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By Electronic Submission (www.regulations.gov)

July 31, 2017

The Honorable Steven Mnuchin
Secretary of the Treasury
Department of the Treasury
1500 Pennsylvania Avenue NW
Washington DC 20220

Re: Department of the Treasury’s Review of Regulations – IRC § 871(m)

Dear Secretary Mnuchin:

The Futures Industry Association (“**FIA**”)¹ welcomes the Department of Treasury’s (“**Treasury**”) review of its existing regulations in accordance with Executive Order 13777 for the purpose of identifying those regulations that, *inter alia*, impose costs that exceed their benefits and, therefore, should be modified or eliminated.² We write regarding the application of Internal Revenue Code (“**IRC**”) § 871(m) to exchange-traded futures and options on futures contracts in securities and securities indices listed for trading on U.S. and non-U.S. markets. Uncertainty surrounding the interpretation of certain provisions of the Internal Revenue Service (the “**Service**”) regulations (the “**Regulations**”) implementing IRC § 871(m) have presented significant compliance challenges to our member firms and imposed costs that we believe exceed any potential benefits.

¹ FIA is the leading global trade organization for the futures, options and centrally cleared derivatives markets, with offices in London, Singapore and Washington, DC. FIA’s membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from more than 48 countries as well as technology vendors, lawyers and other professionals serving the industry. FIA’s mission is to: (i) support open, transparent and competitive markets; (ii) protect and enhance the integrity of the financial system, and (iii) promote high standards of professional conduct.

As the principal members of derivatives clearinghouses worldwide, FIA’s clearing firm members play a critical role in the reduction of systemic risk in global financial markets.

We recently published FIA’s *Roadmap to Smarter Regulation & Healthier Markets*, available at: https://fia.org/sites/default/files/content_attachments/2017-05-11_FIA_US_Policy_Whitepaper.pdf, which we hope will assist U.S. financial regulators in conducting a holistic review of the regulation of futures and cleared derivatives markets and identifying areas where regulations can be improved.

² 82 Fed. Reg. 27,217 (June 14, 2017).

Section 871(m) provides that certain payments made to non-resident aliens and foreign corporations in connection with derivatives transactions that are contingent upon or are determined by reference to U.S. equities, *i.e.*, “dividend equivalent” payments, will be treated as U.S.-source dividends subject to withholding under the Code. Section 871(m) raises a number of complex interpretive issues, which is evidenced by the lengthy and somewhat tortured regulatory history of the Service’s efforts to develop Regulations and related guidance to implement its terms.³

In a letter to the Service in November 2016, we identified a number of issues that were of particular concern to our member firms that are registered with the Commodity Futures Trading Commission as futures commission merchants (“FCMs”). In particular, we asked the Service to: (i) clarify the responsibility of non-U.S. clearing organizations to act as withholding agents and address the attendant risks that non-U.S. customers would be subject to cascading withholding; (ii) clarify the responsible withholding agent when more than one FCM has a role in effecting a non-U.S. customer’s order; (iii) clarify the responsible withholding agent when a non-U.S. customer transfers one or more open positions from one FCM to another; and (iv) confirm that FCMs may calculate delta based on the prior day’s closing price.⁴ As a result of these and other interpretive questions, FCMs have incurred significant costs and delays in attempting to develop the systems necessary to meet their obligations under the Regulations, in particular those obligations that are scheduled to take effect January 1, 2018.

Although the Service provided additional guidance in its January 24, 2017 Federal Register release, a number of interpretive issues remain unresolved. We have had an opportunity to review the June 2017 letter that the Securities Industry and Financial Markets Association (“SIFMA”) filed with Treasury in response to Executive Order 13789, which discussed IRC § 871(m) in addition to other sections of the Code. We share SIFMA’s view that the Regulations nonetheless remain “extraordinarily complex and novel.”⁵ Consequently, “the burdens imposed on financial intermediaries by the 871(m) regulations are substantial and the costs may exceed the amount of tax that Treasury can expect to collect as a result of the new rules.”⁶

³ This regulatory history is summarized in the Federal Register accompanying the adoption of final and temporary regulations in January 2017. *Dividend Equivalents from Sources Within the United States*, 82 Fed. Reg. 8144 (Jan. 24, 2017).

⁴ Letter from Allison Lurton, Senior Vice President and General Counsel, FIA to Emily McMahon, Deputy Assistant Secretary of Tax Policy, Department of the Treasury, Karl Walli, Senior Counsel,-Financial Products, Department of the Treasury, Peter Merkel, Senior Technical Reviewer, Internal Revenue Service, and Karen Walny, Attorney-Advisor, Internal Revenue Service (Nov. 21, 2016).

⁵ Letter from Payson Peabody, Managing Director & Tax Counsel, SIFMA, to the Honorable Steven Mnuchin, Secretary, Department of the Treasury (June 2, 2017) at 3.

⁶ *Id.* at 2.

The Honorable Steven Mnuchin
July 31, 2017
Page 3

FIA joins SIFMA in supporting clear, targeted rules that address tax avoidance. However, because the Regulations go well beyond what is necessary, we also endorse SIFMA's recommendation that Treasury continue to apply "the statutory withholding rules that were in effect until December 31, 2016" pending Treasury's review of the current Regulations and, further, that the September 2015 and January 2017 Regulations be withdrawn or modified.⁷

* * * *

Thank you for your consideration of the views expressed in this letter. We would be pleased to meet with Treasury representatives to discuss the issues identified above and our concerns with the Regulations implementing IRC § 871(m) more generally. To arrange a meeting or ask any questions regarding these matters, please contact Allison Lurton, Senior Vice President and General Counsel, at 202.466.5460 or alurton@fia.org.

Sincerely,



Walt L. Lukken
President and Chief Executive Officer

cc: Heidi Cohen, Office of the General Counsel

⁷ *Id.* at 3.