

February 28, 2014

The Honorable Mark Mazur
Assistant Secretary (Tax Policy)
Department of the Treasury
1500 Pennsylvania Avenue NW
Washington, DC 20220

Re: Delay in the Application of Section 871(m) Proposed Regulations

Dear Mr. Mazur:

I am writing on behalf of the North American Tax Committee (“NATC”) of the International Swaps and Derivatives Association (“ISDA”) to respectfully request immediate relief from the early application of recently proposed Treasury regulations under Internal Revenue Code section 871(m) to U.S. equity-linked derivative transactions. The Securities Industry and Financial Markets Association (“SIFMA”) submitted a letter making such a request on February 21, 2014. The Managed Funds Association (“MFA”), which represents many ISDA members in the investor community, also requested a change to the early application of the proposed regulations in a letter dated February 10, 2014. NATC members share SIFMA’s and MFA’s concerns that application of the regulations to derivatives acquired after March 4, 2014 will cause market disruptions that were not intended by Congress or the Treasury department and Internal Revenue Service. Therefore, we strongly urge that the Treasury department and Internal Revenue Service act swiftly to provide that the proposed regulations under section 871(m) will apply only to instruments issued or entered into after the date that is 180 days after the date on which the regulations are finalized.

The recently proposed regulations apply U.S. federal withholding tax in many situations that could not have been anticipated by market participants using ISDA documentation for their transactions. The two protocols published by ISDA to assist market participants in modifying their existing documentation with regard to withholding under the section 871(m) statutory rules do not resolve the matters raised by the proposed regulations’ novel approach to the application of withholding tax to equity-linked instruments. Moreover, because section 871(m) previously applied only to transactions with payments that were explicitly contingent

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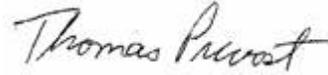
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upon, or determined by reference to, the payment of a dividend, many market participants who entered into other equity-linked transactions have not yet signed on to the ISDA protocols or otherwise amended their documentation to address the new proposed regulations. Consequently, parties engaging in derivatives transactions need time to revise and update their processes, systems and ISDA documentation in light of the regulations once they are finalized. More specifically:

1. Time to create tracking systems. The marketplace has not had sufficient time to develop and implement systems to identify and track transactions to which the proposed regulations may potentially apply after March 4, 2014. Compliance with the proposed regulations would require dealers to capture certain data on derivatives, such as expected dividends and delta, which dealers do not currently capture and retain. Dealers will need time to build such systems in compliance with the final regulations. No one could have anticipated the novel approach taken in the recently proposed regulations or the immediate need to track all acquisitions of U.S. equity-linked instruments made after March 4, 2014, even if withholding applies only to payments made after 2015.
2. Time to make documentation changes. Most ISDA documentation did not contemplate the possibility that a U.S. withholding tax could be due and payable with respect to a transaction in the absence of an actual payment (including a gross amount used in computing a net payment) being made under the ISDA contract for that transaction. The potential application of withholding tax is a material aspect of the pricing of equity-linked derivatives, and it is important that the payment mechanics in ISDA documentation be modified to reflect the potential for withholding tax under the proposed regulations for all types of transactions that have a term that may extend beyond 2015. Such modifications should be made before the transactions at issue are executed in order to protect the parties and provide for an appropriate allocation of risk.
3. Avoid duplicative renegotiation. Because further amendments to ISDA documentation may be needed after the regulations are finalized, it would be unnecessarily wasteful for the marketplace to re-negotiate ISDA documentation currently in order to reflect the proposed regulations, and then potentially need to re-negotiate such documentation again to reflect the final regulations. This is true in particular because no withholding tax will actually be owed under the regulations until 2016. We believe that it would be less disruptive to over-the-counter derivative markets if ISDA had time to develop market-standard documentation before transactions subject to the new regulations are executed.

For the foregoing reasons, NATC respectfully requests that the final regulations apply only to instruments issued or entered into after the date that is 180 days after the date on which the regulations are finalized.

Yours truly,



Thomas Prevost

cc: Mary Miller, Acting Deputy Secretary and Under Secretary for Domestic Finance
Emily McMahon, Deputy Assistant Secretary (Tax Policy)
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