

[TEXT OF THE FATCA COMMENT LETTER SUBMITTED BY
STROOCK & STROOCK & LAVAN LLP]

February 23, 2012

Ladies and Gentlemen:

I commented earlier with a suggestion that you rethink the definition of dividend equivalents subject to withholding. The suggestion was that **all** payments determined by reference to dividends on US stocks, if paid by a US person or a foreign person with a US branch, be treated as US source, but that such payments if paid by a foreign person with no US branch be treated as foreign source. This would substantially reduce complexity both for withholding agents and long parties, and would eliminate the necessity of trying to tax foreign persons (with no US branch) who make payments on notional principal contracts to other foreign persons ~ an enforcement nightmare. After all, one of the main reasons for the sourcing rules is to subject to withholding tax only those payments that the US taxing authorities can easily reach.

My reason for writing again is to comment on another provision of the statute and the proposed regulations that seems to have engendered confusion. That is the provision that treats a “gross amount” as potentially subject to withholding, even if there is no net payment. Some people have been concerned that adjustments to strike prices in options, or other adjustments, even if they could not result in a current payment under any circumstances, would be considered gross amounts subject to withholding. I would urge you to clarify that that is not the case. The statute was not deeming there to be a payment whenever there is an adjustment to the amount that will ultimately be paid under a contract. Rather, it was not allowing netting to reduce the amount subject to withholding, to maintain parity between a leveraged purchase of stock and a total return equity swap. An adjustment to a strike price in an option would never result in a current payment and should not be subject to withholding. Admittedly, a tougher question is whether there should be current withholding on the imbedded dividends in a bullet swap, even though no payments will be due under any circumstances until the end of the swap.

My recommendation is that you clarify the “gross amount” rule by providing that withholding will not be required on any date if an actual payment is not made by the short party on that date and under no circumstances (assuming no default or termination of the contract) would a payment ever be due from the short party on that date.

Sincerely,

Micah Bloomfield