TaxNewsFlash

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Notice 2016-76: Phase-in rules for section 871(m) regulations, QI agreement

The IRS today released an advance version of Notice 2016-76 that provides guidance for complying with final and temporary regulations issued under sections 871(m), 1441, 1461, and 1473—referred to as the "section 871(m) regulations"—and explains a phase-in schedule for certain rules under the section 871(m) regulations.

Notice 2016-76 [PDF 266 KB] explains:

- How the IRS intends to administer the section 871(m) regulations in 2017 and 2018
- That amendments to the section 871(m) regulations are expected
- That application of certain rules in the section 871(m) regulations will be phased in to facilitate the implementation of those regulations
- That, based on comments, taxpayers and withholding agents face challenges in complying with certain aspects of the section 871(m) regulations by their applicability date of January 1, 2017—for instance, the challenges include (1) designing, building, and testing new withholding and reporting infrastructure for dealers, issuers, and other withholding agents; (2) implementing new system requirements for paying agents and clearing organizations; and (3) enhancing and developing data sources for determining whether transactions are section 871(m) transactions
- Certain taxpayers 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

Phase-in schedule

Notice 2016-76 states that the IRS and Treasury Department have decided that phased-in application of certain rules—in combination with the expected changes to the final and temporary regulations—will allow for the orderly implementation of the section 871(m) regulations. Accordingly, Notice 2016-76 provides the following phase-in schedule:

- **For 2017**—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 Reg. section 1.871-15(n).
- **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.

Notice 2016-76 further provides that:

- 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.

- The section 871(m) regulations will not apply to certain existing exchange-traded notes (as specifically identified by Notice 2016-76) until January 1, 2020.

Today's guidance states that the anti-abuse rule provided in Reg. section 1.871-15(o) will apply during the phase-in years (as described in Notice 2016-76). 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 Reg. section 1.871-15(o).

For more information, contact a tax professional with KPMG's Washington National Tax:

About section 871(m)

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