



November 21, 2023

The Honorable Lily Batchelder
Assistant Secretary for Tax Policy
U.S. Department of Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Re: Section 871(m) Transition Rules

Ladies and Gentlemen:

The Securities Industry and Financial Markets Association (SIFMA)¹ is submitting this letter further to Notice 2022-37 (the "Notice") in which the IRS extended transition rules with respect to the application of the Section 871(m) withholding tax for periods prior to January 1, 2025. We urge the government to announce as soon as possible that it will extend the January 1, 2025 date in the Notice to a date that is no earlier than 18 months after the date on which permanent guidance (such as an amendment to the final regulations) is published in the Federal Register.

More specifically, the Notice provides that, prior to January 1, 2025:

- Section 871(m) will only apply to delta-one transactions;
- The IRS will, when enforcing Section 871(m), take into account the extent to which the taxpayer or withholding agent (including a qualified derivatives dealer "QDD") has made a good faith effort to comply with Section 871(m);
- Withholding agents will only be required to combine transactions for Section 871(m) purposes if they are OTC contracts that are "priced, marketed or sold" in connection with each other; and

¹ SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly one million employees, we advocate for legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. 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>.

- A qualified derivatives dealer will not be (i) subject to withholding tax with respect to dividends and dividend equivalents that it receives (or is deemed to receive) in its capacity as an equity derivatives dealer, (ii) required to self-assess tax based on the “net delta” methodology set forth in the Section 871(m) Regulations or maintain a reconciliation schedule, and (iii) required to conduct the periodic review with respect to its QDD activities. However, under the 2023 qualified intermediary agreement (Rev. Proc. 2022-34) a QDD will be required to certify that the QDD made a good faith effort to comply with Section 871(m).

We continue to stress that additional guidance is needed with respect to the issues that are the subject of the Notice, and we appreciate that the government is considering issuing further guidance in this regard. In order to analyze any updated guidance or new requirements, update complex systems, secure budgets, and implement our operational processes to comply, withholding agents will need a significant amount of lead time after final guidance is issued.² We therefore urge the government to announce as soon as possible that it will extend the January 1, 2025 date in the Notice to a date that is no earlier than 18 months after the date on which such guidance is issued.

As stated in our letter dated May 4, 2022, our members continue to spend a substantial amount of time and dedicate resources to the Section 871(m) withholding regime, and we believe that Section 871(m) is currently operating to capture the vast majority of transactions that Congress intended to capture when it enacted Section 871(m). Furthermore, the Section 871(m) anti-abuse rule continues to apply during the transition period, including for purposes of determining whether a contract has a delta of one for Section 871(m) purposes. Accordingly, we believe that the government should not be concerned that the extension of the transition period in the Notice would allow taxpayers and withholding agents to inappropriately avoid the Section 871(m) withholding tax.

We appreciate your consideration of our request and concerns, and we would be happy to discuss this letter and any other Section 871(m) issues with you and your colleagues. You can reach me at 202-962-7311 or paustin@sifma.org.

² A detailed discussion of the existing rules requiring clarification can be found in previous SIFMA comment letters which may be accessed here:
<https://www.sifma.org/resources/submissions/regulatory-project-to-reduce-burdens-under-section-871m/>
<https://www.sifma.org/resources/submissions/sifma-submits-comments-to-the-irs-on-section-871m-implementation-date-delay/>

Respectfully submitted,



P.J. Austin
Vice President, Tax
SIFMA

Cc: Erika Nijenhuis
Senior Counsel, Office of Tax Policy
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Thomas West
Deputy Assistant Secretary
Office of Tax Policy
Department of the Treasury
1500 Pennsylvania Ave., NW, Room 3120
Washington, DC 20220