stated in the "Seller's Affidavit" provided to the buyer. The buyer must remit the \$8,500 withheld to the Department by June 15.

**EXAMPLE B**

Same facts as Example A. Additional facts are:

- The seller has a \$225,000 mortgage on the property that is paid off at closing.
- The loan giving rise to the mortgage was not in contemplation of the sale.

<b>Sale 3 Withholding Based on Net Proceeds</b>	
Amount Realized	\$230,000
Less: Loan Payoff	\$225,000
Net Proceeds	\$ 5,000
Amount to Withhold	\$ 5,000

**Sale 3** - This illustrates the computation of withholding based on 100% of the net proceeds payable to the seller.

# EXHIBIT D



STATE OF SOUTH CAROLINA  
DEPARTMENT OF REVENUE  
**AMENDED NONRESIDENT  
REAL ESTATE WITHHOLDING**

**I-290X**  
(Rev. 2/5/16)  
3290

**Mail to:** South Carolina Department of Revenue, Real Estate Withholding, Columbia, SC 29214-0024

* County _____		Location of Property _____ * Tax Map No. _____		* Date of Withholding (PD CVD) Month _____ Date _____ Year _____		
* Seller's Name _____ Address _____ Phone _____			* Buyer's Name _____ Address _____ Phone _____			
* Seller's FEIN or SSN _____			FEIN or SSN _____			
* Withholding by Third Party (check one): <input type="checkbox"/> Lending Institution <input type="checkbox"/> Real Estate Agent <input type="checkbox"/> Closing Attorney <input type="checkbox"/> Other _____			* Third Party's Name _____ Address _____ Phone _____ FEIN or SSN _____			
<b>ATTACH YOUR COPY OF THE ORIGINAL FORM I-290</b>					Date of Closing Month _____ Date _____ Year _____	
* 1. Reason for filing I-290X (check one): <input type="checkbox"/> a. Seller is stating the amount of gain required to be recognized <b>(Attach computations.)</b> <input type="checkbox"/> b. Seller was exempt from withholding under Revenue Ruling #09-13. State exemption: _____ <input type="checkbox"/> c. The original withholding was incorrectly computed. <b>(Attach Computations.)</b>						
* 2. Original amount withheld and paid with I-290 (See line 4 of I-290)				▶ 2.		
3. Amount realized				3.		
4. Amount of gain on sale (if 1b is checked, enter zero)				4.		
* 5. The lesser of line 3 or 4 multiplied by: 7% <input type="checkbox"/> If seller is not a corporation      14-0812-0004 5% <input type="checkbox"/> If seller is a corporation              14-0812-0003				5.		
6. Refund Requested (If line 2 is greater than line 5 enter the difference)				6.		
7. Balance Due (If line 2 is less than line 5 enter difference and pay this amount)				▶ 7.		
8. Balance of withholding to be claimed on your income tax return (Line 2 less line 6; or, line 2 plus line 7)				8.		

When signing this form, it is important that the information contained in your report be correct and complete. To wilfully furnish a false or fraudulent statement to the SC Department of Revenue is a crime.

Seller's Signature \_\_\_\_\_ Name \_\_\_\_\_ Date \_\_\_\_/\_\_\_\_/\_\_\_\_  
Title \_\_\_\_\_ Telephone (\_\_\_\_) \_\_\_\_\_ Email \_\_\_\_\_

**\*THIS IS A REQUIRED FIELD AND THE INFORMATION MUST BE COMPLETED.**

## INSTRUCTIONS FOR FILING FORM I-290X

See SC Revenue Ruling #09-13 or any subsequent advisory opinion regarding Nonresident Seller Withholding on our website [www.dor.sc.gov](http://www.dor.sc.gov).

You must complete information concerning the location of property, date of withholding (date of payment), the seller's name, and address, **seller's SSN or FEIN**, buyer's name and address, and **buyer's SSN or FEIN**, and the date of closing (date of sale of property). Only in the case of installment sales will the date of withholding and the date of closing be a different date.

I-290X is used to correct the amount of withholding remitted to the South Carolina Department of Revenue from a sale of real and tangible personal property by a nonresident of South Carolina.

I-290X can be filed only after an original I-290 has been filed. When items are in question, refer to instructions for preparing I-290. Attach the original I-290 to this amended I-290X.

I-290X can only be used to request a refund prior to the filing period for the individual income tax return. Once an individual income tax return is filed, we can no longer consider a refund from I-290X. I-290X must be attached to the individual income tax return if there is an amount on line 8 of the I-290X. **Do Not Attach Form I-290.**

### REASONS FOR FILING FORM I-290X

**No Affidavit (I-295)** - A refund can be issued from an I-290X if the seller does not file an affidavit (I-295) with the buyer stating the amount of gain the seller is required to recognize.

**Overstatement of Gain** - A refund can be issued from an I-290X if the seller overestimated the gain as well as the tax due at the time of the sale.

**Please Note:** The net capital gain calculation is not taken into consideration when figuring the 7% nonresident seller withholding. The capital gain is only reported with the filing of the individual income tax return.

**Previous Computation Error** - A refund can be issued from an I-290X if the amount withheld and remitted to the SC Department of Revenue was incorrect due to an error in computing the amount to withhold **OR** at the time of the closing, the seller and buyer were not aware of the exceptions to the withholding (then part of the withholding may be refunded to the seller). **Attach supporting computations.**

### Social Security Privacy Act

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### Mail Requests For Refunds To:

SC Department of Revenue  
Real Estate Withholding  
Columbia, SC 29214-0024

## SC BAR ANNUAL MEETING

### **The Use of Limited Liability Companies in Real Estate Transactions**

#### I. Background

##### A. Legislation

- (1) South Carolina first adopted a limited liability company act in 1994.
- (2) Prior to South Carolina adopting a limited liability company act, most commercial real estate transactions were structured as limited partnerships.
- (3) In 1996, South Carolina adopted the Uniform Limited Liability Company Act and this legislation remains in effect through today.

##### B. Statutory Provisions

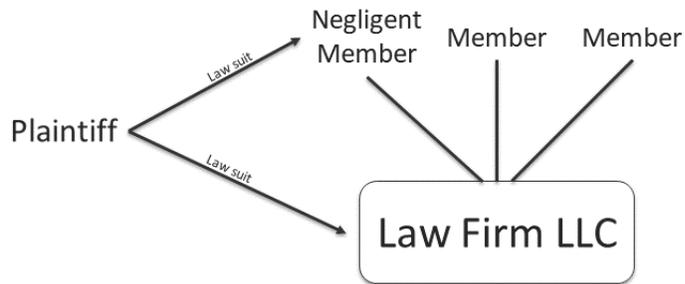
- (1) A limited liability company is a legal entity that is separate and distinct from its member. S.C. Code Ann. § 33-44-201. This provision makes clear that members are not normally liable for the debts, obligations and liabilities of the company and are not proper parties to suits against the company.
- (2) A limited liability company, unlike a partnership, may have just one member and, unlike an S Corporation, may have an unlimited number of members. S.C. Code § 33-44-202.
- (3) A limited liability company may be organized for any lawful purpose and has the same powers as an individual to carry out those purposes. S.C. Code § 33-44-112.
- (4) Subject to certain elections made by the member, a single member limited liability company will be treated as a disregarded

entity for all state and federal tax purposes. S.C. Code Ann. §12-2-25, Treas. Reg. § 301-7701-3.

- (5) Finally and most importantly, the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort or otherwise, are **solely** the debts, obligations, and liabilities of the limited liability company. A member or manager of a limited liability company is not personally liable for the debt, obligation, or liability of a limited liability company solely by reason of being or acting as a member or manager of the company. S.C. Code Ann. § 33-44-303.

C. Judicial Exceptions to the Limitation of Liability of a Member

- (1) If a member of a limited liability company commits a tort while acting in his capacity as a member, the provisions of S.C. Code § 33-44-303 will not insulate that member from personal liability. Dutch Fork Development Group II, LLC v. SEL Properties, LLC, 406 S.C. 596, 753 S.E. 2d 840, citing 16 Jade Street LLC v. R. Design Constr. Co. LLC, 728 S.E.2d 448 (2012). Additionally, because the member was acting in his capacity as an agent of the Company when the tort was committed, the limited liability company will also be liable for his actions. S.C. Code Ann. § 33-44-302. (The other members will, however, be protected from any personal (vicarious) liability resulting from the negligent member’s tort.)

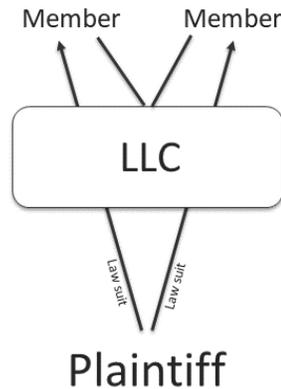


- (2) South Carolina Courts have held [in a corporate setting] that when a “legal entity is used to protect fraud, justify wrong, or defeat public policy, the law will regard the corporation as an association of persons” and pierce the corporate veil. Drury Development Corporation v. Found. Inc. Co., 380 S.C. 97,101, 668 S.E.2d 798, 800 (2008). See also, Sturkie v. Sifly, 280 S.C. 453, 313 S.E.2d 316 (Ct. App. 1984).

South Carolina Courts have utilized a two-prong test to determine whether a corporate veil should be pierced. In addition to the balancing of the equities test discussed above Courts look at the eight factors first enunciated in Sturkie.

1. Whether the Corporation was grossly undercapitalized.
2. Failure to observe corporate formalities.
3. Non-payment of dividends.
4. Insolvency of the debtor Corporation at the time.
5. Siphoning of funds of the Corporation by the dominant stockholder.
6. Nonfunctioning of other officers or directors.
7. Absence of Corporate records.
8. The fact that the Corporation was merely a façade for the operations of the dominant stockholder.

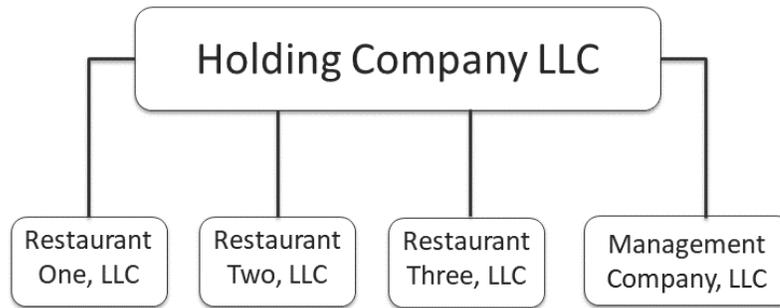
S.C. Code § 33-44-303(b) specifically provides that the failure of a limited liability company to observe “usual company formalities” is not ground for imposing personal liability on the members or managers for liabilities of the company.



(3) The South Carolina Supreme Court in the case of Kyle Pertuis v. Front Roe Restaurants, Inc. et al., 817 S.E. 2d 273, reh’g denied (August 16, 2018) recently recognized the “amalgamation of interest” or “single business enterprise” theory to attach joint liability to brother-sister corporations. The Court stated: “where multiple corporations have unified their business operations and resources to achieve a common business purpose and where adherence to the fiction of separate corporate identities would defeat justice, courts have refused to recognize the corporations’ separateness, instead regarding them as a single enterprise-in-fact, to the extent the specific facts of a particular situation warrant.” Factors often considered:

- Common employees;
- Common officers;
- Centralized accounting;
- Payment of wages by one entity to another entity’s employees;
- Common business name;

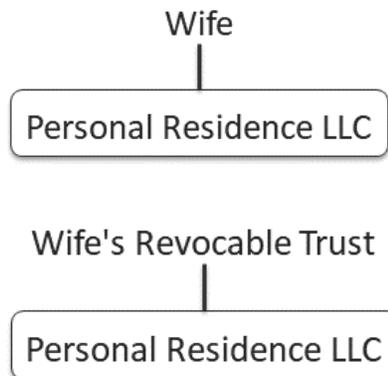
- Services rendered by the employees of one entity on behalf of another entity;
- Undocumented transfers of funds between entities;
- Unclear allocation of profits and losses between corporations.



II. Use of Limited Liability Companies in Real Estate Transactions

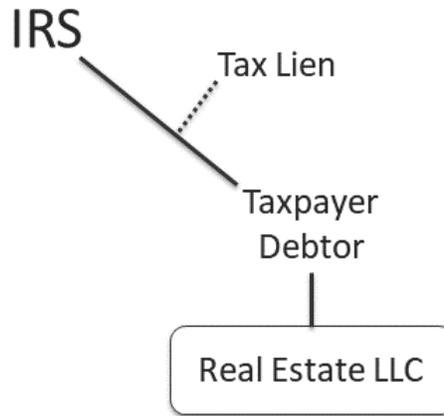
A. Principal Residence

The use of a single member limited liability company to own a taxpayer’s principal residence will not preclude the taxpayer from obtaining the four percent assessment ratio for real property tax purposes. CFRE, LLC v. Greenville County Assessor, 395 S.C. 67, 716 S.E.2d 877 (2011).



B. Tax Liens

If properly structured, limited liability companies can insulate real property from a member's tax lien. In CCA 201116019, the Internal Revenue Service concluded that, because state law determines whether a taxpayer has property or rights to property to which a federal tax lien can be attached, a federal tax lien does not attach to and the IRS cannot levy on, property held by a single member LLC to satisfy the tax liability of its member. This exception does not apply to transfers to an LLC if the sole purpose of the transfer is to defeat a proposed or pending tax lien.



C. Distributions Out of a Multi Member LLC

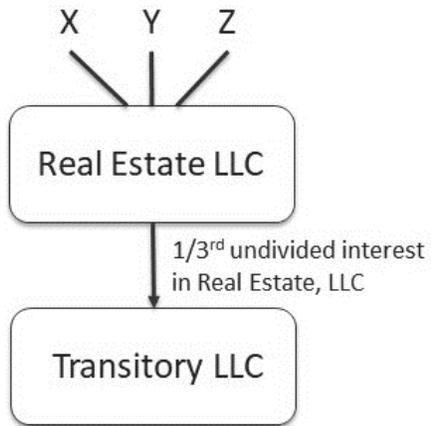
When distributing undivided interest in real property out to one or more members of an LLC, it is prudent to preserve the protection provided by LLC ownership to first distribute the property or the undivided interest in property to a single member subsidiary LLC and then distribute the membership interest in the single member subsidiary LLC to one or more members.

STEP 1



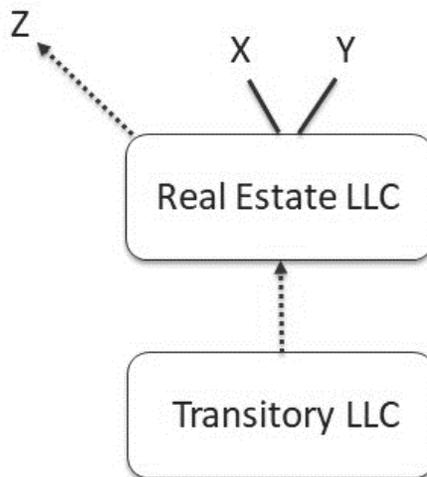
STEP 2

Drop down of property to be distributed in redemption of membership interest

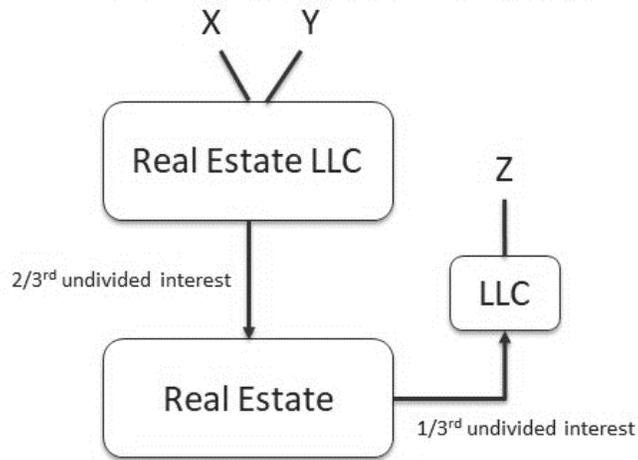


STEP 3

Redemption of Z's Membership



**STEP 4**  
Tenants in Common  
Ownership Following Redemption

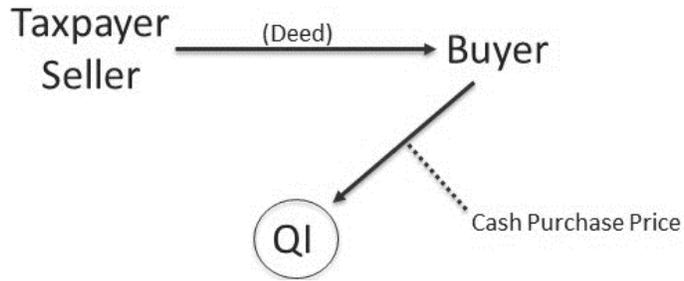


D. Like-Kind Exchange

Because a single member LLC is treated as a disregarded entity for state and local tax purposes, the use of a single member LLC to acquire and own the replacement property will not violate the requirement that both the relinquished property and the replacement property must be owned by the same taxpayer.

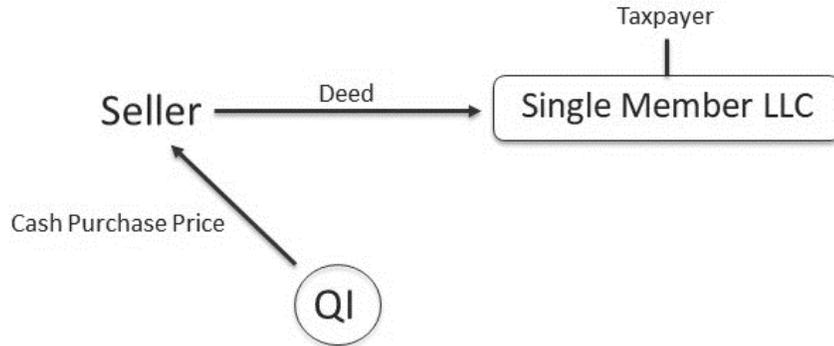
STEP 1

Sale of Relinquished Property



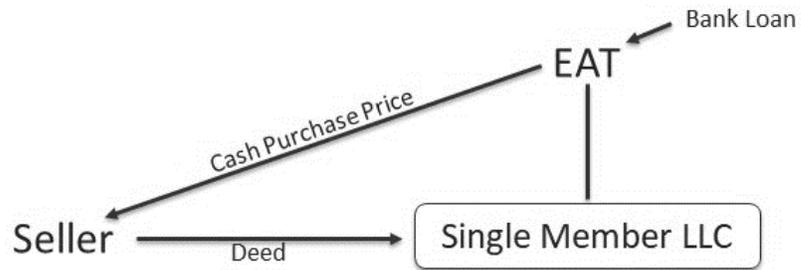
STEP 2

Purchase of Replacement Property

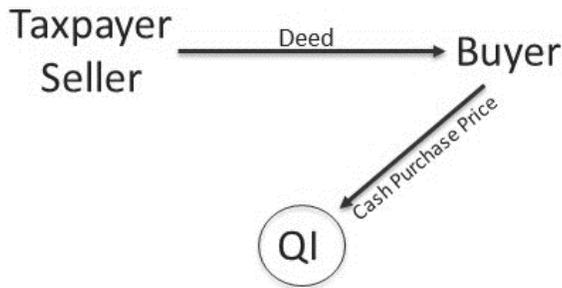


This is also true when, in the case of a reverse exchange where the Exchange Accommodation Titleholder (“EAT”) uses a single member LLC to acquire the replacement property and then, rather than transferring the replacement property to the taxpayer, transfer the member to the single member LLC to complete the transaction.

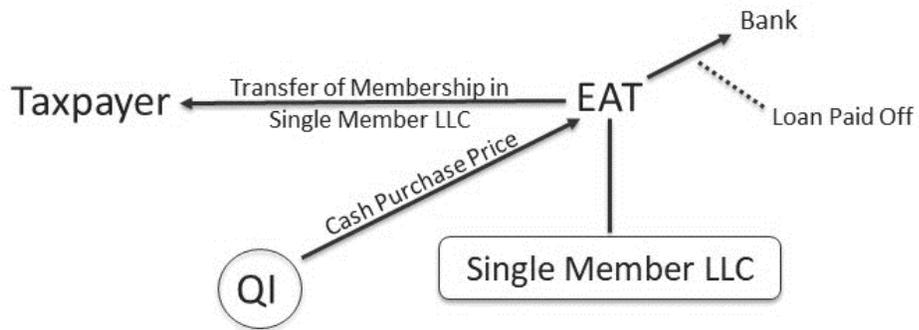
STEP 1  
Purchase of Replacement Property



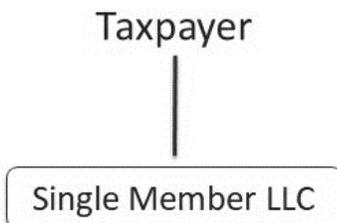
STEP 2  
Sale of Relinquished Property



STEP 3  
Purchase of Replacement Property



STEP 4



E. Gifts of Real Estate to Nonprofit Organizations

Nonprofit organizations often use single member limited liability companies as the vehicle to accept gifts of real property from third party donors. Prudence dictates the use of a separate entity to protect the nonprofit's assets from any potential liability embedded in the real property or any liability arising out of the nonprofit's ownership of the real property. (The Internal Revenue Service has held that a nonprofit organization's exempt status applies as well to a single member LLC owned by the nonprofit).



F. Deed Recording Fees

S.C. Code § 12-24-10, et seq. imposes a deed recording fee of \$1.85 per \$500 of value on the realty transferred. The grantor of the property transferred is primarily liable for the fee with the grantee being secondarily liable.

The deed recording fee is imposed for the privilege of recording a deed in which land is transferred to another person.

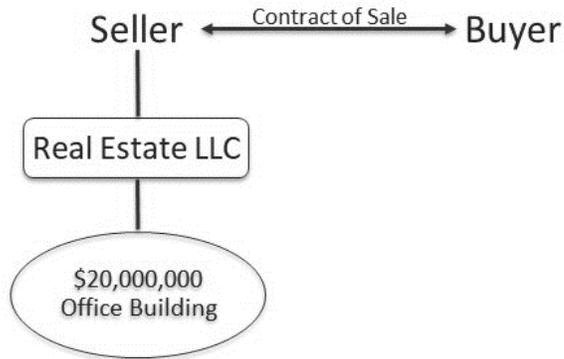
A deed recording fee can be avoided by selling the membership interest in the LLC rather than selling the underlying real estate. In the case of a single member LLC treated as a disregarded entity for all state and federal tax purposes, the deed recording fee is a fee, not a tax, and therefore separate existence of the single member LLC is not disregarded. Further, in the case of a sale of a membership in a single member LLC, no deed is recorded and accordingly no fee is due.

The Department of Revenue has issued Rev. Rul. #17-5 which seems to imply that the transfer of a membership interest in a single member LLC may be

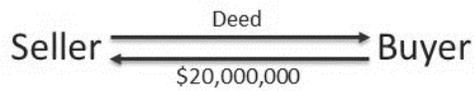
subject to deed recording fees. This confusing language is incorrect and should be ignored.

### Sale of Real Estate

#### STEP 1



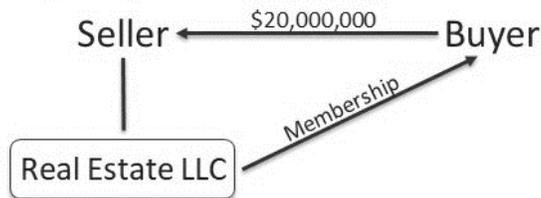
#### STEP 2



Deed Recording Fee \$74,000

### Sale of LLC Membership

#### STEP 1



Deed Recording Fee \$0

#### STEP 2





**South Carolina Bar**

Continuing Legal Education Division

**2019 SC BAR CONVENTION**

**Real Estate Practices Section**

**Saturday, January 19**

**Grow Big or Go Home: Work Smarter, Not  
Harder**

*Dr. Cindy McGovern*

## **Orange Leaf Consulting-Dr Cindy McGovern**

- I. Introduction
- II. Taking Inventory of Who You Are
  - a. Remembering the “why”
  - b. Start with S.W.O.T.
- III. Building on an Ethical Framework
  - a. Knowing the rules
  - b. Competing on an uneven playing field
- IV. Get Your Goals in Order
  - a. It starts with a plan
  - b. Make sure your goals are SMART
  - c. Setting them and sharing them
- V. Zeroing in on Your Targets
  - a. Getting your lists together
  - b. Prioritizing and strategizing
- VI. How Will Your Message Stand Out?
  - a. What makes you different?
  - b. How can you best convey that?
- VII. Proven Growth Strategies
  - a. What works for you?
  - b. Where do you spend your time?
  - c. What’s your ROTI?
- VIII. Measuring and Evaluating
  - a. Quantifying results
  - b. Trace back to your plan
  - c. Celebrate your successes
- IX. Closing