July 31, 2017

The Honorable Steven Mnuchin
Secretary of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

RE: Executive Order 13777

Dear Secretary Mnuchin:

The Securities Industry and Financial Markets Association (SIFMA)[1] appreciates the opportunity to provide comments on measures that the Treasury Department could take to reduce regulatory burdens pursuant to Executive Order 13777, issued on February 24, 2017.

Executive Order 13777 requires each federal agency to develop a joint Regulatory Reform Task Force ("Task Force") and requires the Task Force to identify regulations that:

(i) eliminate jobs, or inhibit job creation;
(ii) are outdated, unnecessary, or ineffective;
(iii) impose costs that exceed benefits;
(iv) create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;
(v) are inconsistent with the requirements of section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note), or the guidance issued pursuant to that provision, in particular those regulations that rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard for reproductivity; or
(vi) derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified.

[1] SIFMA is the voice of the U.S. securities industry. We represent the broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over $2.5 trillion for businesses and municipalities in the U.S., serving clients with over $18.5 trillion in assets and managing more than $67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

We are writing to urge you to review the September 2015 final and temporary regulations under Internal Revenue Code Section 871(m) (T.D. 9734) and subsequent amendments, including the final regulations published on January 24, 2017 (T.D. 9815), and the regulations under Sections 1471-1474 (FATCA) in the report required by E.O. 13777 and consider immediate steps to reduce the regulatory burden and complexity for taxpayers created by these far-reaching and expensive regulatory mandates.

## IRC Section 871(m) Regulations

Final regulations under Section 871(m) were published in the Federal Register on September 18, 2015 (T.D. 9734). The effective date for these regulations was first revised in December 2015, and later further revised in a final rule published in the Federal Register on January 24, 2017 (T.D. 9815). SIFMA has submitted multiple comment letters on the regulations under Section 871(m) that are available on the SIFMA website.[2]

Section 871(m) was enacted in 2010 in response to concerns over transactions where foreign investors owning U.S. equities avoided U.S. withholding taxes on dividends by entering into swap transactions over dividend record dates. The 2010 statute immediately imposed withholding on certain swaps that closely resembled the transactions of concern, and granted regulatory authority to U.S. Treasury to develop additional rules to identify any additional derivative transactions that should be subject to withholding if they have the potential for tax-avoidance.

Since 2012, Treasury and the IRS have issued multiple versions of proposed, temporary and final regulations, supplemented by IRS Notices and Revenue Procedures. The January 2017 final Section 871(m) regulations left in place a January 1, 2017 effective date for withholding on so-called "delta one" transactions, despite industry requests for a delay in light of interpretive questions and implementation challenges. The regulations also currently require withholding on a broader class of transactions – defined as having a delta of 0.80 or higher – beginning January 1, 2018.

SIFMA believes that the costs of complying with Section 871(m) exceed the benefits of the regulations and the regulations could have achieved a similar benefit with a far

[2] Letter from SIFMA to the Hon. Mark Mazur, May 7, 2014; Letter from SIFMA to the Hon. Mark Mazur Requesting Additional Guidance, March 31, 2016 (http://www.sifma.org/issues/item.aspx?id=8589959618) ("March 2016 Letter"); Letter from SIFMA to the Hon. Mark Mazur Urging Implementation Delay, June 24, 2016 (http://www.sifma.org/issues/item.aspx?id=8589961019) ("June 2016 Letter"); SIFMA Letter to Mr. Robert Stack Regarding Notice 2016-42 and Section 871(m), August 1, 2016 (https://www.sifma.org/comment-letters/2016/sifma-submits-comment-to-multiple-agencies-on-the-qi-agreement-published-in-notice-2016-42/ ) ("August 2016 Letter"); and Letter from SIFMA to the Hon Mark Mazur Urging Implementation Delay in Light of G5 Position Letter, Nov. 14, 2016 (http://www.sifma.org/issues/item.aspx?id=8589963522) ("November 2016 Letter").

lower cost either by limiting the scope to transactions described in the statute (and substantially similar transactions) or by limiting the scope to delta one transactions.

The Section 871(m) regulations are lengthy, complex, and ambiguous. The final rule that is the basis for the January 24, 2017 regulations ran to over 29,000 words when it appeared in the Federal Register in September 2015.[3] In SIFMA's March 2016 letter and in three subsequent letters, we highlighted several gaps that make the regulations difficult or impossible to interpret with the specificity necessary to design and build compliance systems.[4] We have urged Treasury to provide additional guidance and to give our industry sufficient lead time in advance of the rules' effective date. Lacking such guidance, our members, whether on their own or through third party vendors, have been forced to adopt inefficient manual and *ad hoc* measures increasing the cost and risk associated with such processes. These problems will be far more significant after January 1, 2018, when the delta threshold in the regulations is reduced to 0.80 and the current good faith standard is no longer applicable. Without basic guidance on interpretive questions that is needed to determine how to design and build new withholding systems to meet the approaching January 1, 2018 effective date, our members and their clients will continue to be at risk for over- or under-withholding or designing systems that fail to capture Treasury's intent.

Even if the regulatory gaps our members are most concerned about could be addressed, the Section 871(m) rules are extraordinarily complex and novel, particularly in the context of non-delta one trades. They rely on mathematically intensive calculations that have never been used in federal tax regulations, and require incredibly complex algorithms to be designed and built to combine transactions in novel ways. Financial institutions have struggled to design algorithms which satisfy this requirement. Furthermore, they impose tax liabilities on flows of phantom dividends that must be tracked by financial firms and chains of intermediaries.

Additionally, five foreign governments, including the United Kingdom, France, Spain, Italy, and Germany, have raised questions about whether the United States has jurisdiction to impose dividend withholding tax on dividend equivalent payments between foreign counterparties outside the United States, and have also said that the United States does not have the authority to modify tax treaties to treat dividend equivalent amounts as dividends under the relevant tax treaty.[5] Lack of agreement by the home governments of major investors in U.S. equity markets on the jurisdictional basis for withholding on foreign-to-foreign derivatives transactions places our members in a difficult position. The lack of a level playing field in this area could cause competitive imbalances or lead to reciprocal countervailing measures by such foreign governments that could directly harm U.S. investors and U.S. equity markets.

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[3] Dividend Equivalents from Sources Within the United States, 80 Fed. Reg. 56,866 (2015).

[4] See supra note 2, "March 2016 Letter."

[5] See supra note 2, "November 2016 Letter." SIFMA has requested that Treasury release under the Freedom of Information Act a letter from these governments to U.S. Treasury regarding the 2015 regulations and their implementation schedule

Furthermore, the qualified securities lender (QSL) regime should be maintained, or at a minimum, extended. The longstanding QSL regime works well and, to our knowledge, is not prone to abuse.

The qualified derivatives dealer (QDD) regime, which has been designed predominantly with equity derivatives (not securities loans) in mind, is a far more complicated regime than the QSL regime, which the QDD regime is scheduled to replace effective January 1, 2018. This is primarily because the Section 871(m) taxation of equity derivatives, which is not in the scope of the QSL regime, is more complicated than the Section 871(m) taxation of securities loans and repurchase agreements. For example, the intricate delta test, substantial equivalence test and combination rules apply to equity derivatives and not to securities loans.

We recommend that the QSL regime be retained indefinitely. If Treasury does not adopt this recommendation, we request that Treasury extend the QSL regime, as it exists in its current form, through December 31, 2019. QSLs need more time to become QDDs and, if necessary, QIs (QSLs need not be QIs if they are subject to audit under Code section 7602), including parsing through the aspects of the QDD regime that apply to them. This additional time would also enable QSLs to be more smoothly integrated into the QDD regime, when the QDD is more mature and its initial implementation kinks have been ironed out.

**SIFMA Position**

SIFMA supports clear, targeted rules that address tax-avoidance and has provided extensive comments to the Treasury Department throughout the rulemaking process. However, SIFMA believes the final regulations go far beyond what is necessary to address abuse and have created substantial administrative and compliance challenges for the industry. We believe the government should consider continuing to apply the statutory withholding rules that were in effect until December 31, 2016 until the current administration has the opportunity to consider whether the current Section 871(m) regulations go too far. The September 2015 and January 2017 regulations should be withdrawn or substantially modified. Furthermore, the QSL regime should be retained or, at a minimum, extended until the QDD regime has matured.

## FATCA Regulations

The Hiring Incentives to Restore Employment (HIRE) Act of 2010 added a new Chapter 4 to the Internal Revenue Code, containing the Foreign Account Taxpayer Compliance Act (FATCA). FATCA imposes a 30% gross-basis withholding tax on payments of U.S. source interest, dividends, rents, salaries, and gross proceeds from the sale of U.S. assets to foreign financial institutions (FFIs) that do not meet certain reporting requirements with respect to the accounts that they maintain.

The Treasury Department issued final regulations under FATCA on January 17, 2013 and has issued numerous notices and regulations correcting and amending the 2013 regulations. Two packages of regulations relating to implementation of FATCA were published on December 30, 2016: final and temporary regulations under Chapter 4 (T.D. 9809) and final and temporary FATCA coordinating regulations under Chapter 3 and Chapter 61 (T.D. 9808). Several significant provisions of FATCA have yet to be finalized, including withholding on gross proceeds and foreign passthru payments, the effective date of which has been delayed until January 1, 2019. SIFMA members do not believe that applying FATCA withholding on gross proceeds and foreign passthru payments would materially further the cause of FATCA. Yet, this application would come at a high cost to the financial markets industry, as a result of the costs of implementing what would be highly technical rules.

The Treasury Department announced in Notice 2015-66 that Treasury would extend the start date for FATCA withholding on gross proceeds and foreign passthru payments to January 1, 2019. Implementing a system of withholding on gross proceeds and foreign passthru payments will require further guidance from Treasury and close coordination among thousands of intermediaries. Accordingly, the global financial services industry will need enough lead time after Treasury and the IRS have issued the precise technical rules to build the systems necessary to interpret and carry out these requirements. While January 1, 2019 may seem far off today, implementing these rules will be a tremendous undertaking. The development cycle for withholding on gross proceeds and foreign passthru payments is generally estimated to be at least 18-24 months after the issuance of final guidance. Moreover, the challenges inherent in these new requirements are greater than those with respect to withholding on interest and dividends where there is a history of past withholding practice on which to build. Given the challenges of implementing these new requirements, our members believe that the January 2019 effective date should be extended. Additionally, considering the offshore tax compliance landscape has dramatically changed since these rules were initially proposed, particularly with the proliferation of bilateral Intergovernmental Agreements (IGAs) and widespread adoption of the Common Reporting Standard (CRS), SIFMA suggests these rules be reevaluated and reassessed to determine if they are still necessary.

The Chapter 3 temporary regulations issued on December 30, 2016 included a particularly problematic requirement that beginning in 2017, U.S. accounts documented with Forms W-8BEN, W-8BEN-E, W-8EXP or W-8ECI contain a beneficial owner's Foreign Taxpayer Identification Number (FTIN) and, in the case of an individual, date of birth (DOB). Although portions of the FTIN requirement have now been delayed until 2018, withholding agents are not prepared operationally to remediate all Forms W-8 that do not include an FTIN and, in the case of an individual, DOB.[6] The consequence of invalidating forms that do not contain an FTIN or a DOB and requiring withholding beginning in 2018 will create turmoil in the financial

[6] SIFMA acknowledges and appreciates the public statements made recently by Treasury officials about Treasury's intent to modify the implementation schedule for the FTIN requirement.

markets as it will require excessive amounts of Chapter 3 or 4 withholding and backup withholding on reportable payments made to foreign clients.

SIFMA conducted a survey of its members to determine the potential impact of the FTIN requirement in the December 30 rules. Among the 21 members that participated in the survey, the members maintain nearly 4 million accounts held by foreign persons. According to our survey, the reportable payments received by these account holders and potentially subject to withholding due to the FTIN requirement total over $1 trillion dollars per year. This amount includes U.S. and foreign source fixed, determinable, annual, or periodic (FDAP) income and gross proceeds paid to accounts held by foreign persons.

SIFMA supports the goals of FATCA, and we recognize that the statute imposes burdens that cannot entirely be alleviated by regulations. Nevertheless, we believe it would be helpful to consider less burdensome regulatory pathways to meet the statute's offshore compliance objectives.

SIFMA conducted an informal survey of its members in 2014 and found that a subset of our members expected to spend over $1 billion on FATCA compliance. The members who responded to our survey are a small fraction of the financial institutions around the world that are required to comply with FATCA. These costs are passed on to consumers of financial services in the U.S. and around the world.

A more recent illustration of the extent of these costs is the number of FFIs that have applied for and obtained a FATCA Global Intermediary Identification Number (GIIN). As of April 2017, just under 300,000 FFIs have completed the complex registration process necessary to obtain a GIIN, a process which commits the applicant to significant ongoing FATCA compliance costs.

Foreign investors often have many options about where to invest, and regulatory regimes such as FATCA that impose costs or create significant uncertainty as to the outcome of a given investment can change investor behavior. Less international demand for U.S. financial services, as a result of FATCA, has the potential to reduce the price of U.S. financial assets or reduce the liquidity of U.S. financial markets.

**SIFMA Position**

While SIFMA supports the objective to improve offshore tax compliance, we remain concerned that the FATCA regulations and ongoing compliance burden unnecessarily disrupts the operation of the financial markets and adds enormous cost and complexity on financial institutions and taxpayers. We believe that a number of steps can be taken to address these concerns, including a further delay in the effective date, and eventual elimination (we understand that this may require Congressional action) of the passthru payment rules and the gross-proceeds withholding rules, and changes to the FTIN requirement discussed above. These concerns could also be mitigated by harmonizing

the FATCA rules with the domestic laws of countries with an Intergovernmental Agreement in force and with the OECD Common Reporting Standard, and we would be pleased to work with Treasury and the IRS to identify the changes necessary to effect this.

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SIFMA would welcome an opportunity to help explore options as you complete your review of these regulations, and should you have any questions please feel free to contact me at ppeabody@sifma.org or 202-962-7333. Thank you for your consideration of SIFMA's views.

Sincerely,

Payson Peabody
Managing Director & Tax Counsel
SIFMA

cc: Brian Callanan, Acting General Counsel;
Dan Kowalski, Counselor to the Secretary;
Justin Muzinich, Counselor to the Secretary;
Neomi Rao, Administrator, Office of Information and Regulatory Affairs, Office of Management & Budget