

*本文本以中文和英文两种文字书写。中文和英文版本若出现不一致，应以英文版本为准。

美国联邦税务局关于在分阶段实施期内执行和管理 871(m) 条款以及相关预扣税条款的通告 通告第 2016-76 号

一、目的

本通知旨在为纳税人提供相关的指南，以帮助在 2017 年和 2018 年遵守《美国税法》（下称税法）第 871 条第 (m) 款、第 1441、1461 和 1473 条下的最终和临时规定（统称为 871(m) 条款规定），并说明了美国联邦税务局 (IRS) 将如何在 2017 年和 2018 年管理这些规定。由于 871(m) 条款的规定预计将会修正，美国财政部和 IRS 已经确定，分阶段实施第 871(m) 条款规定中的某些规则，有利于促进这些规定的实施。评论人士指出，纳税人和预扣代理人将在 2017 年 1 月 1 日的生效日期前遵守 871(m) 条款规定的某些方面遇到挑战，这包括设计、建设和测试针对交易商、发行人和其他预扣代理人的新预扣和报告基础设施；实施有关付款代理人 and 清算组织的新系统要求；以及增强和开发相关数据来源以确定相关交易是否属于 871(m) 条款交易¹。此外，某些纳税人可能会在及时依据合格中介 (QI) 预扣而协议 (QI 协议) 申请合格衍生品交易商 (QDD) 身份并实施 QDD 制度方面遇到额外的挑战。财政部和 IRS 确定，通过本次通告分阶段实施某些规则，并结合对最终和临时规定的预期调整，将有利于 871(m) 条款规定的有序实施。

如本通告第三部分所详细描述，本通告规定如下：

· 对于 2017 年²，IRS 在针对任何 Delta One（中性对冲）交易执行的 871(m) 条款时，将考虑纳税人或预扣代理人诚信遵守 871(m) 条款规定的程度；

¹ 除非另有规定，在本通告中，已在 871(m) 条款规定以及通告第 2016-42 号中拟议的 QI 协议中定义的术语（例如“871(m) 条款交易”、“合格衍生品交易商”、“Delta”、“等效股息”、“标的证券”、“付款”和“QDD 纳税责任”）具有相关文件中规定的含义。

2 除非另有规定，所称年是指日历年。

- 对于 2018 年，IRS 在针对任何非 Delta One（中性对冲）交易执行的 871(m) 条款时，将考虑纳税人或预扣代理人诚信遵守 871(m) 条款规定的程度；
- 对于 2017 年，预扣代理人可以采用简化的标准来确定交易是否是符合第 1.871-15 条第 (n) 款的合并交易；
- 对于 2017 年，预扣代理人可以按季度汇缴针对等效股息付款预扣的金额；
- 对于 2017 年及以后年度，QDD 的 871(m) 条款金额将通过计算 QDD 的净 Delta 敞口来确定；
- 对于 2017 年，IRS 在执行这些规定时将考虑 QDD 诚信遵守 QI 协议中 QDD 规定的程度；
- 潜在的 QDD 可以在 2017 年 3 月 31 日或之前申请 QDD 身份，如其申请被 IRS 接受，则将从 2017 年 1 月 1 日起具有 QDD 身份；
- 在获得 QI-EIN 前，QDD 可以在表格 W-8IMY 中提供一段声明，表明该 QDD “正在申领 QI-EIN”，并且预扣代理人可以在本通告允许的范围内依赖该声明；并且
- 871(m) 条款规定将在 2020 年 1 月 1 日前不适用于本通告第三部分第 D 节特别列出的某些现有交易所交易型票据。

第 1.871-15 条第 (o) 款规定的反滥用规则在本通告规定的分期实施年度适用。因此，本不会被视为 871(m) 条款交易的交易（包括因本通告的原因）可能依据第 1.871-15 条第 (o) 款成为 871(m) 条款交易。

二、背景

871(m) 条款出于第 3 章和第 4 章，以及第 871 条第 (a) 款、第 881 条和第 4948 条第 (a) 款之目的将等效股息付款视为美国来源的股息。因此，等效股息付款是出于第 1441 条至第 1443 条之目的应当预扣税（如第 1441-2 条第 (a) 款所定义）的金额，以及出于第 1471 条和第 1472 条之目的可预扣税的付款（如第 1473-1 条第 (a) 款所定义）。相应地，预扣代理人通常必须从支付给外国人的任何等效股息付款中按 30% 的税率预扣税收，但依据税法或其下的条例或适用的所得税协定适用豁免或更低税率的除外。

财政部和 IRS 分多个部分发布了 871(m) 条款规定。2013 年 12 月 5 日，最终规定 (TD 9648) 通过 78 FR 73079 发布。2015 年 9 月 18 日，最终规定和临时规定 (TD 9734) 通过 80 FR 56866 发布（2015 年最终规定）。此外在 2015 年 9 月 18 日，联邦公报通过 80 FR 56415 交叉引用临时规定的方式发布了拟议规则制定通告并发布了公开听证通告（2015 年拟议规定）。2015 年 12 月 7 日，联邦公报通过 80 FR 75946 发布了对 2015 年最终规定的更正。

2016 年 7 月 1 日，财政部和 IRS 发布通告第 2016-42 号 (2016-29 IRB 67)，其中包含一份拟议的 QI 协议（拟议 QI 协议），说明了将适用于 QDD 的要求和义务。财政部和 IRS 收到了有关通告第 2016-42 号的书面意见。财政部和 IRS 在考虑这些意见后，计划在 2016 年底前发布最终的 QI 协议。最终 QI 协议将于 2017 年 1 月 1 日或以后生效。

三、分阶段实施期间对 871(M) 条款的执行和合规管理

这一部分说明了对 871(m) 条款规定的分阶段适用。本通告不适用于依据第 1.871-15 条第 (d) 条款第 (1) 项属于 871(m) 条款交易的任何交易。

A. Delta-One 和非 Delta-One 交易的分阶段适用

本通告宣布，财政部和 IRS 计划修改 871(m) 条款规定对于特定交易的适用日期。

1. Delta-One 交易的 2017 分阶段实施年度

第 1.871-15 条第 (d) 款第 (2) 项和第 (e) 款将继续适用于与在 2017 年 1 月 1 日或之后发行的，具有 Delta One 功能的任何潜在 871(m) 条款交易有关的付款——包括依据第 1.871-15 条第 (n) 款属于合并交易的交易（执行本通告第三部分第 B 节中的简化标准）。但是，如本通告第三部分第 A 节第 3 条所述，对于纳税人和预扣代理人而言，2017 年将是依据第 1.871-15 条第 (d) 款第 (2) 项或第 (e) 款属于 871(m) 条款交易的 Delta One 交易的分阶段实施年度。

2. 非 Delta-One 交易的 2018 分阶段实施年度

财政部和 IRS 确定，对于除 Delta One 交易以外的 871(m) 条款交易（非 Delta One 交易），包括依据第 1.871-15 条第 (n) 款属于合并交易的交易，纳税人和预扣代理人需要额外的时间来实施 871(m) 条款规定。因此，财政部和 IRS 计划修订第 1.871-15 条第 (d) 款第 (2) 项和第 (e) 款，以不适用于在 2018 年 1 月 1 日前发行的任何非 Delta One 交易的相关付款。此外，对于依据第 1.871-15 条第 (d) 款第 (2) 项或第 (e) 款属于 871(m) 条款交易的任何非 Delta One 交易，2018 年将是分阶段实施年度。

3. IRS 在分阶段实施期间的执行和管理

在相关分阶段实施年度执行 871(m) 条款规定时，IRS 将考虑纳税人或预扣代理人诚信遵守 871(m) 条款规定的程度。例如，IRS 将考虑预扣代理人是否在诚信 (1) 建设或更新其文件记录和预扣系统，以遵守 871(m) 条款规定；(2) 确定交易是否属于第 1.871-15 条第 (n) 款下的合并交易（考虑本通告第三部分第 B 节有关 2017 年的简化标准）；(3) 向交易的其他当事方报告信息（根据第 1.871-15 条第 (p) 款的要求）；以及 (4) 在 2018 年实施第 1.871-15 条第 (h) 款规定的实质性等效测试。任何人未诚信努力遵守 871(m) 条款规定的，将不能享受 IRS 的管理或执法豁免，包括罚金。

2017 年，预扣代理人如果在任何日历季度最后一日或之前缴存为该日历季度的等效股息付款预扣的金额，则视为已经及时履行 871(m) 条款有关等效股息付款的缴存要求。预扣代理人应在 2017 纳税年度的表格 1042 纳税申报表的顶端中央位置写明” 通告第 2016-76 号 “字样。此外，对于 2017 年，纳税人可以继续依赖通告第 2010-46 号。通告第 2010-46 号将于 2018 年 1 月 1 日作废。

B. 确定交易是否属于合并交易的简化标准

在确定交易是否属于 871(m) 条款交易时，两个或以上的交易如何符合下列条件，则可视为单笔交易：(1) 多方（或相关人）订立了多个参考同一标的证券的交易；(2) 合并后的潜在 871(m) 条款交易复制了一项交易属于 871(m) 条款交易时的经济特征，并且 (3) 订立的这些交易相互有关。第 1.871-15 条第 (n) 款。在适用此合并规则时，如果符合下列情况，则作为空方的经纪商可以假定（除非事实上知道存在相反的情况）订立的交易并非相互关联：(1) 多方在独立的账户中持有交易，但经纪商实际上知道这些独立的账户是为了规避 871(m) 条款而创建或使用的除外；或者 (2) 交易是在两个或以上不同的工作日订立的。

对最终 871(m) 条款规定的意见指出，预扣代理人要遵守此合并规则，将需要开发新型复杂的系统来识别所订立的相互关联的交易。这些意见建议，将现有的规则替换为要求在预扣代理人实际上知道合约的定价、营销或出售相互关联时合并合约。财政部和 IRS 确定，” 定价、营销或出售 “标准不能为合并规则提供充分的长期替代，并且将损害 871(m) 条款规定的执行。

不过，本通告提供了一个简化的标准，以便预扣代理人确定在 2017 年订立的交易是否属于合并交易。预扣代理人只需在交易属于场外交易并且其定价、营销或出售相互关联时，出于确定相关交易是否属于 871(m) 条款交易时合并 2017 年订立的交易。预扣代理人无需合并 2017 年订立的任何上市证券交易。

在 2017 年订立且依据此简化标准合并的交易，将在未来年度继续视为合并交易，不因适用第 1.871-15 条第 (n) 款或处置不足全部依据此规则合并的潜在 871(m) 条款交易而停止视为合并交易。在 2017 年订立但未依据此简化标准合并的交易，将不因第 1.871-15 条第 (n) 款在未来年度适用于这些交易而成为合并交易，但重新发行或其他事件导致需要重新评估相关交易以确定其是否属于 871(m) 条款交易的除外。此简化标准仅适用于预扣代理人，不适用于属于潜在 871(m) 条款交易多方的纳税人。

C. 合格衍生品交易商的分阶段实施年度

允许属于合格实体的 QI 成为 QDD，但前提是该实体依据第 1.1441-1 条第 (e) 款第 (5) 项和第 (6) 项订立了 QI 协议。通常，在 QDD 遵守 QI 协议下的 QDD 义务的前提下，第 1.1441-1 条第 (e) 款第 (6) 项中描述的 QDD 将依据第 881 条对其作为股票衍生品交易商收到的等效股息付款承担纳税责任，但仅限本通告第三部分第 C 节第 1 段中描述的范围。

意见请求为合格实体给予充分的时间，以便订立 QI 协议、确定其 QDD 纳税责任以及遵守相应的报告和预扣义务。为促进 QDD 制度的实施，本通告第三部分第 C 节第 2 段说明了 IRS 将如何在 2017 年管理 QDD 规则。

1. QDD 的 871(m) 条款金额的净 Delta 计算

QDD 负责依据第 881 条第 (a) 款第 (1) 项为该 QDD 收到的实物股份股息或视同股息（统称为“实际股息”）纳税。但第 1.871-15T 条第 (q) 款第 (1) 项规定，QDD 可免于就 QDD 作为股票衍生品交易商收到的实际股息和等效股息执行第 3 章和第 4 章下的预扣，但如果 QDD 因标的证券收到的股息和等效股息付款超过 QDD 有义务为同一标的证券的相同股息政府的等效股息付款，QDD 仍需依据第 881 条纳税。本通告宣布，财政部和 IRS 计划修订第 1.871-15 条第 (q) 款第 (1) 项，以规定对于 QDD 收到的实际股息，其将继续承担第 881 条第 (a) 款第 (1) 项下的纳税责任，并且承担第 3 章和第 4 章下的预扣义务，并且 QI 协议将规定 QDD

的“871(m) 条款金额”将通过计算 QDD 在第 1.871-15 条第 (j) 款第 (2) 项规定的日期的净 Delta 敞口（以股份数量衡量），再乘以相关的每股股息金额来确定。QDD 的净 Delta 敞口将通过加总 QDD 以其股票衍生品交易商身份就某个标的证券订立的所有现货头寸以及潜在的 871(m) 条款交易（如第 1.871-15 条第 (a) 款第 (12) 项所定义）来确定。如果 QDD 出于非税务商业目的计算净 Delta 敞口，该净 Delta 敞口通常也将是为此目的使用的 Delta。QDD 对于与某个标的证券有关的 871(m) 条款金额的纳税责任，将减去（但不得低于零）QDD 以其股票衍生品交易商身份依据第 881 条第 (a) 款第 (1) 项因收到同一标的证券的同一股息付款而缴纳的税收金额。

2. 适用于 QDD 的全面分阶段实施年度

IRS 在 2017 年执行和管理 871(m) 条款规定中的 QDD 规则以及 QI 协议中的相关规定时，IRS 将考虑 QDD 诚信遵守 871(m) 条款规定以及 QI 协议的相关规定的程度。QI 协议将相应规定，在 QDD 诚信努力遵守 QI 协议相关条款的前提下，QDD 将被视为在 2017 年满足 QI 协议下特别适用于该 QDD 的义务。任何 QDD 未诚信努力履行其 QDD 义务的，将不能在 2017 年享受 IRS 的管理或执法豁免，包括罚金。

3. QI 协议的生效日期

通告第 2016-42 号中所述拟议的 QI 协议规定了一个三个月的窗口期，以便 QI 协议在日历年度内适用。具体而言，拟议的 QI 协议第 2.23 条允许潜在的 QI 在任何给定年度 3 月 31 日之前申请，从而规定其 QI 协议在该年 1 月 1 日生效，潜在的 QI 如果在给定年度 3 月 31 日后申请，并且未在提交申请之日前收到任何可报告付款的，该 QI 协议的生效日期也将为该年 1 月 1 日。潜在的 QI 如果在给定年度 3 月 31 日后申请，并且在提交申请之日前已经收到任何可报告付款的，该 QI 协议的生效日期将为 QI 申请完成并且 QI 收到其 QI-EIN 的首月第一

日。QI 申请其 QI 协议续期时，在 2017 年 3 月 31 日续期的 QI 协议的生效日期将为 2017 年 1 月 1 日。

4. QI 申请待处理期间或申报前证明 QDD 身份

QDD 必须向预扣代理人提供一份有效的表格 W-8IMY，证明其是一家 QDD，并且预扣代理人无需就其向担任 QDD 身份的 QDD 支付的，与潜在 871(m) 条款交易（包括实际的 871(m) 条款交易）有关的任何付款进行预扣。在其 QI 协议和 QDD 身份获批之前，如果申请人在 2017 年 3 月 31 日或之前提交了申请 QDD 身份的 QI 申请，则在其提交申请 QDD 身份的 QI 申请之月后满足六个完整月度前，可以在表格 W-8IMY 中声明其是一家 QDD。如果申请人尚未提交申请 QDD 身份的 QI 申请，但计划在 2017 年 3 月 31 日或之前提交该申请，则可以在其实际提交申请 QDD 身份的 QI 申请之月后满足六个完整月度前，在表格 W-8IMY 中声明其是一家 QDD，但前提是其在 2017 年 3 月 31 日前提交该申请。但是，如果 QDD 不再计划在 2017 年 3 月 31 日前提交申请 QDD 身份的 QI 申请，或者其申请被驳回，则 QDD 申请人不得声明其属于 QDD。此外，如果申请人收到 IRS 的通知，告知该 QDD 申请人在申请人的 QI 和 QDD 身份获批之前不得作出前述声明，则申请人不得声明其是 QDD。（IRS 通常仅在申请实质上不完整或者 IRS 初步确定其将不会与申请人订立 QI 协议或者该申请人不是合格实体时发出此类通知。）

申请人在其 QDD 申请获批之前证明其 QDD 身份的，如果申请人有下列情况的，必须立即通知其之前作出证明的预扣代理人，告知其不再符合 QDD 资格：(1) 申请人确定其不在计划在 2017 年 3 月 31 日前提交申请 QDD 身份的 QI 申请；(2) 申请人未在 2017 年 3 月 31 日前提交申请；或者 (3) 其申请被驳回。预扣代理人在提交其表格 1042 时必须向 IRS 告知其收到的任何通知，列明其 QDD 证明因上述任何原因而被撤销的每个人的名称和 EIN（如有）。申请人向预扣代理人提供一份包含 QDD 证明的有效表格 W-8IMY 的，预扣代理人无需就其在

QDD 以本人身份行事（即不是中介）向 QDD 支付的，与潜在 871(m) 条款交易有关的任何付款进行预扣，但其已被通知 W-8IMY 不再有效（包括出于上述原因）的除外。

预扣代理人必须对支付给 QDD 的实际股息进行预扣，无论 QDD 是以股票衍生品经纪商身份还是其他身份收到该股息。

5. 在收到 QI-EIN 之前证明 QDD 身份并缴存预扣金额

IRS 将在批准 QI 申请后颁发 QI 雇主识别号码 (QI-EIN)。申请人收到 IRS 颁发的 QI-EIN 后，必须在申请人作为 QDD 提供的任何表格 W-8IMY 中填写其 QI-EIN。如果申请人必须在收到 QI-EIN 之前向预扣代理人提供证明其 QDD 身份的表格 W-8IMY，则申请人应在表格第一部分第 8 行填写“正在申领 QI-EIN”，以说明其正在申领 QI-EIN。如果申请人在表格 W-8IMY 中填写了“正在申领 QI-EIN”，则必须在 QDD 收到 QI-EIN 后尽快将其 QI-EIN 提供给预扣代理人。但只要原始表格中的所有信息继续有效，则申请人无需在收到其 QI-EIN 后或收到完整签署的 QI 协议后提供包含其 QI-EIN 的新签署的表格 W-8IMY。申请人可以按照申请人与其预扣代理人商定的任何方式，将其 QI-EIN 提供给预扣代理人。如果申请人的 QDD 申请被驳回，则必须立即通知预扣代理人。

预扣代理人收到包含“正在申领 QI-EIN”声明的表格 W-8IMY 后，可以将提供该表格的人视为 QDD，除非预扣代理人知道或者有理由知道该表格的提供者不能有效地声明其属于 QDD。预扣代理人无需确定 QDD 何时申请了协议或者 QDD 是否确实掌握了完全签署的协议。预扣代理人还无需核实 QDD 的 EIN 是否是 QI-EIN。预扣代理人在收到包含“正在申领 QI-EIN”声明的表格 W-8IMY 后，仅可以依赖该表格最长六个月，除非在此期间向预扣代理人提供了 QI-EIN。

QDD 未在其收到 QI-EIN 前缴存预扣的金额，只要 QDD 在收到其 QI-EIN 后 3 天内缴存 QDD 之前必须缴存的任何金额，则 IRS 将不会收取任何罚金。此外，如果 QDD 在收到 QI-

EIN 后 30 天内注册联邦电子缴税系统 (EFTPS)，只要 QDD 在注册 EFTPS 后 3 天内缴存 QDD 之前必须缴存的任何金额，则 IRS 将不会收取罚金。

D. 具有延后生效日期的交易所交易型票据 (ETN)

参考标的证券并且属于 Delta One 交易的 ETN 从 2017 年 1 月 1 日全面受第 871 条第 (m) 款约束。财政部和 IRS 知道这些 ETN 中有相当数量在 2015 年最终规定发布前已经存在并且在持续发行 [即发行人在持续依据与原始 ETN 证券相同的发行文件“创设”（即发行并出售）新的 ETN]。新创设的 ETN 的证券代码和 CUSIP 代码与之前发行的 ETN 相同，因此与之前依据同一发行文件发行的 ETN 可相互替代。不过，依据 871(m) 条款规定属于 Delta One 交易，但在 2017 年 1 月 1 日前发行的 ETN 无需进行 871(m) 条款预扣，而在 2017 年 1 月 1 日后以后新创设的同等 ETN 将需要进行 871(m) 条款预扣。这一差异将导致本来相同的 ETN 在税务上无法相互替代，即使它们在商业和其他法律目的上无法区别。

为方便发行人注销识别出的 ETN，保持可相互替代性，并维护市场流动性，财政部和 IRS 计划修改第 1.871-15 条第 (r) 款第 (3) 项，以规定第 1.871-15 条第 (d) 款第 (2) 项和第 (e) 款（分别针对指定 NPC 和指定 ELI）将在 2020 年 1 月 1 日前不适用于下列 ETN（按名称、证券代码和 CUSIP 代码识别）：

<u>证券代码</u>	<u>ETN 名称</u>	<u>CUSIP</u>
CAPE	BARCLAYS ETN+ SHILLER CAPE	06742A669
CEFL	ETRACS MONTH PAY 2X LEV C/E	90270L842
CSLS	X-LINKS LONG/SHORT EQUITY	22542D878
CSMA	X-LINKS MERGER ARBITRAGE ETN	22542D845
DIVC	C-TRACKS ETN MILLER/HOWARD	17322H149

DOD	ELEMENTS-DOGS OF DOW	25153Q658
DVYL	ETRACS 2X DJ SEL DVD ETN	90268G607
EEH	ELEMENTS SPECTRUM ETN	870297504
FBG	FI ENHANCED BIG CAP GR ETN	90267L508
FBGX	FI ENHANCED LARGE CAP GROWTH	902677780
FIBG	CS FI ENHANCED BIG CAP GROW	22539T563
FIEG	FI ENHANCED GLOBAL HI YLD	25155L293
FIGY	FI ENHANCED GLOBAL HIGH YLD	06742C152
FLGE	FI LARGE CAP GROWTH ENHANCED	22542D423
GCE	CLAYMORE CEF GS CONNECT ETN	362273104
HDLV	ETRACS 2X HI DIV LOW VOL ETN	90270L727
HOML	ETRACS MON RST 2XLEV ISE EX	90274P302
HOMX	ETRACS ISE EXCLUSIV HOMEBUIL	90274P310
LRET	ETRACS MONTHLY PAY 2XLEVERAG	90274R100
MORL	ETRACS MONTHLY PAY 2XLEVERAG	90269A302
RODI	BARCLAYS RETURN ON DISABILIT	06740D830
SDYL	ETRACS 2X S&P DVD ETN	90267L409
SMHD	ETRACS MON PAY 2X LEV US SM	90274D838
WIL	BARCLAYS WOMEN IN LEADERSHIP	06742W430
WMW	ELEMENTS LKD TO MORNINGSTAR	25153Q708

针对是否有其他的 Delta One ETN 未包含在此名单中但在 2015 年 9 月 18 日前已经存在，并且将在 2017 年 1 月 1 日进行 871(m) 条款预扣，也征求了意见。财政部和 IRS 将考虑通过发布指南或通过定向裁定函的方式，允许其他符合这些条件的 ETN 执行延后的生效日期（如适当）。

四、在提交表格 1042 的截止日期（无延期）前调整预扣不足的情况

依据第 1.1461-2 条第 (b) 款的规定，预扣代理人如果未对支付给受益所有人的款项进行预扣，则可以通过未来对该受益所有人的付款进行预扣，也可利用其为该受益所有人保管的财产或其控制的财产来履行纳税义务。前述额外预扣或履行纳税义务的时间不得晚于为预扣不足年度提交表格 1042 的截止日期（不含延期）。依据 IRS 对第 1.1461-2 条第 (b) 款的解释，预扣代理人依据前述程序进行预扣不足调整的，只要其及时缴存额外的预扣金额或另行取得的金额，将不会因怠于缴存或怠于付款而面临第 6656 条、第 6672 条和第 7202 条下的罚金。因此，预扣代理人如果未对支付给外国人的等效股息付款进行预扣，可以依赖第 1.1461-2 条第 (b) 款规定的程序，在发生预扣不足的年度次年 3 月 15 日前调整其预扣不足的情况，从而避免遭受罚金。

五、起草信息

本通告的主要编制人员为副首席法律顾问（国际）办公室的 D. Peter Merkel 和 Karen Walny。如需有关本通告的进一步信息，请致电 (202) 317-6938（非免费电话）联系 Merkel 先生或 Walny 女士。

IRS Enforcement and Administration of Section 871(m) and Related Withholding Provisions During the Phase-In Period

Notice 2016-76

I. PURPOSE

This notice provides taxpayers with guidance for complying with final and temporary regulations under sections 871(m), 1441, 1461, and 1473 of the Internal Revenue Code (the Code) (collectively, referred to as the section 871(m) regulations) in 2017 and 2018, and explains how the Internal Revenue Service (IRS) intends to administer those regulations in 2017 and 2018. Because amendments to the section 871(m) regulations are expected, the Treasury Department and the IRS have determined that it is appropriate to phase in the application of certain rules in the section 871(m) regulations to facilitate the implementation of those regulations. Comments have noted that taxpayers and withholding agents will face challenges complying with certain aspects of the section 871(m) regulations by their applicability date of January 1, 2017. Those challenges include designing, building, and testing new withholding and reporting infrastructure for dealers, issuers, and other withholding agents; implementing new system requirements for paying agents and clearing organizations; and enhancing and developing data sources for determining whether transactions are section 871(m) transactions.¹ In addition, certain taxpayers

¹ Unless otherwise provided, for purposes of this notice, terms that are defined in the section 871(m) regulations and in the proposed QI agreement in Notice 2016-42 (for example, "section 871(m) transaction,"

may face additional challenges applying for status as a qualified derivatives dealer (QDD) under the Qualified Intermediary (QI) withholding agreement (QI agreement) and implementing the QDD regime in a timely manner. The Treasury Department and the IRS have determined that the phased-in application of certain rules as provided by this notice—in combination with the expected changes to the final and temporary regulations—will allow for the orderly implementation of the section 871(m) regulations.

As described in detail in section III of this notice, this notice provides as follows:

- For 2017,¹ 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 delta-one transaction;
- For 2018, 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;
- For 2017, withholding agents may rely on a simplified standard for determining whether transactions are combined transactions pursuant to §1.871-15(n);

“qualified derivatives dealer,” “delta,” “dividend equivalent,” “underlying security,” “payment,” and “QDD tax liability”) have the meanings described in those documents.

¹ Unless otherwise provided, all references to years refer to calendar years.

- For 2017, withholding agents may remit amounts withheld for dividend equivalent payments quarterly;
- For 2017 and following years, a QDD's section 871(m) amount is to be determined by calculating the net delta exposure of the QDD;
- For 2017, the IRS will take into account the extent to which the QDD made a good faith effort to comply with the QDD provisions in the QI agreement when enforcing those provisions;
- Prospective QDDs may apply for QDD status on or before March 31, 2017, and, if accepted by the IRS, be treated as having QDD status as of January 1, 2017;
- Before receiving a QI-EIN, QDDs may provide a statement on a Form W-8IMY that the QDD is "awaiting QI-EIN," and withholding agents may rely on this statement, to the extent permitted in this notice; and
- The section 871(m) regulations will not apply to certain existing exchange-traded notes specifically identified in section III.D of this notice until January 1, 2020.

The anti-abuse rule provided in §1.871-15(o) will apply during the phase-in years described in this notice. As a result, a transaction that would not otherwise be treated as a section 871(m) transaction (including as a result of this notice), may be a section 871(m) transaction under §1.871-15(o).

II. BACKGROUND

Section 871(m) treats dividend equivalent payments as U.S. source dividends for purposes of chapters 3 and 4 and sections 871(a), 881, and 4948(a). As a result, dividend equivalent payments are amounts subject to withholding (as defined in §1.1441-2(a)) for purposes of sections 1441 through 1443 and withholdable payments (as defined in §1.1473-1(a)) for purposes of sections 1471 and 1472. Accordingly, a withholding agent generally is required to deduct and withhold a tax equal to 30 percent on any dividend equivalent payment made to a foreign person unless an exception from, or lower rate of, withholding applies pursuant to the Code or regulations thereunder, or an applicable income tax treaty.

The Treasury Department and the IRS issued the section 871(m) regulations in several parts. On December 5, 2013, final regulations (TD 9648) were published at 78 FR 73079. On September 18, 2015, final regulations and temporary regulations (TD 9734) were published at 80 FR 56866 (2015 final regulations). Also on September 18, 2015, the Federal Register published a notice of proposed rulemaking by crossreference to temporary regulations and a notice of public hearing at 80 FR 56415 (2015 proposed regulations). Correcting amendments to the 2015 final regulations were published on December 7, 2015, in the Federal Register at 80 FR 75946, and on December 7, 2015, in the Federal Register at 80 FR 75956.

On July 1, 2016, the Treasury Department and the IRS released Notice 2016-42, 2016-29 IRB 67, containing a proposed QI agreement (the proposed QI

agreement) that describes requirements and obligations that will be applicable to QDDs. The Treasury Department and the IRS have received written comments on Notice 2016-42. The

Treasury Department and the IRS intend to publish a final QI agreement before the end of 2016, taking into account these comments. The final QI agreement will be effective on or after January 1, 2017.

III. ENFORCEMENT AND ADMINISTRATION OF COMPLIANCE WITH SECTION 871(M) DURING THE PHASED-IN YEARS

This section describes the phased-in application of the section 871(m) regulations. This notice does not apply to any transaction that is a section 871(m) transaction pursuant to §1.871-15(d)(1).

A. Phased-In Application for Delta-One and Non-Delta-One Transactions

This notice announces that the Treasury Department and the IRS intend to amend the applicability dates of the section 871(m) regulations with respect to certain transactions.

1. *2017 Phase-in Year for Delta-One Transactions*

Section 1.871-15(d)(2) and (e) will continue to apply with respect to any payment made with respect to any potential section 871(m) transaction issued on or after January 1, 2017, that has a delta of one—including a transaction that is a combined transaction under §1.871-15(n) (subject to the simplified standard provided in section III.B of this notice). However, as described in section III.A.3 of this notice, for taxpayers and withholding agents 2017 will be a phase-in year for any

delta-one transaction that is a section 871(m) transaction pursuant to §1.871-15(d)(2) or (e).

2. *2018 Phase-in Year for Non-Delta-One Transactions*

The Treasury Department and the IRS have determined that taxpayers and withholding agents need additional time to implement the section 871(m) regulations with respect to section 871(m) transactions other than delta-one transactions (nondelta-one transactions)—including transactions that are combined transactions under

§1.871-15(n). Therefore, the Treasury Department and the IRS intend to revise §1.871-15(d)(2) and (e) to not apply to any payment made with respect to any non-delta-one transaction issued before January 1, 2018. In addition, 2018 will be a phase-in year for any non-delta-one transaction that is a section 871(m) transaction pursuant to §1.871-15(d)(2) or (e).

3. *IRS Enforcement and Administration During the Phase-In Years*

When enforcing the section 871(m) regulations for the applicable phase-in year, 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. For example, the IRS will take into account whether a withholding agent made a good faith effort to (1) build or update its documentation and withholding systems to comply with the section 871(m) regulations; (2) determine whether transactions are combined transactions under §1.871-15(n) (taking into account the simplified

standard in section III.B of this notice for 2017); (3) report information to other parties to a transaction (as required under §1.871-15(p)); and (4) implement the substantial equivalence test provided in §1.871-15(h) for 2018. Any person that did not make a good faith effort to comply with the section 871(m) regulations will not be given relief from IRS administration or enforcement, including penalties.

During 2017, a withholding agent will be considered to have timely satisfied its deposit requirements for section 871(m) dividend equivalent payments if it makes deposits of amounts withheld for dividend equivalents during any calendar quarter on or before the last day of that calendar quarter. The withholding agent should write "Notice 2016-76" on the center, top portion of the tax year 2017 Form 1042 tax return.

In addition, during 2017, taxpayers may continue to rely on Notice 2010-46. Notice 2010-46 will be obsoleted as of January 1, 2018.

B. Simplified Standard for Determining Whether Transactions Are Combined Transactions

For purposes of determining whether transactions are section 871(m) transactions, two or more transactions are treated as a single transaction when (1) a long party (or a related person) enters into multiple transactions that reference the same underlying security, (2) the combined potential section 871(m) transactions replicate the economics of a transaction that would be a section 871(m) transaction, and (3) the transactions were entered into in connection with each other. §1.871-15(n). In applying this combination rule, a broker acting as a short party may presume (absent actual knowledge to the contrary) that transactions are not entered

into in connection with each other if (1) the long party holds the transactions in separate accounts, unless the broker has actual knowledge that the separate accounts were created or used to avoid section 871(m), or (2) the transactions are entered into two or more business days apart.

Comments to the final section 871(m) regulations noted that for withholding agents to comply with this combination rule would require the development of novel and complicated systems to identify transactions entered into in connection with each other. These comments recommended replacing the existing rule with a requirement to combine contracts if the withholding agent has actual knowledge that the contracts were priced, marketed, or sold in connection with each other. The Treasury Department and the IRS have determined that the “priced, marketed, or sold” standard would provide an inadequate long-term substitute for the combination rule and would undermine enforcement of the section 871(m) regulations.

However, this notice provides a simplified standard for withholding agents to determine whether transactions entered into in 2017 are combined transactions. A withholding agent will only be required to combine transactions entered into in 2017 for purposes of determining whether the transactions are section 871(m) transactions when the transactions are over-the-counter transactions that are priced, marketed, or sold in connection with each other. Withholding agents will not be required to combine any transactions that are listed securities that are entered into in 2017.

Transactions that are entered into in 2017 that are combined under this simplified standard will continue to be treated as combined transactions for future years and will not cease to be combined transactions as a result of applying §1.871-15(n) or disposing of less than all of the potential section 871(m) transactions that are combined under this rule. Transactions that are entered into in 2017 that are not combined under this simplified standard will not become combined transactions as a result of applying §1.871-15(n) to these transactions in future years, unless a reissuance or other event causes the transactions to be retested to determine whether they are section 871(m) transactions. This simplified standard only applies to withholding agents, and does not apply to taxpayers that are long parties to potential section 871(m) transactions.

C. Phase-in Year for Qualified Derivatives Dealers

A QI that is an eligible entity is permitted to be a QDD, provided that the entity enters into a QI agreement under §1.1441-1(e)(5) and (6). Generally, a QDD described in §1.1441-1(e)(6) will be liable for tax under section 881 on the dividend equivalents it receives in its capacity as an equity derivatives dealer only to the extent described in paragraph III.C.1 of this notice, provided that the QDD complies with its QDD obligations under the QI agreement.

Comments requested that eligible entities be given sufficient time to enter into QI agreements, determine their QDD tax liability, and comply with their reporting and withholding obligations. To facilitate implementation of the QDD system, paragraph

III.C.2 of this notice describes how the IRS will administer the QDD rules for 2017.

1. *Net Delta Computation for QDD's Section 871(m) Amount*

A QDD is liable for tax under section 881(a)(1) on dividends on physical shares or deemed dividends (together "actual dividends") received by the QDD. Section 1.87115T(q)(1), however, provides that a QDD is exempt from withholding under chapters 3 and 4 on actual dividends and dividend equivalents that the QDD receives in its capacity as an equity derivatives dealer, although the QDD remains liable for tax under section 881 to the extent that dividends and dividend equivalent payments the QDD receives on an underlying security exceed the dividend equivalent payments the QDD is obligated to make with respect to the same dividend on the same underlying security. This notice announces that the Treasury Department and the IRS intend to revise §1.871-15(q)(1) to provide that a QDD will remain liable for tax under section 881(a)(1) and subject to withholding under chapters 3 and 4 on actual dividends it receives, and that the QI agreement will provide that a QDD's "section 871(m) amount" will be determined by calculating the net delta exposure (measured in number of shares) of the QDD on the date provided in §1.871-15(j)(2), multiplied by the relevant dividend amount per share. A QDD's net delta exposure will be determined by aggregating the delta of all physical positions and potential section 871(m) transactions (as defined in §1.87115(a)(12)) with respect to an underlying security entered into by the QDD in its equity derivatives dealer capacity. If a QDD calculates net delta for non-tax business purposes, that net delta ordinarily will be the delta used for this purpose. A QDD's

tax liability on the section 871(m) amount associated with an underlying security will be reduced (but not below zero) by the amount of tax paid by the QDD in its capacity as an equity derivatives dealer under section 881(a)(1) on the receipt of the same dividend payment on that same underlying security.

2. *General Phase-in Year for QDDs*

For purposes of the IRS's enforcement and administration of the QDD rules in the section 871(m) regulations and the relevant provisions of the QI agreement for 2017, the IRS will take into account the extent to which the QDD made a good faith effort to comply with the section 871(m) regulations and the relevant provisions of the QI agreement. The QI agreement will accordingly provide that a QDD will be considered to satisfy the obligations that apply specifically to a QDD under the QI agreement for 2017 provided that the QDD made a good faith effort to comply with the relevant terms of the QI agreement. Any QDD that has not made a good faith effort to comply with its QDD obligations will not be given any relief from IRS administration or enforcement during 2017, including penalties.

3. *Effective Date of QI Agreement*

The proposed QI agreement described in Notice 2016-42 provides a three-month window in which to apply for a QI agreement within a calendar year. In particular, section 2.23 of the proposed QI agreement allows a prospective QI to have its QI agreement effective as of January 1 in any given year in which the QI applies on or before March 31 of that year. For a prospective QI that applies after

March 31 of a given year and that has not received any reportable payments before the date the application is submitted, the effective date of the QI agreement will be January 1 of that year. For a prospective QI that applies after March 31 of a given year and that has received a reportable payment in the year before the date the application is submitted, the effective date of the QI agreement will be the first day of the first month in which both the QI application is complete and the QI has received its QI-EIN. For a QI that is renewing its QI agreement, the effective date of the QI agreement when renewed by

March 31, 2017, will be January 1, 2017.

4. *Certifying QDD Status with QI Application Pending or Prior to Filing*

A QDD must provide a valid Form W-8IMY to a withholding agent certifying that it is a QDD, and the withholding agent is not required to withhold on any payment with respect to a potential section 871(m) transaction (including an actual section 871(m) transaction) that it makes to the QDD in its QDD capacity. Before approval of its QI agreement and QDD status, an applicant that has submitted a QI application applying for QDD status on or before March 31, 2017, may represent on a Form W-8IMY that it is a QDD until the end of the sixth full month after the month in which it submits its QI application requesting QDD status. An applicant that has not yet submitted a QI application applying for QDD status but that intends to submit that application on or before March 31, 2017, may represent on a Form W-8IMY that it is a QDD until the end of the sixth full month after the month in which it actually submits its QI application requesting QDD status, provided that it submits that application by March 31, 2017. However, a QDD applicant may not represent that it

is a QDD if it no longer intends to submit a QI application applying for QDD status by March 31, 2017, or its application has been denied. In addition, an applicant may not represent that it is a QDD if it receives a notice from the IRS stating that the QDD applicant may not make the representation until the applicant's QI and QDD status has been approved. (The IRS will generally only issue such notices in cases where an application is not substantially complete or when the IRS has determined on a preliminary basis that it will not enter into a QI agreement with the applicant or that the applicant is not an eligible entity.)

In cases where an applicant certifies to QDD status before its QDD application is approved, the applicant must immediately notify any withholding agent to whom it has certified that it no longer qualifies as a QDD if (1) it determines that it no longer intends to submit a QI application applying for QDD status by March 31, 2017, (2) it does not submit the application by March 31, 2017, or (3) its application is denied. The withholding agent will be required to inform the IRS of any notifications it receives when it files its Form 1042, listing the name and EIN (if available) of each person whose QDD certification was withdrawn for any of these reasons. When an applicant provides a valid W-8IMY with a QDD certification to a withholding agent, the withholding agent is not required to withhold on payments with respect to potential section 871(m) transactions made to the QDD when the QDD is acting as a principal (that is, not as an intermediary), unless it has been notified that the W-8IMY is no longer valid, including for the reasons mentioned above.

A withholding agent is required to withhold on any actual dividend paid to a QDD, whether the dividend is paid to the QDD in its capacity as a dealer in equity derivatives or otherwise.

5. *Certifying QDD Status and Depositing Withheld Amounts Pending Receipt of QI-EIN*

The IRS will issue a QI employer identification number (QI-EIN) upon approval of a QI application. After an applicant receives a QI-EIN from the IRS, the applicant must include its QI-EIN on any Form W-8IMY that the applicant provides as a QDD. If an applicant must provide a Form W-8IMY certifying its QDD status to a withholding agent before it has received a QI-EIN, the applicant should indicate that it is awaiting a QI-EIN by writing “awaiting QI-EIN” on line 8 of Part I of the form. If an applicant provides an “awaiting QI-EIN” statement on a Form W-8IMY, the applicant must provide its QI-EIN to its withholding agent as soon as practicable after the QDD receives its QI-EIN. It is not necessary, however, for the applicant to provide a newly executed Form W-8IMY with its QI-EIN after it receives its QI-EIN or after it receives the fully executed QI agreement, provided all of the information on the original form remains valid. The applicant may furnish its QI-EIN to its withholding agent in any manner agreed to by the applicant and its withholding agent. If an applicant is denied QDD status, it must notify the withholding agent immediately.

A withholding agent that receives a Form W-8IMY with an “awaiting QI-EIN” statement may treat the person that provides the form as a QDD unless it knows, or has reason to know, that the provider of the form cannot validly represent that it is a

QDD. A withholding agent is not required to determine when a QDD applied for an agreement or if it is actually in possession of a fully executed agreement. A withholding agent is also not required to verify whether a QDD's EIN is a QI-EIN. A withholding agent may only rely on a Form W-8IMY that says "awaiting QI-EIN" for up to six months after receipt, unless a QI-EIN is provided to the withholding agent within that time.

The IRS will not assess any penalties for a QDD's failure to deposit withheld amounts before the date the QDD receives its QI-EIN, provided that within 3 days of receiving its QI-EIN the QDD deposits any amounts that the QDD was previously required to deposit. In addition, if a QDD applies to enroll in the Electronic Federal Tax Payment Systems (EFTPS) within 30 days of receiving a QI-EIN, no penalty will be assessed for the QDD's failure to deposit withheld amounts, provided that within 3 days of being enrolled in EFTPS the QDD deposits any amounts that the QDD was previously required to deposit.

D. List of Exchange Traded Notes (ETNs) with Delayed Effective Date

ETNs that reference underlying securities and are delta-one transactions will generally become subject to section 871(m) beginning on January 1, 2017. The Treasury Department and the IRS are aware that a certain number of these ETNs existed before the issuance of the 2015 final regulations and have been in continuous distribution (meaning that issuers continuously "create"—that is, issue and sell—new ETNs based on the same offering documents as the original ETN securities). The newly created ETNs have the same ticker symbol and CUSIP code

as the previously issued ETNs and are therefore fungible with ETNs previously issued under the same offering documents. An ETN that is a delta-one transaction under the section 871(m) regulations but that is issued before January 1, 2017, however, would not be subject to section 871(m) withholding, while an identical newly created ETN issued on or after January 1, 2017, would be subject to section 871(m) withholding. This difference would result in otherwise identical ETNs not being fungible for tax purposes, even though they are indistinguishable for commercial and other legal purposes.

To permit issuers time to unwind the identified ETNs, maintain fungibility, and preserve market liquidity, the Treasury Department and the IRS intend to amend §1.871-15(r)(3) to provide that §1.871-15(d)(2) and (e) (regarding specified NPCs and specified ELIs, respectively) will not apply to the following ETNs (identified by name, ticker symbol, and CUSIP number) until January 1, 2020:

<u>Ticker Symbol</u>	<u>ETN Name</u>	<u>CUSIP</u>
CAPE	BARCLAYS ETN+ SHILLER CAPE	06742A669
CEFL	ETRACS MONTH PAY 2X LEV C/E	90270L842
CSLS	X-LINKS LONG/SHORT EQUITY	22542D878
CSMA	X-LINKS MERGER ARBITRAGE ETN	22542D845
DIVC	C-TRACKS ETN MILLER/HOWARD	17322H149
DOD	ELEMENTS-DOGS OF DOW	25153Q658
DVYL	ETRACS 2X DJ SEL DVD ETN	90268G607
EEH	ELEMENTS SPECTRUM ETN	870297504
FBG	FI ENHANCED BIG CAP GR ETN	90267L508
FBGX	FI ENHANCED LARGE CAP GROWTH	902677780

FIBG	CS FI ENHANCED BIG CAP GROW	22539T563
FIEG	FI ENHANCED GLOBAL HI YLD	25155L293
FIGY	FI ENHANCED GLOBAL HIGH YLD	06742C152
FLGE	FI LARGE CAP GROWTH ENHANCED	22542D423
GCE	CLAYMORE CEF GS CONNECT ETN	362273104
HDLV	ETRACS 2X HI DIV LOW VOL ETN	90270L727
HOML	ETRACS MON RST 2XLEV ISE EX	90274P302
HOMX	ETRACS ISE EXCLUSIV HOMEBUIL	90274P310
LRET	ETRACS MONTHLY PAY 2XLEVERAG	90274R100
MORL	ETRACS MONTHLY PAY 2XLEVERAG	90269A302
RODI	BARCLAYS RETURN ON DISABILIT	06740D830
SDYL	ETRACS 2X S&P DVD ETN	90267L409
SMHD	ETRACS MON PAY 2X LEV US SM	90274D838
WIL	BARCLAYS WOMEN IN LEADERSHIP	06742W430
WMW	ELEMENTS LKD TO MORNINGSTAR	25153Q708

Comments are requested on whether there are other delta-one ETNs that are not included in this list but that existed before September 18, 2015, and that will become subject to section 871(m) withholding on January 1, 2017. The Treasury Department and the IRS will consider allowing other ETNs that meet these criteria to be subject to the delayed effective date, if appropriate—either through published guidance or in a private letter ruling.

IV. ADJUSTING UNDERWITHHOLDING BEFORE THE DUE DATE (WITHOUT EXTENSIONS) FOR FILING FORM 1042

Under §1.1461-2(b), a withholding agent that fails to withhold on a payment made to a beneficial owner may withhold on a future payment made to the beneficial owner or may satisfy the tax from property that it holds in custody for the beneficial owner or from property over which it has control. That additional withholding or satisfaction of tax must be made no later than the due date (not including extensions) for filing Form 1042 for the year in which the underwithholding occurred.

Under the

IRS's interpretation of §1.1461-2(b), a withholding agent that adjusts its underwithholding pursuant to these procedures will not be subject to any penalties for failure to deposit or failure to pay under sections 6656, 6672, and 7202 when it timely deposits the additional amounts withheld or otherwise obtained. Therefore, a withholding agent that fails to withhold on a dividend equivalent payment made to a foreign person may rely on the procedures in §1.1461-2(b) to adjust its underwithholding without penalty before March 15 of the year following the year in which the underwithholding occurred.

V. DRAFTING INFORMATION

The principal authors of this notice are D. Peter Merkel and Karen Walny of the Office of Associate Chief Counsel (International). For further information regarding this notice contact Mr. Merkel or Ms. Walny at (202) 317-6938 (not a toll-free call).