

MEMO# 29424

October 16, 2015

Revised ISDA Protocol to Address Potential U.S. Withholding Taxes Under Section 871 (m)

[29424]

October 16, 2015

TO: TAX COMMITTEE No. 34-15

ICI GLOBAL TAX COMMITTEE No. 20-15

DERIVATIVES MARKETS ADVISORY COMMITTEE No. 73-15 RE: REVISED ISDA PROTOCOL TO ADDRESS POTENTIAL U.S. WITHHOLDING TAXES UNDER SECTION 871 (m)

Following the release by the Treasury Department and IRS of final regulations under section 871(m) in September 2015, the International Swaps and Derivatives Association (“ISDA”) is preparing to publish a revised protocol for amending ISDA Master Agreements (the “Revised ISDA Protocol”).

ISDA previously released a protocol to address section 871(m) in 2010 (the “2010 ISDA Protocol”). [\[1\]](#) The buy side did not widely adopt the 2010 ISDA Protocol, as it contained certain payee and payor representations that were viewed as being too dealer-friendly. In drafting the Revised ISDA Protocol, ISDA proactively sought input from the ICI and ICI Global, our members, and other buy side trade organizations. The goal was to create a protocol that enjoys both buy side and sell side support, since mutual adherence to the protocol streamlines the document remediation process greatly. ISDA document remediation for section 871(m) must generally be accomplished by January 1, 2016.

The Revised ISDA Protocol (attached and with a redline against the 2010 ISDA Protocol) streamlines the agreement substantially and, notably, removes completely the payor and payee representations that hindered buy side adoption of the 2010 ISDA Protocol. The Revised ISDA Protocol changes the generally applicable provisions of an ISDA Master Agreement that require a gross-up of payments for any tax required to be withheld. Under the Revised ISDA Protocol, the tax gross-up provisions of ISDA Master Agreements will not apply to any withholding tax on a “dividend equivalent payment” that is subject to withholding under section 871(m). In addition, if a party has to remit a tax payment under section 871(m) in excess of any net payment being made to a foreign counter-party, that amount is treated as a withheld tax and such amount becomes an additional amount due to the payor from the foreign counter-party.

If you have any questions or comments concerning the Revised ISDA Protocol please contact me by Wednesday, October 21, 2015. Additionally, the ICI and ICI Global may hold calls for members to discuss additional amendments to ISDA Master Agreements addressing section 871(m) that members may wish to negotiate directly with their derivatives counterparties. Please let me know if you would like to be included in those discussions. I can be reached at ryan.lovin@ici.org or 202-326-5826.

Ryan Lovin
Assistant General Counsel

[ISDA 871m Protocol \(draft October 16\)](#)

[ISDA Protocol - 871\(m\) Final Regs Revisions - BLACKLINE Against Short Form Hire Act Protocol](#)

[ISDA Protocol - 871\(m\) Final Regs Revisions - BLACKLINE Against Previous Version](#)

endnotes

[1] See [Institute Memorandum #24512](#), dated August 26, 2010.

Copyright © by the Investment Company Institute. All rights reserved. Information may be abridged and therefore incomplete. Communications from the Institute do not constitute, and should not be considered a substitute for, legal advice.