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In this article, Colasanto and Amitrano suggest amendments to the application regulations for the "Application for Withholding Certificate for Dispositions by Foreign Persons of U.S. Real Property Interests." They propose extending the time the IRS has to complete the certificate review to 180 days (from 90 days), and rendering the certificate to be deemed accepted if the IRS does not respond by the end of those 180 days.

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Although the authors of this article might have clients affected by its subject matter and have advised them on the applicable law, no participant has been specifically engaged by a client to participate in this project.

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This article proposes a statutory or regulatory change in the Foreign Investment in Real Property Tax Act exemption provisions. FIRPTA requires that tax be withheld when a foreign person disposes of a U.S. real property interest. To ensure tax compliance, FIRPTA generally requires a withholding agent to withhold 15 percent of the amount realized on the disposition of U.S. real property regardless of the actual tax that would be owed as a result of the transaction. IRC section 1445(a). Section 1445 allows the buyer, seller, or buyer's settlement agent to request a determination of the seller's maximum tax liability and to request a reduction in the withholding amount. IRC section 1445(c). These requests are submitted on a Form 8288-B, "Application for Withholding Certificate for Dispositions by Foreign Persons of U.S. Real Property Interests" (Application for Withholding Certificate). Under section 1445(c)(3)(B), the IRS must respond to an Application for Withholding Certificate within 90 days. IRC section 1445(c)(3)(B).

Because of the volume of applications and the time it takes to review supporting documentation submitted with each application, the IRS often does not respond to a taxpayer's request within the statutory 90-day window. This leads to delays that affect:

1. the IRS's receipt of withheld funds;
2. the seller's ability to obtain a release of any over-withheld tax amounts; and
3. delays in the filing, and processing, of income tax returns that report the property sale and the associated withholding amounts.

The delays are negatively affecting both the federal government and buyers and sellers of real property.

This article proposes that IRC section 1445(c)(3)(B) be amended to extend the 90-day determination deadline to 180 days and provide that if the IRS fails to meet the 180-day deadline, the submitted Application for Withholding Certificate be deemed approved as a matter of law, subject to limited exceptions. The article also separately proposes that Treasury issue regulations providing that if the IRS fails to respond to an Application for Withholding Certificate within the statutory deadline, the submitted Application for Withholding Certificate be deemed approved, subject to limited exceptions.

## Introduction

FIRPTA imposes a tax on capital gains derived from the disposition of U.S. real property interests by foreign persons. The general withholding rate is 15 percent of the amount realized on the disposition of the property. IRC section 1445(a). A withholding rate of 10 percent applies in select situations. IRC section 1445(c)(4). The amount realized includes the sum of cash paid, the fair market value of other property transferred, and the outstanding amount of any liability assumed by the transferee. 26 CFR section 1.1445-1(g)(5).

Because the general withholding rate applies to the entire amount realized and transferors often owe less than this amount, Congress provided that withholding cannot exceed the transferor's maximum tax liability. IRC section 1445(c)(1). Congress delegated to the secretary the authority to pass regulations to determine a transferor's maximum tax liability. IRC section 1445(c)(3)(A)(ii). The applicable regulations provide a mechanism to reduce or eliminate the withholding amount through the issuance of a withholding certificate. 26 CFR section 1.1445-3(a). A buyer, seller, or buyer's settlement agent may request a determination of the seller's maximum tax liability by submitting Form 8288-B. In response, the IRS may deny the request, or it may issue a withholding certificate stating the amount of tax that is required to be withheld.

A Form 8288-B submission typically includes supporting documentation to justify a request for reduced or exempt FIRPTA withholding. This may include a copy of the signed purchase and sale agreement, evidence of the transferor's adjusted basis in the property (such as settlement statements or acquisition records), estimated selling expenses, and a calculation of the anticipated gain or loss. If the transfer is claimed to be nontaxable (for example, because of a like-kind exchange or corporate reorganization), relevant legal or transactional documentation must also be provided. All information is provided under penalties of perjury and must be accurate and complete to allow the IRS to evaluate the request.

The obligation to remit the withheld tax and file Form 8288, "U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests," rests with the transferee or another designated withholding agent under IRC section 1445(a) and 26 CFR section 1.1445-1(c). Form 8288 is used to report the remitted withholding tax to the IRS. Along with Form 8288, the transferee or withholding agent must file Form 8288-A, "Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests," for each foreign seller involved in the transaction. 26 CFR section 1.1445-1(e)(2). Form 8288-A provides detailed information about the transferor, the amount withheld, and the real property disposed of. The IRS processes Form 8288-A by matching it with the withheld tax payment and then detaches and stamps a copy to serve as official proof of the amount withheld. The IRS mails this stamped copy back to the transferor who uses the Form to claim a credit for the withheld tax on their U.S. income tax return, typically Form 1040-NR or Form 1120-F. 26 CFR section 1.1445-1(f)(2). This procedure ensures that the foreign seller can receive credit for the tax withheld at the time of sale and helps the IRS track compliance with FIRPTA reporting and payment requirements.

In general, a transferee must report and pay over the withheld tax by the 20th day after the date of the transfer. 26 CFR section 1.1445-1(c). If an Application for Withholding Certificate is submitted to the IRS on or before the date of the property transfer, the transferee is still required to withhold the applicable FIRPTA tax. However, the obligation to remit the withheld amount to the IRS is deferred, and the transferee is not required to report and pay the withheld tax until the 20th day following the IRS's final determination on the application. 26 CFR section 1.1445-1(c)(2)(i). This determination is deemed to have occurred when the IRS issues and mails either the withholding certificate or a formal notice of denial to the transferee.

By law, the IRS must respond to an Application for Withholding Certificate within 90 days. IRC section 1445(c)(3)(B).[1] While the law requires the IRS to act within 90 days, it is silent as to what occurs if the IRS does not act. A deadline without a consequence is meaningless. As such, consequences should be added to the statute or be provided through regulation. An Application for Withholding Certificate should be deemed accepted by the IRS if it fails to timely respond. To balance such consequences, the 90-day response deadline should be extended to 180 days to allow the IRS more time to review and consider each application.

## The IRS's 90-Day Requirement

### Current Law and Regulations

IRC section 1445(c)(3)(B) provides that in response to the submission of a Form 8288-B:

> (B) Requests to be handled within 90 days
>
> The Secretary shall take action with respect to any request [relating to a determination of the transferor's maximum tax liability] . . . within 90 days after the Secretary receives the request.

Treas. reg. section 1.1445-3(a) provides in part:

> **(a)** ***In general.*** Withholding under section 1445(a) may be reduced or eliminated pursuant to a withholding certificate issued by the Internal Revenue Service in accordance with the rules of this section. . . . The Internal Revenue Service will act upon an application for a withholding certificate not later than the 90th day after it is received. Solely for this purpose (i.e., determining the day upon which the 90-day period commences), an application is received by the Service on the date that all information necessary for the Service to make a determination is provided by the applicant.

The law and regulations, in no uncertain terms, instruct the IRS to act upon an Application for Withholding Certificate not later than 90 days after receipt. The statute and regulations do not state that it *may* or *should* act, but rather the statute provides that the IRS *shall* act, demonstrating Congress's intent to impose a hard deadline that the IRS must abide. However, neither the statute nor the regulations provide for a consequence if it fails to act, making the 90-day deadline meaningless.

## Statistics

According to the IRS, more than 50,000 Forms 8288-A, "Statement of Withholding on Certain Dispositions by Foreign Persons," were filed in 2021 and over $3 billion dollars of tax were

[1] In limited situations additional time is allowed because of amendments to the withholding certificate application. 26 CFR section 1.1445-3(f)(2)(iii).

withheld.[2] Although there are no direct statistics on how many Applications for Withholding Certificate are submitted each year, we believe that a large portion of the 50,000 foreign persons that filed Forms 8288-A filed an Application for Withholding Certificate seeking a reduced withholding amount.

According to the National Association of Realtors, more than 50,000 U.S. homes, totaling over $42 billion in value, are purchased by foreign investors on a yearly basis.[3] It is estimated that foreign investment in U.S. real property since 2009 has surpassed $1.2 trillion dollars.[4]

## Inequities of Not Timely Responding

### Those Affected by the Current Law

With hundreds of thousands to millions of foreign investments representing billions of dollars in U.S. real property, delays in the issuance of withholding certificates present a significant challenge. For foreign investors who sell U.S. real estate, there is no specific statutory relief available if a withholding certificate is not issued within the required 90-day period. These delays are negatively affecting both the flow of foreign investment into the United States and investors' ability to efficiently reinvest their sales proceeds into new U.S. properties.

In situations in which the IRS fails to respond to an Application for Withholding Certificate within 90-days, the taxpayer must decide whether to instruct the transferee or withholding agent to remit the fully withheld tax or wait for a reply. If the taxpayer waits, a situation can arise in which the taxpayer's return becomes due before the Form 8288 is filed. In this situation, the taxpayer must file a return either reporting withholding that has not yet been paid to the IRS or reporting no withholding and later amending the return to correct the withholding amount once the IRS acts. In either situation, government resources are ultimately wasted processing and matching the withheld tax amounts.

While the statistics on the exact number of taxpayers potentially affected by the delays in issuing a withholding certificate are not readily available, the potential covers tens of thousands of foreign investors and potentially billions of dollars in investment and tax revenue each tax year. For these reasons, the law and regulations should be changed to ensure that these foreign taxpayers are not negatively affected.

### Losing the Time Value of Money and Resources

In general, a transferee must report and pay over the withheld tax by the 20th day after the date the real property is transferred. See 26 CFR section 1.1445-1(c)(1). This deadline, however, is delayed in situations in which an Application for Withholding Certificate is submitted on the day of or at any time before the transfer of the real property. When an Application for Withholding Certificate has been submitted:

> the amount withheld, or a lesser amount as determined by the Service, need not be reported and paid over to the Service until the 20th day following the Service's final determination with respect to the application for a withholding certificate. 26 CFR section 1.1445-1(c)(2).

The IRS's delay in responding to an Application for Withholding Certificate delays the remittance of the withheld funds to the Treasury. By not timely responding, the IRS is depriving itself of the time value of money of these withheld funds. If it were to timely act on these withholding certificate requests, then funds could be transferred to it for its use as opposed to sitting in the account of the withholding agent. Fixing the current delay provides a benefit to not only taxpayers but also the United States itself.

## An Additional 90 Days and Automatic Approval

### Proposed Statutory Change

Two changes should be made to IRC section 1445 to rectify the issues discussed above. First, IRC section 1445(c)(3)(B) should be amended to extend the 90-day determination deadline to 180-days. Second, IRC section 1445(c)(3)(B) should be

[2] IRS, SOI Tax Stats — Withholding Tax on Dispositions of U.S. Real Property Interests By Foreign Persons Statistics (last updated Mar. 18, 2025).

[3] *See* National Association of Realtors, "Annual Foreign Investment in U.S. Existing Homes Sales Decreased 21.2 percent to $42 Billion" (July 17, 2024).

[4] *See* "Foreign Investment in the US Real Estate 2023 [Statistics]," Nonresident Investor (Nov. 30, 2023).

amended to provide that if the IRS fails to meet the 180-day deadline, the submitted Application for Withholding Certificate will be deemed approved as a matter of law, subject to limited exceptions.

The current statute, IRC section 1445(c)(3)(B) provides:

> The Secretary shall take action with respect to any request described in subparagraph (A) within 90 days after the Secretary receives the request.

The statute should be amended to read as follows:

> **(B) Time for Acting on Request; Deemed Approval**
>
> **(i) Requests to Be Handled Within 180 Days**
>
> The Secretary shall take action and notify the applicant of such action with respect to any request described in subparagraph (A) within 180 days after the Secretary receives the request.
>
> **(ii) Deemed Approval**
>
> If the Secretary fails to notify the applicant of such determination within the applicable period, the application shall be deemed approved and the amount of withholding shall be reduced in accordance with the amount proposed in the application. The applicant and the withholding agent may rely on such deemed approval as though an actual certificate had been issued. The Secretary may retroactively revoke deemed approval only in cases involving material misstatements, fraud, or bad faith.

Amending the statute in the manner described above will provide the IRS with additional time to review and respond to an Application for Withholding Certificate, while providing for a deemed approval timeline if it fails to act within 180 days.

Congress has previously adopted deemed approval mechanisms within the IRC. For example, IRC section 7122(f) provides that an offer in compromise is deemed accepted if the secretary fails to formally reject the offer within 24 months of its submission. Likewise, Congress has enacted various provisions limiting the period of time the IRS has to act. Several statutes, including those governing assessment and refund limitations, impose strict time requirements on the IRS, with the failure to adhere leading to the loss of assessment or collection rights.

Assuming a statutory adjustment similar to the one described above is adopted, corresponding amendments to the applicable regulations would also be necessary. These amendments should include a provision specifying that, in cases in which an Application for Withholding Certificate is deemed approved, the withholding agent must file Form 8288 within 30 days of the deemed approval date. In addition, Treasury should implement a rule providing that any excess funds withheld from the sale proceeds and remaining in the withholding agent's possession must be released to the transferor no earlier than 20 days after the deemed approval date. Extending the deadline for filing Form 8288 to 30 days, coupled with a 20-day additional holdback period before disbursing excess funds in cases of deemed approval, would address potential issues relating to mailing delays.

## Proposed Additions to 26 CFR Section 1.1445-3

We propose that regardless of whether Congress acts, Treasury should adopt a regulation providing that if the Application for Withholding Certificate is not acted upon within 180 days, the application is deemed accepted.

The Treasury Department has the authority to adopt such a regulation. The statutory language of IRC section 1445(c)(3)(A) provides:

> (3) Procedural rules
>
> (A) Regulations
>
> Requests for —
>
> > (i) qualifying statements under subsection (b)(4),
> >
> > (ii) determinations of transferor's maximum tax liability under paragraph (1), and
> >
> > (iii) reductions under paragraph (2) in the amount required to be withheld,

shall be made at the time and manner, and shall include such information, as the Secretary shall prescribe by regulations.

In passing this code section, Congress clearly delegated to the secretary the right to prescribe regulations relating to determining a transferor's maximum tax liability, which is done through the filing of an Application of Withholding Certificate. Also, the secretary has authority, given that the wording is "shall" take action. As such, the secretary has the authority to issue regulations prescribing a deemed acceptance because of:

- authorization to issue regulations; and
- the reg's use of "shall" take action wording.

Further, IRC section 1445(c)(1)(A) provides that the amount withheld "shall not exceed" the tax owed on the sale of the property. The authority to determine the transferor's maximum tax liability is delegated to the secretary under IRC section 1445(c)(1)(B). The use of the phrase "shall not exceed" indicates that Congress did not intend to require that the amount withheld always match the final tax liability with exact precision. Rather, because the determination of the transferor's maximum tax liability rests with the secretary, the Treasury Department may promulgate regulations providing that, if an Application for Withholding Certificate is not acted upon within 180 days, the application is deemed accepted.

We propose that the following regulation be promulgated:

> Proposed Treasury Regulation section 1.1445-3(i): Automatic Approval for Withholding Certificates Not Acted Upon Within Statutory Period
>
> (i) Automatic Approval of Withholding Certificate Applications.
>
> (1) Automatic Deemed Approval.
>
> If the Secretary fails to issue a written determination approving or denying the application for a withholding certificate within 180 days (or as extended pursuant to section 1.1445-3(f)(2)) of receipt as described in section 1.1445-3(a), the application shall be deemed approved as of the 181st day after receipt of the complete application.
>
> (2) Effect of Deemed Approval.
>
> Upon deemed approval under paragraph (i)(1), the applicant and the withholding agent may rely on the proposed reduced or exempt withholding amount specified in the application. The applicant and the withholding agent shall retain a copy of the complete application and evidence of when the application was initially submitted as proof of deemed approval.
>
> The withholding agent must report and remit any tax by the 30th day after the date of deemed approval. If no tax is required to be remitted as a result of the deemed approval, the withholding agent is still required to file a Form 8288.
>
> The withholding agent may not release any excess withheld proceeds to the transferor until 20 days after the date of deemed approval.
>
> (3) Recordkeeping and Notification.
>
> The Form 8288 filed by the withholding agent shall include a copy of the withholding certificate application and supporting documentation, along with a statement notifying the IRS that the remitted amount (if any) is based on the deemed approval provisions found in this section.
>
> (4) Exceptions.
>
> The provisions of this paragraph shall not apply in cases where the application is found to be materially incomplete, fraudulent, or submitted in bad faith. The Secretary retains the authority to retroactively revoke deemed approval if it is determined that the application contained material misstatements or omissions.

The proposed regulation described above would assign meaningful consequences to a statute that otherwise lacks any enforcement mechanism. The proposed regulation will also result in more effective and efficient tax administration, which benefits both the taxpayer and the government.

## Conclusion

The failure to timely respond to an Application for Withholding Certificate has caused uncertainty and unnecessary delays for foreign persons investing in United States real property. These delays deprive the United States and foreign persons of funds to which they are entitled. For these reasons, the above statutory and regulatory revisions should be adopted. ■