

Operational Tax News

871(m) regulations Update

8 December 2016

Notice 2016-76: guidance on section 871(m) regulations and phased-in rules

The IRS issued Notice 2016-76 on 2 December 2016, aiming to provide taxpayers with guidance and additional clarifications with regards to the administration of, and compliance with, section 871(m) regulations.

Comments received by the IRS have shown that taxpayers and withholding agents may face timing issues for complying with certain aspects of the section applicable from 1 January 2017. In addition, certain taxpayers may face further challenges while applying for a Qualified Derivatives Dealer (QDD) status under the Qualified Intermediary (QI) agreement and implementing the QDD regime on time. Therefore, the phased-in application of certain rules will allow an orderly implementation of 871(m) rules.

In general, the notice sets forth the following timelines:

- **2017:**
 - o The IRS will take into account the “good faith efforts” made by the taxpayer to comply with 871(m) regulations for delta-one transactions (efforts to build or update its documentation and withholding systems, to report information to counterparties, etc.)
 - o Withholding agents may rely on more relaxed rules with regards to the treatment of “combined transactions” and remittance of amounts withheld
 - o A QDD’s section 871(m) liability is to be determined by calculating the net delta exposure of the QDD
- **2018:**
 - o The IRS will take into account the extent to which the taxpayer or withholding agent made a good faith effort to comply with the section 871(m) regulations in enforcing the section 871(m) regulations for any non-delta-one transaction

- **Other provisions stated:**

- o Deadline for prospective QDDs to apply for QDD status is set up for the 31 March 2017, with a retroactive effect as of 1 January 2017 (if accepted by the IRS)
- o Section 871(m) regulations will not apply to certain existing exchange-traded notes until 1 January 2020

Luxembourg banks, custodians, investment funds, brokers, and investors alike that issue, trade, or are part of the payment chain for instruments caught by section 871(m) are encouraged to assess their state of readiness and start implementing section 871(m) rules in order to be able to demonstrate that good faith efforts have been made in this respect.

If you have any queries regarding the above, please do not hesitate to contact us.

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