

## Eurex Clearing Circular 021/18

# Clearing of Section 871 (m) Internal Revenue Code transactions: Amendment to the Clearing Conditions of Eurex Clearing AG

### Summary

This circular outlines further developments on the general clearing framework of potential Section 871 (m) Internal Revenue Code (IRC) transactions (hereinafter: potential Section 871 (m)-transactions) and reminds all Clearing Members of Eurex Clearing AG (Eurex Clearing) to fulfill all requirements of the relevant regulations of the IRC with particular reference to all withholding and reporting obligations as laid out in Eurex Clearing circulars 028/17 and 074/17.

This circular contains the updated sections of the Clearing Conditions of Eurex Clearing AG (Clearing Conditions), which will come into effect on **3 April 2018**. The changes include:

- Acting either as a primary withholding Qualified Intermediary (QI-A) or as Qualified Derivatives Dealer (QDD) will become a formal prerequisite for the clearing of potential Section 871 (m)-transactions.
- As outlined in the previous circulars 028/17 and 074/17, all Clearing Members are requested to provide Eurex Clearing with all information required for the purposes of Form 1042/1042-S reporting and reporting reconciliation.

Kindly forward this circular to all involved departments within your company.

### Attachment:

- Amended sections of the Clearing Conditions of Eurex Clearing AG (Chapter II Part 1 Number 1.7 Paragraphs (1) to (6))

**Date:** 23 February 2018

#### Recipients:

All Clearing Members of  
Eurex Clearing AG and Vendors

#### Authorized by:

Heike Eckert

#### Target group:

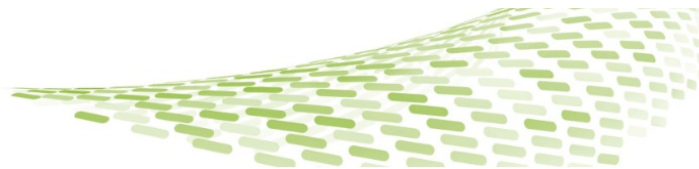
All departments

#### Related circulars:

Eurex Clearing Circulars 028/17, 074/17

#### Contact:

Your Group Client Key Account  
Manager Clearing, [clearing.services-  
admission@eurexclearing.com](mailto:clearing.services-admission@eurexclearing.com)



## **Clearing of Section 871 (m) Internal Revenue Code transactions: Amendment to the Clearing Conditions of Eurex Clearing AG**

### **1. Background**

Section 871(m) IRC and the regulations thereunder impose a tax on “dividend equivalent amounts” (DEAs) paid or deemed paid pursuant to a derivative contract (such as a notional principal contract or other equity-linked instrument that reference U.S. equity security(ies)). The U.S. Internal Revenue Service (IRS) and the U.S. Treasury Department issued Notice 2017-42 providing further relief from certain requirements of both the preliminary and final Section 871(m) IRC regulations, in particular postponing the phase-in period of non-delta one instruments if issued before 1 January 2019.

Eurex Clearing informed its Clearing Members about the general clearing framework of potential Section 871 (m)-transactions through Eurex Clearing circulars 028/17 and 074/17 and its status as Qualified Derivatives Dealer (QDD) as defined in Section 2.63 of the Qualified Intermediary (QI) agreement (Revenue Procedure 2017-15).

### **2. Amendment to the Clearing Conditions of Eurex Clearing AG (Chapter II)**

As announced in Eurex Clearing circulars 028/17 and 074/17, all Clearing Members, which are not U.S. Persons, had to enter into an QI-Agreement with the IRS and either (1) select the QDD status for principal transactions and/or (2) assume the primary chapter 3 and chapter 4 withholding and Form 1099 reporting and backup-withholding responsibility when acting as an intermediary from a U.S. tax point of view, when clearing potential Section 871 (m)-transactions. In addition, all reporting obligations towards Eurex Clearing, as described in the amended Clearing Conditions, must be fulfilled.

To implement the changes, the following provisions of the Clearing Conditions will be amended, as outlined in the attachment:

- Chapter II Part 1 Number 1.7 Paragraphs (1) to (6)

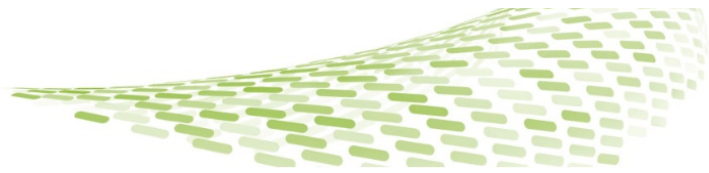
The relevant amendments will become effective on 3 April 2018. As of the effective date, the full version of the amended Clearing Conditions will be available for download on the Eurex Clearing website [www.eurexclearing.com](http://www.eurexclearing.com) under the following link:

**[Resources > Rules and Regulations > Clearing Conditions](#)**

### **3. Information required from Clearing Members for the purposes of Form 1042/1042-S reporting and reporting reconciliation**

Once again, Eurex Clearing points out that Clearing Members are requested to fulfil their general reporting obligations in accordance with Treasury Regulations Section § 1.1461-1 (b) and (c), irrespective whether the Clearing Member take a long or short position with respect to the equity exposure.

For more information, please refer to Eurex Clearing circulars 028/17 and 074/17.



#### **4. Inadmissibility of clearing of potential Section 871 (m)-transactions without appropriate Tax Status as QDD (proprietary business) or QI-A (client's business)**

The clearing of potential Section 871 (m)-transactions without appropriate tax status as QDD (proprietary business) or QI-A (client's business) is prohibited. Clearing Members have to confirm their tax status by providing Eurex Clearing with one-time certification via Form W-8IMY or W-9. Based on the documentation received (Form W-8IMY or W-9), Eurex Clearing has classified its Clearing Members as either Section 871 (m) IRC eligible or Section 871 (m) IRC non-eligible. Besides, Clearing Members have to provide Eurex Clearing with all information required for the purposes of Form 1042/1042-S reporting and reporting reconciliation on the 10th of each month.

Each Clearing Member participating in the clearing of potential Section 871 (m)- transactions represents and warrants by way of an independent guarantee irrespective of fault (*selbständiges, verschuldensunabhängiges Garantieverprechen*) to Eurex Clearing that each time when entering into a potential Section 871 (m)-transaction, that the Clearing Member still maintains the appropriate tax status as QDD (proprietary business) or QI-A (client's business). Failure to comply with these submission requirements or violation of such guarantee may result in Disciplinary Procedures and in the suspension of the clearing of potential Section 871 (m)-transactions.

Eurex Clearing is not a Responsible Party within the meaning of Treasury Regulations Section 1.871-15(p) (or any successor thereto) and hence not required to provide its Clearing Members with any information identifying potential Section 871(m) IRC transactions, applicable delta, combined transactions, dividend equivalent amount, or the timing of withholding.

#### **5. Further Information on reporting and Eurex Clearing's US tax status**

Please find further information on how to report Section 871 (m) transactions to Eurex Clearing in accordance with the regulations and additional representation with respect to Eurex Clearing's general U.S. tax status on the Eurex Clearing website under the following link:

**[Resources > US-Tax > Section 871 \(m\) IRC](#)**

If you have any questions with respect to potential tax impacts, please contact your tax adviser. Eurex Clearing is not in a position to provide assistance beyond the information contained in this circular and in Eurex Clearing circulars 028/17 and 074/17, as we are legally not permitted to give any tax advice.

If you have any non-tax related questions, please contact your Group Client Key Account Manager Clearing or send an e-mail to: [clearing.services-admission@eurexclearing.com](mailto:clearing.services-admission@eurexclearing.com).

23 February 2018

Chapter II of the Clearing Conditions of Eurex Clearing AG

# Transactions Concluded at Eurex Deutschland and Eurex Zürich

(Eurex Exchanges)

As of 03.04.2018

Attachment to Eurex Clearing circular 021/18	Eurex04e
Clearing Conditions of Eurex Clearing AG	As of 03.04.2018
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AMENDMENTS ARE MARKED AS FOLLOWS:

INSERTIONS ARE UNDERLINED,

DELETIONS ARE CROSSED OUT.

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## Part 1 General Provisions

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[...]

### 1.7 Obligations with regard to the Tax Legislation of the United States of America

(1) Clearing Members and Non-Clearing Members admitted to trading at Eurex Deutschland agree to provide, upon request by Eurex Deutschland or Eurex Clearing AG, the U.S. Internal Revenue Service (the “**Service**”) or any grand jury properly convened within the United States with any data, books or papers related to transactions which are concluded at Eurex Deutschland. Such requests will be made by Eurex Deutschland or Eurex Clearing AG whenever it receives a written request, summons or subpoena to produce such information from the Service or from any grand jury.

(2) Clearing Members and Non-Clearing Members admitted to trading at Eurex Deutschland agree to comply, with the reporting requirements under Section 6045 of the United States Internal Revenue Code of 1986 (the “Code”) and the regulations thereunder if such requirements are applicable to such Clearing Members and Non-Clearing Members.

Clearing Members admitted to trading at Eurex Deutschland and participating in the clearing of any transaction being subject to Section 871(m) of the Code (“potential 871m Transaction”) that references interest in at least one security that could give rise to a U.S. source dividend (as defined in Treasury Regulations Section 1.871-15(a)(12) or any successor thereto) shall provide Eurex Clearing AG (i) with a duly executed Form W-8IMY (Certificate of Foreign Intermediary, Foreign Flow-Through Entity, or Certain U.S. Branches for United States Tax Withholding and Reporting) or Form W-9 (Request for Taxpayer Identification Number and Certification) and (ii) by the 10<sup>th</sup> day of each month with all information in form and substance, each as laid out on Eurex Clearing’s webpage ([www.eurexclearing.com](http://www.eurexclearing.com)).

(3) Clearing Members and Non-Clearing Members admitted to trading at Eurex Deutschland consent to Eurex Deutschland, ~~or~~ Eurex Frankfurt AG – which is the

exchange operating company – or Eurex Clearing AG submitting any information described in Sentence 1 of Paragraph (1) to the Service upon its request or to another authority within the United States as specified in such request. Clearing Members and Non-Clearing Members submitting personal data within the meaning of the German Federal Data Protection Act (*Bundesdatenschutzgesetz der Bundesrepublik Deutschland*) to Eurex Deutschland, ~~or~~ Eurex Frankfurt AG, or Eurex Clearing AG shall ensure, that Eurex Deutschland, ~~and~~ Eurex Frankfurt AG or Eurex Clearing AG, respectively, are authorised to submit such data to comply with Eurex Deutschland's obligations as a "qualified board or exchange" or Eurex Clearing AG's obligations as a "qualified intermediary" to authorities in the United States.

- (4) As soon as Eurex Deutschland, Eurex Frankfurt AG or the Service notify Eurex Clearing AG of a Clearing Member or a Non-Clearing Member not complying with its obligations under Paragraphs (1) and (2), Eurex Clearing AG shall immediately notify the respective Clearing Member or the respective Non-Clearing Member and its Clearing Member of such fact. Upon receipt of such notification of Eurex Clearing AG according to Sentence 1, (i) in case of a non-compliant Clearing Member, the right of this Clearing Member to participate in the clearing of Eurex Transactions and Eurex Off-Book Trades and (ii) in case of a non-compliant Non-Clearing Member, the right of this Non-Clearing Member and the respective Clearing Member (with respect to such Non-Clearing Member) to participate in the clearing of Eurex Transactions and Eurex Off-Book Trades shall immediately be suspended.

As soon as Eurex Clearing AG itself becomes aware that a Clearing Member is not complying with its obligations under Paragraphs (1), (2), (5) or (6), without having obtained prior notice thereof pursuant to Sentence 1, Eurex Clearing AG shall immediately notify the Executive Board of Eurex Deutschland and the respective Clearing Member, and the right of this Clearing Member to participate in the clearing of Eurex Transactions and Eurex Off-Book Trades may immediately be suspended by way of a respective notification by Eurex Clearing AG vis-à-vis the respective Clearing Member.

Such<sup>A</sup> suspension includes the conclusion of any new Eurex Transactions from the point in time of receipt of such notification (other than transactions undertaken to close, transfer or exercise any position or Transaction of such Clearing Member or Non-Clearing Member that exists at the time of such notification). Eurex Clearing AG shall notify the Executive Board of Eurex Deutschland of such suspension. The suspension shall be revoked by way of notification by Eurex Clearing AG vis-à-vis the respective Clearing Member or the respective Non-Clearing Member and its Clearing Member as soon as the respective party provides proof to Eurex Clearing AG that the obligations according to Paragraphs (1), ~~and~~ (2), (5) or (6), respectively, have been fulfilled. Any obligations of the involved parties arising from the clearing relationship shall continue to exist even during the period of suspension.

(5) Clearing Members participating in the clearing of potential 871m Transaction(s) that have provided Eurex Clearing AG, in accordance with Paragraph (2) above, with a W-8IMY Form (not a W-9 Form) represent and warrant by way of an independent guarantee irrespective of fault (*selbständiges, verschuldensunabhängiges Garantieverprechen*) to Eurex Clearing AG that each time when entering into potential 871m Transaction, the following requirements are true and valid:

The Clearing Member has before entered into a qualified intermediary agreement (U.S. Revenue Procedure 2017-15) with the Service, maintains the acquired status and,

- a. if acting as an intermediary – including transactions entered into on behalf of its customers – it has assumed primary responsibility for reporting, collecting and remitting withholding taxes imposed pursuant to Subtitle A Chapters 3 and 4 and Chapter 61 and Section 3406 of the Code, and it withholds with respect to potential 871(m) Transaction(s) any payment of a dividend equivalent on the dividend payment date for the applicable dividend (as determined in Treasury Regulations Section 1.1441-2(e)(4) or any successor thereto); or
- b. if acting for its own account, it has selected the qualified derivatives dealer status for principal transactions (as defined in U.S. Revenue Procedure 2017-15, Section 2.63).

(6) Any Clearing Member participating in the clearing of potential 871(m) Transactions shall immediately notify Eurex Clearing AG in writing if it undergoes a change in circumstances (including a termination of its status as a qualified intermediary or qualified derivatives dealer), or otherwise knows or has reason to know that it is not, or will not be, in compliance with this section. Such written notice must be delivered to Eurex Clearing AG no later than within two days of the Clearing Member's knowledge thereof together with a correspondingly amended Form W-9 or W-8IMY, if applicable.

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