

October 23, 2025

Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Internal Revenue Service
1111 Constitution Avenue NW
Washington, D.C. 20044

Recommendations for the Withdrawal of Treasury Regulations Pursuant to Executive Order
14219

I. Introduction

This letter sets forth comments of the North American Tax Working Group (“NATWG”) of the International Swaps and Derivatives Association, Inc. (“ISDA”)¹ in response to the statement of the U.S. Treasury Department (“Treasury”) and the Internal Revenue Service (the “IRS”) inviting taxpayer recommendations regarding regulations meeting the criteria set forth in Executive Order 14219, “Ensuring Lawful Governance and Implementing the President’s ‘Department of Government Efficiency’ Deregulatory Initiative” (the “Executive Order”).²

The Executive Order, published on February 25, 2025, directs the heads of governmental agencies to initiate a process to review all regulations within their jurisdiction to identify certain categories of regulations, including those that impose significant costs upon private parties that are not outweighed by public benefits, and to determine whether ongoing enforcement of identified regulations is compliant with law and Administration policy. On April 7, 2025, the IRS and Treasury announced that they would consider taxpayer recommendations throughout the year regarding regulations identified by taxpayers as potentially falling within the categories set forth in the Executive Order.

The NATWG recommends the following actions:

¹ Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 1,000 member institutions from 78 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association’s website: www.isda.org. Follow us on [LinkedIn](#) and [YouTube](#).

² 90 Fed. Reg. 10583.

I. Modify the regulations under Section 871(m)³ (the “Section 871(m) Regulations”) to withdraw certain provisions thereof that are not yet in effect (the “Deferred Section 871(m) Provisions”) and preserve the current framework under Notice 2024-44.

II. Withdraw the proposed regulations that would treat “basket contracts” as “listed transactions” within the meaning of Section 6011 (the “Proposed Basket Contract Regulations”).⁴ Absent such a withdrawal, the NATWG recommends taking action to mitigate the burden currently being imposed on market participants by the Proposed Basket Contract Regulations.

As discussed herein, the NATWG believes that these regulations meet the criteria outlined in the Executive Order because, if fully implemented, they will impose significant costs on private parties that are not outweighed by public benefit. The Proposed Basket Contract Regulations impose these costs currently due to their proposed retroactive applicability date.

I. *Modify the Section 871(m) Regulations to Eliminate the Deferred Section 871(m) Provisions and Preserve the Current Framework under Notice 2024-44*

Section 871(m) operates to treat U.S.-source “dividend equivalents” derived by non-U.S. persons with respect to certain notional principal contracts and other equity-linked instruments in the same manner as actual U.S.-source corporate dividends for purposes of the 30% withholding tax on “fixed or determinable annual or periodical” income.

Although the Section 871(m) Regulations were largely finalized in 2017,⁵ the effective date of certain provisions of the regulations has been repeatedly deferred by the IRS and Treasury, most recently in Notice 2024-44, in recognition of the additional challenges to withholding agents and taxpayers that implementation of the relevant provisions would impose.⁶

In particular, the relevant IRS Notices (i) delayed the application of the Section 871(m) rules to “non-delta-one” transactions; (ii) extended a simplified standard under which withholding agents are required to match up multiple transactions of a single counterparty in order to treat those transactions as “combined” transactions subject to withholding under Section 871(m) only if those transactions are over-the-counter transactions that are priced, marketed or sold in connection with each other; and (iii) extended withholding tax relief and simplified compliance requirements for “qualified derivative dealers.”

³ References to “Sections” herein are references to sections of the Internal Revenue Code of 1986, as amended (the “Code”), or the Treasury Regulations promulgated thereunder.

⁴ Identification of Basket Contract Transactions as Listed Transactions, REG-102161-23, Jul. 12, 2024.

⁵ T.D. 9815, Jan. 24, 2017.

⁶ Notice 2024-44, 2024-25 I.R.B. 1737; *see also* Notice 2022-37, 2022-37 I.R.B. 234; Notice 2020-2, 2020-3 I.R.B. 327; Notice 2018-72, 2018-40 I.R.B. 522; Notice 2017-42, 2017-34 I.R.B. 212; Notice 2016-76, 2016-51 I.R.B. 834.

The NATWG believes that the existing framework as reflected in Notice 2024-44 sets forth, as a general matter, an appropriate standard for implementation of the key policies underpinning Section 871(m) by capturing the vast majority of transactions on which Congress was focused. Making effective the Deferred Section 871(m) Provisions would lead to undue compliance burden relative to the potential benefit to the fisc. Most particularly, applying the Section 871(m) rules to non-delta-one transactions would cause the Section 871(m) regime to be materially more complex than it currently is, with limited benefit given the economic differences between these transactions and the underlying equity. Moreover, the Section 871(m) Regulations' anti-abuse rule provides an adequate backstop against avoidance of the Section 871(m) regime through the use of non-delta-one transactions. Finally, extending withholding tax relief for qualified derivatives dealers on dividend equivalents and dividends, as well as simplified compliance requirements, is important to the functioning of an efficient derivatives market. As a result, the NATWG recommends withdrawing the Deferred Section 871(m) Provisions and otherwise revising the Section 871(m) Regulations to retain permanently the framework set forth in Notice 2024-44 and its predecessors.

If our recommendation is not adopted, we request that Treasury and the IRS act expeditiously to issue a new Notice extending the applicability date of Notice 2024-44, as financial institutions need significant time to prepare for any change in applicable withholding rules.

II. Withdraw or Substantially Narrow the Scope of the Proposed Basket Contract Regulations

In 2015, the IRS issued two notices (the "Notices") targeting "basket" transactions: Notice 2015-73 (applicable to "basket options") and Notice 2015-74 (applicable to "basket contracts"). Each of the Notices treated the relevant category of transaction as a "reportable transaction" required to be reported by taxpayers pursuant to Treasury Regulations Section 1.6011-4—"listed transactions" in the case of basket options and "transactions of interest" in the case of basket contracts. The Notices were issued in response to transactions that purported to be options but represented, in substance, beneficial ownership by the taxpayer in the underlying "basket" of assets that was held by the option issuer.

In July 2024, Treasury and the IRS issued the Proposed Basket Contract Regulations, which treat all basket transactions as listed transactions and would be effective retroactively. The NATWG provided comments on the Proposed Basket Contract Regulations in a letter to Treasury dated September 10, 2024 and attached hereto as Exhibit A (the "September 2024 Letter").

Given their broad drafting, the scope of the Proposed Basket Contract Regulations extends significantly beyond the specific abusive transactions at which they were aimed. While the original Notices were focused on transactions in which a taxpayer is the effective owner of an actual account or pool of assets, the Proposed Basket Contract Regulations have the potential to apply to a vast array of index-linked derivatives because they can be read to treat many forms of discretion in managing an index, including in cases where an index sponsor or underlying data provider is unconnected to the transaction at hand and to the taxpayer, as potentially problematic.

Investing in a derivative (or other financial instrument) linked to indices that seek to follow a theme or other investment thesis is a way for investors to achieve legitimate investment goals

without the costs and difficulty of acquiring the relevant underlying assets. The Proposed Basket Contract Regulations force index creators and market participants to undertake costly and time-consuming analyses to determine whether an index might run afoul of the regulations, and frequently result in uncertainty sufficient to deter parties from entering into legitimate, non-abusive transactions.

Accordingly, the NATWG believes that the Proposed Basket Contract Regulations impose a significant burden on private sector parties well in excess of their public benefit of deterring a much smaller universe of genuinely abusive transactions, and therefore should be withdrawn in line with the policies announced in Executive Order 14219.

Should Treasury choose not to withdraw the Proposed Basket Contract Regulations, the NATWG recommends that it amend the regulations and reissue them in proposed form as soon as possible, with updates to address comments from the public. Such regulations should only apply prospectively with sufficient lead time to ensure that taxpayers and other market participants have an opportunity to develop guidelines and systems to comply with them.⁷ These steps would mitigate the current burdens faced by market participants due to the breadth and retroactivity of the Proposed Basket Contract Regulations. Furthermore, we reiterate our view, expressed in the September 2024 Letter, that Treasury and the IRS should prioritize guidance regarding the application of Section 1001 to derivative contracts, as such guidance would provide greater certainty for taxpayers and the IRS and thereby reduce the potential for genuinely abusive basket contract transactions.

Thank you for your consideration of these concerns. We would be pleased to discuss any aspect of this letter with you further.

Yours truly,



Maureen Smith

⁷ See Securities Industry and Financial Markets Association, 2024 Proposed Regulations for the Identification of Basket Contract Transactions as Listed Transactions (Sept. 10, 2024), *available at* <https://www.sifma.org/wp-content/uploads/2024/10/SIFMAComments.BasketRegulations.pdf>; New York State Bar Association Tax Section, NYSBA Tax Section Report No. 1499 — Report on Proposed Regulations Identifying Basket Contract Transactions as Listed Transactions (Sept. 10, 2024), *available at* <https://nysba.org/wp-content/uploads/2024/09/NYSBA-Tax-Section-Report-on-Proposed-Basket-Transaction-regulations-1499.pdf>.

Exhibit A - September 2024 Letter

[Enclosed]