

Application of Section 871(m) to Specified Equity-Linked Instruments

Notice 2014-14

I. Background

On December 5, 2013, a withdrawal of notice of proposed rulemaking, notice of proposed rulemaking, and notice of public hearing were published in the Federal Register at 78 FR 73128 (2013) (the “2013 proposed regulations”). The 2013 proposed regulations proposed new rules for determining whether a transaction is subject to tax pursuant to section 871(m) of the Internal Revenue Code (“Code”). Generally, section 871(m)(1) provides that a dividend equivalent is treated as a dividend from sources within the United States for purposes of sections 871(a), 881, 4948(a), and chapters 3 and 4. The proposed regulations provide that a dividend equivalent includes any payment pursuant to a specified notional principal contract (“specified NPC”) or a specified equity-linked instrument (“specified ELI”) that references the payment of a dividend from an underlying security, each as defined in the 2013 proposed regulations. An ELI, however, is only a specified ELI under the 2013 proposed regulations if the long party acquired it on or after March 5, 2014.

The Treasury Department and the Internal Revenue Service (the “Service”) have received comments recommending that an ELI issued prior to January 1, 2016, not be treated as a specified ELI or, alternatively, that an ELI not be treated as a specified ELI if it is issued prior to the date that the final regulations are published. Comments note that the 2013 proposed regulations significantly expanded the scope of ELIs that would

be subject to tax pursuant to section 871(m). Comments further note that this expansion will create uncertainty in pricing transactions today and will not give market participants sufficient time to implement the systems necessary to track the information required by the 2013 proposed regulations by March 5, 2014.

II. Amendment to the Term “Specified ELI” in Final Regulations

When §1.871-15(e) of the 2013 proposed regulations is finalized, the Treasury Department and the Service intend to limit specified ELIs to ELIs issued on or after 90 days after the date of publication of the final regulations.

III. Effective Date

This Notice is effective March 4, 2014.

IV. Effect on Other Documents

This Notice announces the intention of Treasury and the Service to modify Prop. Reg. §1.871-15(e) as published in the Federal Register 78 FR 73128 (2013) when the Treasury Decision adopting those rules as final regulations is published in the Federal Register.

V. Request for Comments

The Treasury Department and the Service invite comments on the change to the 2013 proposed regulations described in this Notice. Comments on this Notice may be submitted along with comments to the 2013 proposed regulations. To provide written or electronic comments, send submissions to: CC:PA:LPD:PR (REG-120282-10), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours

of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–120282–10), Courier’s Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC, or sent electronically, via the Federal eRulemaking Portal at <http://www.regulations.gov> (IRS REG–120282–10).

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