Title 26—Internal Revenue

(This book contains part 1, §§1.61 to 1.169)

Part

CHAPTER I—INTERNAL REVENUE SERVICE, DEPARTMENT OF THE TREASURY (CONTINUED)

EDITORIAL NOTE: IRS published a document at 45 FR 6088, Jan. 25, 1980, deleting statutory sections from their regulations. In Chapter I cross-references to the deleted material have been changed to the corresponding sections of the IRS Code of 1954 or to the appropriate regulations sections. When either such change produced a redundancy, the cross-reference has been deleted. For further explanation, see 45 FR 20795, Mar. 31, 1980.

SUBCHAPTER A—INCOME TAX (CONTINUED)

SUPPLEMENTARY PUBLICATIONS: *Internal Revenue Service Looseleaf Regulations System, Alcohol and Tobacco Tax Regulations,* and *Regulations Under Tax Conventions.*

EDITORIAL NOTE: Treasury Decision 6091, 19 FR 5167, Aug. 17, 1954, provides in part as follows:

PARAGRAPH 1. All regulations (including all Treasury decisions) prescribed by, or under authority duly delegated by, the Secretary of the Treasury, or jointly by the Secretary and the Commissioner of Internal Revenue, or by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, or jointly by the Commissioner of Internal Revenue and the Commissioner of Customs or the Commissioner of Narcotics with the approval of the Secretary of the Treasury, applicable under any provision of law in effect on the date of enactment of the Code, to the extent such provision of law is repealed by the Code, are hereby prescribed under and made applicable to the provisions of the Code corresponding to the provision of law so repealed insofar as any such regulation is not inconsistent with the Code. Such regulations shall become effective as regulations under the various provisions of the Code as of the dates the corresponding provisions of law are repealed by the Code, until superseded by regulations issued under the Code.

PAR. 2. With respect to any provision of the Code which depends for its application upon the promulgation of regulations or which is to be applied in such manner as may be prescribed by regulations, all instructions or rules in effect immediately prior to the enactment of the Code, to the extent such instructions or rules could be prescribed as regulations under authority of such provision of the Code, shall be applied as regulations under such provision insofar as such instructions or rules are not inconsistent with the Code. Such instructions or rules shall be applied as regulations under the applicable provision of the Code as of the date such provision takes effect.

PAR. 3. If any election made or other act done pursuant to any provision of the Internal Revenue Code of 1939 or prior internal revenue laws would (except for the enactment of the Code) be effective for any period subsequent to such enactment, and if corresponding provisions are contained in the Code, such election or other act shall be given the same effect under the corresponding provisions of the Code to the extent not inconsistent therewith. The term ''act'' includes, but is not limited to, an allocation, identification, declaration, agreement, option, waiver, relinquishment, or renunciation.

PAR. 4. The limits of the various internal revenue districts have not been changed by the enactment of the Code. Furthermore, delegations of authority made pursuant to the provisions of Reorganization Plan No. 26 of 1950 and Reorganization Plan No. 1 of 1952 (as well as redelegations thereunder), including those governing the authority of the Commissioner of Internal Revenue, the Regional Commissioners of Internal Revenue, or the District Directors of Internal Revenue, are applicable to the provisions of the Code to the extent consistent therewith.

SUBCHAPTER A—INCOME TAX (CONTINUED)

PART 1—INCOME TAXES (CONTINUED)

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REGULATIONS APPLICABLE TO CERTAIN BONDS SOLD PRIOR TO JULY 8, 1997

DEDUCTIONS FOR PERSONAL EXEMPTIONS

ITEMIZED DEDUCTIONS FOR INDIVIDUALS AND CORPORATIONS

AUTHORITY: 26 U.S.C. 7805, unless otherwise noted.

Section 1.61–2T also issued under 26 U.S.C. 61.

Section 1.61–21 also issued under 26 U.S.C. 61.

Sections 1.62–1T and 1.62–2 also issued under 26 U.S.C. 62.

Section 1.66–4 also issued under 26 U.S.C. 66(c);

Sections 1.67–2T and 1.67–3T also issued under 26 U.S.C. 67(c).

Section 1.67–3 also issued under 26 U.S.C. 67(c).

Sections 1.72–4, 1.72–5, 1.72–6, 1.72–7, 1.72–8, and 1.72–11 also issued under 26 U.S.C. 72(c).

Section 1.101–7 also issued under 26 U.S.C. 101(d)(2)(B)(ii).

Section 1.103–10 also issued under 26 U.S.C. 103(b)(6).

Section 1.103A–2 also issued under 26 U.S.C. 103A(j).

Section 1.108–1 also issued under 26 U.S.C. 108(e)(8) and 108(e)(10(B).

Section 1.108–2 also issued under 26 U.S.C. 108.

Section 1.108–3 also issued under 26 U.S.C. 108, 267, and 1502.

Section 1.108–4 also issued under 26 U.S.C. 108.

Section 1.108–5 also issued under 26 U.S.C. 108.

Section 1.108(c)–1 also issued under the authority of 26 U.S.C. 108(d)(9).

Section 1.108(i)–0T also issued under 26 U.S.C. 108(i)(7) and 1502.

Section 1.108(i)–1T also issued under 26 U.S.C. 108(i)(7) and 1502.

Section 1.108(i)–2T also issued under 26 U.S.C. 108(i)(7).

Section 1.108(i)–3T also issued under 26 U.S.C. 108(i)(7) and 1502.

Section 1.110–1 also issued under 26 U.S.C. 110(d).

Sections 1.132–0 through 1.132–8T also issued under 26 U.S.C. 132.

Sections 1.148–0 through 1.148–11 also issued under 26 U.S.C. 148 (f), (g), and (i).

Section 1.148–6 also issued under 26 U.S.C. 148 (f), (g), and (i).

Section 1.149(b)–1 also issued under 26 U.S.C. 149(b)(3)(B) (v).

Section 1.149(d)–1 also issued under 26 U.S.C. 149(d)(7).

Section 1.149(e)–1 also issued under 26 U.S.C. 149(e).

Section 1.149(g)–1 also issued under 26 U.S.C. 149(g)(5).

Section 1.150–4 also issued under 26 U.S.C. 150 (c)(5).

Section 1.152–4 also issued under 26 U.S.C. 152(e).

Section 1.162–24 also issued under 26 U.S.C. 162(h).

Section 1.162(k)–1 is also issued under section 26 U.S.C. 162(k).

Section 1.163–8T also issued under 26 U.S.C. 469(k)(4).

Section 1.163–9T also issued under 26 U.S.C. 163(h)(3)(D).

Section 1.163–11T is also issued under 26 U.S.C. 163(h).

Section 1.165–12 also issued under 26 U.S.C. 165(j)(3).

Section 1.166–10 also issued under 26 U.S.C. 166(f).

Section 1.168(d)–1 also issued under 26 U.S.C. 168(d)(3).

Section 1.168(f)(8)–1T also added under sec. 112(c), Black Lung Benefits Revenue Act of 1981 (Pub. L. 97–119).

Section 1.168(h)–1 also issued under 26 U.S.C. 168.

Section 1.168(i)–1 also issued under 26 U.S.C. 168(i)(4).

Section 1.168(i)–1T also issued under 26 U.S.C. 168(i)(4).

Section 1.168(i)–2 also issued under 26 U.S.C. 168.

Section 1.168(i)–4 also issued under 26 U.S.C. 168(i)(5).

Section 1.168(j)–1T also added under 26 U.S.C. 168(j)(10).

SOURCE: T.D. 6500, 25 FR 11402, Nov. 26, 1960; 25 FR 14021, Dec. 21, 1960, unless otherwise noted.

COMPUTATION OF TAXABLE INCOME

DEFINITION OF GROSS INCOME, ADJUSTED GROSS INCOME, AND TAXABLE INCOME

§ 1.61–1 Gross income.

(a) *General definition.* Gross income means all income from whatever source derived, unless excluded by law. Gross income includes income realized in any form, whether in money, property, or services. Income may be realized, therefore, in the form of services, meals, accommodations, stock, or other property, as well as in cash. Section 61 lists the more common items of gross income for purposes of illustration. For purposes of further illustration, § 1.61–14 mentions several miscellaneous items of gross income not listed specifically in section 61. Gross income, however, is not limited to the items so enumerated.

(b) *Cross references.* Cross references to other provisions of the Code are to be found throughout the regulations under section 61. The purpose of these cross references is to direct attention to the more common items which are included in or excluded from gross income entirely, or treated in some special manner. To the extent that another section of the Code or of the regulations thereunder, provides specific treatment for any item of income, such other provision shall apply notwithstanding section 61 and the regulations thereunder. The cross references do not cover all possible items.

(1) For examples of items specifically included in gross income, see Part II (section 71 and following), Subchapter B, Chapter 1 of the Code.

(2) For examples of items specifically excluded from gross income, see part III (section 101 and following), Subchapter B, Chapter 1 of the Code.

(3) For general rules as to the taxable year for which an item is to be included in gross income, see section 451 and the regulations thereunder.

§ 1.61–2 Compensation for services, including fees, commissions, and similar items.

(a) *In general.* (1) Wages, salaries, commissions paid salesmen, compensation for services on the basis of a percentage of profits, commissions on insurance premiums, tips, bonuses (including Christmas bonuses), termination or severance pay, rewards, jury fees, marriage fees and other contributions received by a clergyman for services, pay of persons in the military or naval forces of the United States, retired pay of employees, pensions, and retirement allowances are income to the recipients unless excluded by law. Several special rules apply to members of the Armed Forces, National Oceanic and Atmospheric Administration, and Public Health Service of the United States; see paragraph (b) of this section.

(2) The Code provides special rules including the following items in gross income:

(i) Distributions from employees' trusts, see sections 72, 402, and 403, and the regulations thereunder;

(ii) Compensation for child's services (in child's gross income), see section 73 and the regulations thereunder;

(iii) Prizes and awards, see section 74 and the regulations thereunder.

(3) Similarly, the Code provides special rules excluding the following items from gross income in whole or in part:

(i) Gifts, see section 102 and the regulations thereunder;

(ii) Compensation for injuries or sickness, see section 104 and the regulations thereunder;

(iii) Amounts received under accident and health plans, see section 105 and the regulations thereunder;

(iv) Scholarship and fellowship grants, see section 117 and the regulations thereunder;

(v) Miscellaneous items, see section 122.

(b) *Members of the Armed Forces, National Oceanic and Atmospheric Administration, and Public Health Service.* (1) Subsistence and uniform allowances granted commissioned officers, chief warrant officers, warrant officers, and enlisted personnel of the Armed Forces, National Oceanic and Atmospheric Administration, and Public Health Service of the United States, and amounts received by them as commutation of quarters, are excluded from gross income. Similarly, the value of quarters or subsistence furnished to such persons is excluded from gross income.

(2) For purposes of this section, quarters or subsistence includes the following allowances for expenses incurred after December 31, 1993, by members of the Armed Forces, members of the commissioned corps of the National Oceanic and Atmospheric Administration, and members of the commissioned corps of the Public Health Service, to the extent that the allowances are not otherwise excluded from gross income under another provision of the Internal Revenue Code: a dislocation allowance, authorized by 37 U.S.C. 407; a temporary lodging allowance, authorized by 37 U.S.C. 405; a temporary lodging expense, authorized by 37 U.S.C. 404a; and a move-in housing allowance, authorized by 37 U.S.C. 405. No deduction is allowed under this chapter for any expenses reimbursed by such excluded allowances. For the exclusion from gross income of—

(i) Disability pensions, see section 104(a)(4) and the regulations thereunder;

(ii) Miscellaneous items, see section 122.

(3) The per diem or actual expense allowance, the monetary allowance in lieu of transportation, and the mileage allowance received by members of the Armed Forces, National Oceanic and Atmospheric Administration, and the Public Health Service, while in a travel status or on temporary duty away from their permanent stations, are included in their gross income except to the extent excluded under the accountable plan provisions of § 1.62–2.

(c) *Payment to charitable, etc., organization on behalf of person rendering services.* The value of services is not includible in gross income when such services are rendered directly and gratuitously to an organization described in section 170(c). Where, however, pursuant to an agreement or understanding, services are rendered to a person for the benefit of an organization described in section 170(c) and an amount for such services is paid to such organization by the person to whom the services are rendered, the amount so paid constitutes income to the person performing the services.

(d) *Compensation paid other than in cash*—(1) *In general.* Except as otherwise provided in paragraph (d)(6)(i) of this section (relating to certain property transferred after June 30, 1969), if services are paid for in property, the fair market value of the property taken in payment must be included in income as compensation. If services are paid for in exchange for other services, the fair market value of such other services taken in payment must be included in income as compensation. If the services are rendered at a stipulated price, such price will be presumed to be the fair market value of the compensation received in the absence of evidence to the contrary. For special rules relating to certain options received as compensation, see §§ 1.61–15, 1.83–7, and section 421 and the regulations thereunder. For special rules relating to premiums paid by an employer for an annuity contract which is not subject to section 403(a), see section 403(c) and the regulations thereunder and §1.83–8(a). For special rules relating to contributions made to an employees' trust which is not exempt under section 501, see section 402(b) and the regulations thereunder and §1.83–8(a).

(2) *Property transferred to employee or independent contractor.* (i) Except as otherwise provided in section 421 and the regulations thereunder and §1.61–15 (relating to stock options), and paragraph (d)(6)(i) of this section, if property is transferred by an employer to an employee or if property is transferred to an independent contractor, as compensation for services, for an amount less than its fair market value, then regardless of whether the transfer is in the form of a sale or exchange, the difference between the amount paid for the property and the amount of its fair market value at the time of the transfer is compensation and shall be included in the gross income of the employee or independent contractor. In computing the gain or loss from the subsequent sale of such property, its basis shall be the amount paid for the property increased by the amount of such difference included in gross income

(ii)(A) *Cost of life insurance on the life of the employee.* Generally, life insurance premiums paid by an employer on the life of his employee where the proceeds of such insurance are payable to the beneficiary of such employee are part of the gross income of the employee. However, the amount includible in the employee's gross income is determined with regard to the provisions of section 403 and the regulations thereunder in the case of an individual contract issued after December 31, 1962, or a group contract, which provides incidental life insurance protection and which satisfies the requirements of section 401(g) and §1.401–9, relating to the nontransferability of annuity contracts. For example, if an employee or independent contractor is the owner (as defined in §1.61–22(c)(1)) of a life insurance contract and the payments with regard to such contract are not split-dollar loans under §1.7872–15(b)(1), the employee or independent contractor must include in income the amount of any such payments by the employer or service recipient with respect to such contract during any year to the extent that the employee's or independent contractor's rights to the life insurance contract are substantially vested (within the meaning of §1.83–3(b)). This result is the same regardless of whether the employee or independent contractor has at all times been the owner of the life insurance contract or the contract previously has been owned by the employer or service recipient as part of a split-dollar life insurance arrangement (as defined in §1.61–22(b)(1) or (2)) and was transferred by the employer or service recipient to the employee or independent contractor under §1.61–22(g). For the special rules relating to the includibility in an employee's gross income of an amount equal to the cost of certain group term life insurance on the employee's life which is carried directly or indirectly by his employer, see section 79 and the regulations thereunder. For special rules relating to the exclusion of contributions by an employer to accident and health plans for the employee, see section 106 and the regulations thereunder.

(B) *Cost of group-term life insurance on the life of an individual other than an employee.* The cost (determined under paragraph (d)(2) of §1.79–3) of group-term life insurance on the life of an individual other than an employee (such as the spouse or dependent of the employee) provided in connection with the performance of services by the employee is includible in the gross income of the employee.

(3) *Meals and living quarters.* The value of living quarters or meals which an employee receives in addition to his salary constitutes gross income unless they are furnished for the convenience of the employer and meet the conditions specified in section 119 and the regulations thereunder. For the treatment of rental value of parsonages or rental allowance paid to ministers, see section 107 and the regulations thereunder; for the treatment of statutory

subsistence allowances received by police, see section 120 and the regulations thereunder.

(4) *Stock and notes transferred to employee or independent contractor.* Except as otherwise provided by section 421 and the regulations thereunder and §1.61–15 (relating to stock options), and paragraph (d)(6)(i) of this section, if a corporation transfers its own stock to an employee or independent contractor as compensation for services, the fair market value of the stock at the time of transfer shall be included in the gross income of the employee or independent contractor. Notes or other evidences of indebtedness received in payment for services constitute income in the amount of their fair market value at the time of the transfer. A taxpayer receiving as compensation a note regarded as good for its face value at maturity, but not bearing interest, shall treat as income as of the time of receipt its fair discounted value computed at the prevailing rate. As payments are received on such a note, there shall be included in income that portion of each payment which represents the proportionate part of the discount originally taken on the entire note.

(5) *Property transferred on or before June 30, 1969, subject to restrictions.* Notwithstanding paragraph (d) (1), (2), or (4) of this section, if any property is transferred after September 24, 1959, by an employer to an employee or independent contractor as compensation for services, and such property is subject to a restriction which has a significant effect on its value at the time of transfer, the rules of §1.421–6(d)(2) shall apply in determining the time and the amount of compensation to be included in the gross income of the employee or independent contractor. This (5) is also applicable to transfers subject to a restriction which has a significant effect on its value at the time of transfer and to which §1.83–8(b) (relating to transitional rules with respect to transfers of restricted property) applies. For special rules relating to options to purchase stock or other property which are issued as compensation for services, see §1.61–15 and section 421 and the regulations thereunder.

(6) *Certain property transferred, premiums paid, and contributions made in connection with the performance of services after June 30, 1969*—(i) *Exception.* Paragraph (d) (1), (2), (4), and (5) of this section and §1.61–15 do not apply to the transfer of property (as defined in §1.83–3(e)) after June 30, 1969, unless §1.83–8 (relating to the applicability of section 83 and transitional rules) applies. If section 83 applies to a transfer of property, and the property is not subject to a restriction that has a significant effect on the fair market value of such property, then the rules contained in paragraph (d) (1), (2), and (4) of this section and §1.61–15 shall also apply to such transfer to the extent such rules are not inconsistent with section 83.

(ii) *Cross references.* For rules relating to premiums paid by an employer for an annuity contract which is not subject to section 403(a), see section 403(c) and the regulations thereunder. For rules relating to contributions made to an employees' trust which is not exempt under section 501(a), see section 402(b) and the regulations thereunder.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6696, 28 FR 13450, Dec. 12, 1963; T.D. 6856, 30 FR 13316, Oct. 20, 1965; T.D. 7544, 43 FR 31913, July 24, 1978; T.D. 7623, 44 FR 28800, May 17, 1979; T.D. 8256, 54 FR 28582, July 6, 1989; T.D. 8607, 60 FR 40076, Aug. 7, 1995; T.D. 9092, 68 FR 54344, Sept. 17, 2003]

§ 1.61–2T Taxation of fringe benefits—1985 through 1988 (temporary).

(a) *Fringe benefits*—(1) *In general.* Section 61(a)(1) provides that, except as otherwise provided in subtitle A, gross income includes compensation for services, including fees, commissions, fringe benefits, and similar items. Examples of fringe benefits include: an employer-provided automobile, a flight on an employer-provided aircraft, an employer-provided free or discounted commercial airline flight, an employer-provided vacation, and employer-provided discount on property or services, and emkployer-provided membership in a country club or other social club, and an employer-provided ticket to an entertainment or sporting event.

(2) *Fringe benefits excluded from income.* To the extent that a particular fringe benefit is specifically excluded

from gross income pursuant to another section of subtitle A, that section shall govern the treatment of the fringe benefit. Thus, if the requirements of the governing section are satisfied, the fringe benefits may be excludable from gross income. Examples of excludable fringe benefits are qualified tuition reductions provided to an employee (section 177(d)); meals and lodging furnished to an employee for the convenience of the employer (section 119); and benefits provided under a dependent care assistance program (section 129). Similarly, the value of the use by an employee of an employer-provided vehicle or a flight provided to an employee on an employer-provided aircraft may be excludable from income under section 105 (because, for example, the trnsportation is provided for medical reasons) if and to the extent that the requirements of that section are satisfied. Section 61 and the regulations thereunder shall apply, however, to the extent that they are not inconsistent with such other section. For example, many fringe benefits specifically addressed in other sections of subtitle A are excluded from gross income only to the extent that they do not exceed specific dollar or percentage limits, or only if certain other requirements are met. If the limits are exceeded or the requirements are not met, some or all of the fringe benefit may be includible in gross income. See paragraph (b)(3) of this section.

(3) *Compensation for services.* A fringe benefit provided in connection with the performance of services shall be considered to have been provided as compensation for servcies. Refraining from the performance of services (such as pursuant to a covenant not to compete) is deemed to be the performance of services for purposes of this section.

(4) *Recipient of a fringe benefit*—(i) *Definition.* A fringe benefit is included in the income of the ''recipient'' of the fringe benefit. The recipient of a fringe benefit is the person performing the services in connection with which the fringe benefit is provided. Thus, a person may be considered to be a recipient, even though that person did not actually receive the fringe benefit. For example, a fringe benefit provided to any person is connection with the performance of services by another person is considered to have been provided to the person who performs the services and not the person who receives the fringe benefit. In addition, if a fringe benefit is provided to a person, but taxable to a second person as the recipient, such benefit is referred to as provided to the second person and use by the first person is considered use by the second person. For example, provision of an automobile to an employee's spouse by the employer is taxable to the employee as the recipient. The automobile is referred to as available to the employee and use by the employee's spouse is considered use by the employee.

(ii) *Recipient may be other than an employee.* The recipient of a fringe benefit need not be an employee of the provider of the fringe benefit, but may be a partner, director, or an independent contractor. For convenience, the term ''employee'' includes a reference to any recipient of a fringe benefit, unless otherwise specifically provided in this section.

(5) *Provider of a fringe benefit.* The ''provider'' of a fringe benefit is that person for whom the services are performed, regardless of whether that person actually provides the fringe benefit to the recipient. The provider of a fringe benefit need not be the employer of the recipient of the fringe benefit, but may be, for example, a client or customer of an independent contractor. For convenience, the term ''employer'' includes a reference to any provider of a fringe benefit, unless otherwise specifically provided in this section.

(6) *Effective date.* This section is effective from January 1, 1985, to December 31, 1988, with respect to fringe benefits furnished before January 1, 1989. No inference may be drawn from the promulgation or terms of this section concerning the application of law in effect prior to January 1, 1985.

(b) *Valuation of fringe benefits*—(1) *In general.* An employee must include in gross income the amount by which the fair market value of the fringe benefit exceeds the sum of (i) the amount, if any, paid for the benefit, and (ii) the amount, if any, specifically excluded from gross income by some other section of subtitle A. Therefore, for example, if the employee pays fair market value for what is received, no amount is includible in the gross income of the employee.

(2) *Fair market value.* In general, fair market value is determined on the basis of all the facts and circumstances. Specifically, the fair market value of a fringe benefit is that amount a (hypothetical person would have to pay a hypothetical third party to obtain (*i.e.*, purchase or lease) the particular fringe benefit. Thus, for example, the effect of any special relationship that may exist between the employer and the employee must be disregarded. This also means that an employee's subjective perception of the value of a fringe benefit is not relevant to the determination of a fringe benefit's fair market value. In addition, the cost incurred by the employer is not determinative of the fair market value of the fringe benefit. For special rules relating to the valuation of certain fringe benefits, see paragraph (c) of this section.

(3) *Exclusion from income based on cost.* If a statutory exclusion phrased in terms of cost applies to the provision of a fringe benefit, section 61 does not require the inclusion in the recipient's gross income of the difference between the fair market value and the excludable cost of that fringe benefit. For example, section 129 provides an exclusion from an employee's gross income for amounts paid or incurred by an employer to provide dependent care assistance to employees. Even if the fair market value of the dependent care assistance exceeds the employer's cost, the excess is not subject to inclusion under section 61 and this section. If the statutory cost exclusion is a limited amount, however, then the fair market value of the fringe benefit attributable to any excess cost is subject to inclusion.

(4) *Fair market value of the availability of an employer-provided vehicle.* If the vehicle special valuation rules of paragraph (d), (e), or (f) of this section are not used by a taxpayer entitled to use such rules, the value of the availability of an employer-provided vehicle is determined under the general valuation principles set forth in this section. In general, such valuation must be determined by reference to the cost to a hypothetical person of leasing from a hypothetical third party the same or comparable vehicle on the same or comparable terms in the geographic area in which the vehicle is available for use. Unless the employee can substantiate that the same or comparable vehicle could have been leased on a cents-per-mile basis, the value of the availability of the vehicle cannot be determined by reference to a cents-per-mile rate applied to the number of miles the vehicle is driven. An example of a comparable lease term is the amount of time that the vehicle is available to the employee for use, e.g., a one-year period.

(5) *Fair market value of a flight on an employer-provided aircraft.* If the non-commercial flight special valuation rule of paragraph (g) of this section is not used (or is not properly used) by a taxpayer entitled to use such rule, the value of a flight on an employer-provided aircraft is determined under the general valuation principles set forth in this section. An example of how the general valuation principles would apply is that if an employee whose flight is primarily personal controls the use of an aircraft with respect to such flight, such flight is valued by reference to how much it would cost a hypothetical person to charter the same or comparable aircraft for the same or comparable flight. The cost to charter the aircraft must be allocated among all employees on board the aircraft based on all the facts and circumstances, including which employees controlled the use of the aircraft. Notwithstanding the allocation required by the preceding sentence, no additional amount shall be included in the income of any employee whose flight is properly valued under the special valuation rule of paragraph (g) of this section.

(c) *Special valuation rules*—(1) *In general.* Paragraphs (d) through (j) of this section provide special valuation rules that may be used under certain circumstances for certain commonly provided fringe benefits. Paragraph (d) provides a lease valuation rule relating to employer-provided automobiles.

Paragraph (e) provides a cents-per-mile valuation rule relating to employer-provided vehicles. Paragraph (f) provides a commuting valuation rule relating to employer-provided vehicles. Paragraph (g) provides a flight valuation rule relating to flights on employer-provided aircraft. Paragraph (h) provides a flight valuation rule relating to flights on commercial airlines. Paragraph (i) is reserved. Paragraph (j) provides a meal valuation rule relating to employer-operated eating facilities for employees. For general rules relating to the valuation of fringe benefits not eligible for valuation under the special valuation rules, see paragraph (d) of this section.

(2) *Use of the special valuation rules*—(i) *In general.* The Special valuation rules may be used for income, employment tax, and reporting purposes. Use of any of the special valuation rules is optional. An employer need not use the same vehicle special valuation rule for all vehicles provided to all employees. For example, an employer may use the automobile lease valuation rule for automobiles provided to some employees, and the commuting and vehicle cents-per-mile valuation rules for automobiles provided to other employees. Except as otherwise provided, however, if either the commercial flight valuation rule or the noncommercial flight valuation rule is used, such rule must be used by an employer to value all flights taken by employees in a calendar year. Effective January 1, 1986, if an employer uses one of the special rules to value the benefit provided to an employee, the employee may not use another special rule to value that benefit. The employee may, however, use general valuation rules based on facts and circumstances (see paragraph (b) of this section). Effective January 1, 1986, an employee may only use a special valuation rule if the employer uses the rule. If a special rule is used, it must be used for all purposes. If an employer properly uses a special rule and the employee uses the special rule, the employee must include in gross income the amount determined by the employer under the special rule less any amount reimbursed by the employee to the employer. The employer and the employee may use the special rules to determine the amount of the reimbursement due the employer by the employee. If an employer properly uses a special rule and properly determines the amount of an employee's working condition fringe under section 132 and §1.132–1T (under the general rule or under a special rule), and the employee uses the special valuation rule, the employee must include in gross income the amount determined by the employer less any amount reimbursed by the employee to the employer.

(ii) *Transitional rules*—(A) *Use of vehicle special valuation rules for 1985 and 1986.* For purposes of valuing the use or availability of a vehicle, the consistency rules provided in paragraphs (d)(6) and (e)(5) of this section (relating to the automobile lease valuation rule and the vehicle cents-per-mile valuation rule, respectively) apply for 1987 and thereafter. Therefore, for 1985 and 1986 an employer (and employee, subject to paragraph (c)(2)(i) of this section) may use any applicable special valuation rule (or no special valuation rule) to value the use or availability of a vehicle, subject to paragraph (c)(2)(ii)(B) of this section.

(B) *Consistency Rules for 1985 and 1986.* If an employer uses the automobile lease valuation rule of paragraph (d) of this section in 1985 or 1986 with respect to an automobile, such rule must be used for the entire calendar year with respect to the automobile except for any period during which the commuting valuation rule of paragraph (f) of this section is properly used. If an employer uses the vehicle cents-per-mile valuation rule of pararaph (e) of this section in 1985 or 1986 with respect to a vehicle, such rule must be used for the entire calendar year with respect to the vehicle except for any period during which the commuting valuation rule of paragraph (f) of this section is properly used. The rules of this paragraph (c)(2)(ii)(B) also apply to employees using the special valuation rules of paragraphs (d) or (e) of this section.

(C) *Employee's use of special valuation rules for 1985.* An employee may use a special valuation rule (other than the rule in paragraph (e) of this section relating to the vehicle cents-per-mile valuation rule) during 1985 even if the employer does not use the same special valuation rule during 1985. An employee's use of a special valuation rule in 1986 and thereafter must be consistent with his employer's use of the rule as required under paragraph (c)(2)(i) of this section.

(D) *Examples.* The following examples illustrate the rules of paragraph (c)(2)(ii) of this section:

Example 1. Assume that an employer properly uses the automobile lease valuation rule in 1985. The employer may use the vehicle cents-per-mile valuation rule in 1986 if the requirements of the vehicle cents-per-mile valuation rule are satisfied.

Example 2. Assume that an employer does not use a special valuation rule to value the availability of an automobile in 1985. The employer may use any of the special valuation rules in 1986 if the requirements of the rule chosen are satisfied. The same applies for 1987.

Example 3. Assume that an employer properly uses the vehicle cents-per-mile valuation rule in 1985. The employer may continue to use to the rule or use any of the other special valuation rules to value the benefit provided in 1986 if the requirements of the rule chosen are satisfied. Alternatively, the employer may use none of the special valuation rules in 1986 but use any of the rules in 1987 if the requirements of the rule chosen are satisfied.

Example 4. Assume that an employee properly uses the automobile lease valuation rule in 1985. In 1986 and thereafter the employee may use a special valuation rule only if the employee's employer uses the same special valuation rule. The employee may use general valuation principles to value the benefit provided in 1986 and thereafter.

(3) *Election to use the special valuation rules*—A particular special valuation rule is deemed to have been elected by the employer (and, if applicable, by the employee), if the employer (and, if applicable, the employee) determines the value of the fringe benefit provided by applying the special valuation rule and treats such value as the fair market value of the fringe benefit for income, employment tax, and reporting purposes. Neither the employer nor the employee is required to notify the Internal Revenue Service of the election.

(4) *Application of section 414 to employers.* For purposes of paragraphs (c) through (j) of this section, except as otherwise provided therein, the term ''employer'' includes all entities required to be treated as a single employer under section 414 (b), (c), or (m).

(5) *Valuation formulas contained in the special valuation rules.* The valuation formulas contained in the special valuation rules are provided only for use in connection with such rules. Thus, when a special valuation rule is properly applied to a fringe benefit, the Commissioner will accept the value calculated pursuant to the rule as the fair market value of that fringe benefit. However, when a special valuation rule is not properly applied to a fringe benefit (see, for example, paragraph (g)(11) of this section), or when a special valuation rule is not used to value a fringe benefit by a taxpayer entitled to use the rule, the fair market value of that fringe benefit may not be determined by reference to any value calculated under any special valuation rule. Under the circumstances described in the preceding sentence, the fair market value of the fringe benefit must be determined pursuant to paragraph (b) of this section.

(6) *Modification of the special valuation rules.* The Commissioner may, if he deems it necessary, add, delete, or modify the special valuation rules, including the valuation formulas contained herein, on a prospective basis.

(7) *Special Accounting Period.* If the employer is using the special accounting rule provided in Announcement 85–113 (1985–31 I.R.B., August 5, 1985) (relating to the reporting of and withholding on the value of noncash fringe benefits), benefits which are deemed provided in a subsequent calendar year pursuant to such rule are considered as provided in such subsequent calendar year for purposes of the special valuation rules. Thus, if a particular special valuation rule is in effect for a calendar year, it applies to benefits deemed provided during such calendar year under the special accounting rule.

(d) *Automobile lease valuation rule*—(1) *In general*—(i) *Annual Lease Value.* Under the special valuation rule of this paragraph (d), if an employer provides an employee with an automobile that is available to the employee for an entire calendar year, the value of the benefit provided in the Annual Lease Value (determined under paragraph (d)(2) of this section) of that automobile. Except as otherwise provided, for an automobile that is available to an employee for less than an entire calendar year, the value of the benefit provided is either a pro-rated Annual Lease Value or the Daily Lease Value (as defined in paragraph (d)(4) of this section), whichever is applicable. Absent any statutory exclusion relating to the employer-provided automobile (see, for example, section 132(a)(3) and §1.132–5T(b)), the amount of the Annual Lease Value (or a pro-rated Annual Lease Value or the Daily Lease Value, as applicable) is included in the gross income of the employee.

(ii) *Definition of automobile.* For purposes of this paragraph (d), the term ''automobile'' means any four-wheeled vehicle manufactured primarily for use on public streets, roads, and highways.

(2) *Calculation of Annual Lease Value*—(i) *In general.* The Annual Lease Value of a particular automobile is calculated as follows:

(A) Determine the fair market value of the automobile as of the first date on which the automobile is made available to any employee of the employer for personal use. For an automobile first made available to any employee for personal use prior to January 1, 1985, determine the fair market value as of January 1, 1985. For rules relating to determination of the fair market value of an automobile for purposes of this paragraph (d), see paragraph (d)(5) of this section.

(B) Select the dollar range in column 1 of the Annual Lease Value Table, set forth in paragraph (d)(2)(iii) of this section, corresponding to the fair market value of the automobile. Except as otherwise provided in paragraphs (d)(2) (iv) and (v) of this section, the Annual Lease Value for each year of availability of the automobile is the corresponding amount in column 2 of the Table.

(ii) *Use by employee only in 1985.* If the employee, but not the employer, is using the special rule of this paragraph (d), the employee may calculate the Annual Lease Value in the same manner as described in paragraph (d)(2)(i)(A) of this section, except that the fair market value of the automobile is determined as of the first date on which the automobile is made available to the employee for personal use or, for an automobile made available to the employee for personal use prior to January 1, 1985, by determining the fair market value as of January 1, 1985. If the employer is also using the special rule of this paragraph (d), however, then the employee to whom the automobile is made available must use the special rule, if at all, by using the Annual Lease Value calculated by the employer. The rules of this paragraph (d)(2)(ii) apply only for 1985.

(iii) *Annual Lease Value Table.*

Automobile fair market value (1)	Annual lease value (2)
$0 to $999	$600
$1,000 to $1,999	850
$2,000 to $2,999	1,100
$3,000 to $3,999	1,350
$4,000 to $4,999	1,600
$5,000 to $5,999	1,850
$6,000 to $6,999	2,100
$7,000 to $7,999	2,350
$8,000 to $8,999	2,600
$9,000 to $9,999	2,850
$10,000 to $10,999	3,100
$11,000 to $11,999	3,350
$12,000 to $12,999	3,600
$13,000 to $13,999	3,850
$14,000 to $14,999	4,100
$15,000 to $15,999	4,350
$16,000 to $16,999	4,600
$17,000 to $17,999	4,850
$18,000 to $18,999	5,100
$19,000 to $19,999	5,350
$20,000 to $20,999	5,600
$21,000 to $21,999	5,580
$22,000 to $22,999	6,100
$23,000 to $23,999	6,350
$24,000 to $24,999	6,600
$25,000 to $25,999	6,850
$26,000 to $27,999	7,250
$28,000 to $29,999	7,750
$30,000 to $31,999	8,250
$32,000 to $33,999	8,750
$34,000 to $35,999	9,250
$36,000 to $37,999	9,750
$38,000 to $39,999	10,250
$40,000 to $41,999	10,750
$42,000 to $43,999	11,250
$44,000 to $45,999	11,750
$46,000 to $47,999	12,250
$48,000 to $49,999	12,750
$50,000 to $51,999	13,250
$52,000 to $53,999	13,750
$54,000 to $55,999	14,250
$56,000 to $57,999	14,750
$58,000 to $59,999	15,250

For vehicles having a fair market value in excess of $59,999, the Annual Lease Value is equal to: (.25 × the fair market value of the automobile) + $500.

(iv) *Recalculation of annual lease value.* The Annual Lease Values determined under the rules of this paragraph (d) are based on a four-year lease term. Therefore, except as otherwise provided in paragraph (d)(2)(v) of this section, the Annual Lease Value calculated by applying paragraph (d)(2) (i) or (ii) of this section shall remain in effect for the period that begins with the first date the special valuation rule of paragraph (d) of this section is applied by the employer to the automobile and ends on December 31 of the fourth full calendar year following that date. The Annual Lease Value for each subsequent four-year period is calculated by determining the fair market value of the automobile as of the January 1 following the period described in the previous sentence and selecting the amount in column 2 of the Annual Lease Value Table corresponding to the appropriate dollar range in column 1 of the Table. If, however, the employer is using the special accounting rule provided in Announcement 85–113 (1985–31 I.R.B., August 5, 1985) (relating to the reporting of and withholding on the value of noncash fringe benefits), the employer may calculate the Annual Lease Value for each subsequent four-year period as of the beginning of the special accounting period that begins immediately prior to the January 1 described in the previous sentence. For example, assume that pursuant to Announcement 85–113, an employer uses the special accounting rule. Assume further that beginning on November 1, 1985, the special accounting period is November 1 to October 31 and that the employer elects to use the special valuation rule of this paragraph (d) as of January 1, 1985. The employer may recalculate the Annual Lease Value as of November 1, 1988, rather than as of January 1, 1989.

(v) *Transfer of the automobile to another employee.* Unless the primary purpose of the transfer is to reduce Federal taxes, if an employer transfers an automobile from one employee to another employee, the employer may recalculate the Annual Lease Value based on the fair market value of the automobile as of January 1 of the year of transfer. If, however, the employer is using the special accounting rule provided in Announcement 85–113 (1985–31 I.R.B., August 5, 1985) (relating to the reporting of and withholding on the value of noncash fringe benefits), the employer may recalculate the Annual Lease Value based on the fair market value of the automobile as of the beginning of the special accounting period in which the transfer occurs. If the employer does not recalculate the Annual Lease Value, and the employee to whom the automobile is transferred uses the special valuation rule, the employee may not recalculate the Annual Lease Value.

(3) *Services included in, or excluded from, the Annual Lease Value Table*—(i) *Maintenance and insurance included.* The Annual Lease Values contained in the Annual Lease Value Table include the fair market value of maintenance of, and insurance for, the automobile. Neither an employer nor an employee may reduce the Annual Lease Value by the fair market value of any service included in the Annual Lease Value that is not provided by the employer, such as reducing the Annual Lease Value by the fair market value of a maintenance service contract or insurance. An employer or employee may take into account the services actually provided with respect to the automobile by valuing the availability of the automobile under the general valuation rules of paragraph (b) of this section.

(ii) *Fuel excluded*—(A) *In general.* The Annual Lease Values do not include the fair market value of fuel provided by the employer, regardless of whether fuel is provided in kind or its cost is reimbursed by or charged to the employer.

(B) *Valuation of fuel provided in kind.* The provision of fuel in kind may be valued at fair market value based on all the facts and circumstances or, in the alternative, it may be valued at 5.5 cents per mile for all miles driven by the employee. However, the provision of fuel in kind may not be valued at 5.5 cents per mile for miles driven outside the United States, Canada, and Mexico. For purposes of this section, the United States includes the United States and its territories.

(C) *Valuation of fuel where cost reimbursed by or charged to employer.* The fair market value of fuel, the cost of which is reimbursed by or charged to an employer, is generally the amount of the actual reimbursement or the amount charged, provided the purchase of the fuel is at arm's length. If an employer with a fleet of at least 20 automobiles that meet the requirements of paragraph (d)(5)(v)(C) of this section reimburses employees for the cost of fuel or allows employees to charge the employer for the cost of the fuel, however, the fair market value of fuel provided to those automobiles may be determined by reference to the employer's fleet-average cents-per-mile fuel cost. The fleet-average cents-per-mile fuel cost in equal to the fleet-average per-gallon fuel cost divided by the fleet-average miles-per-gallon rate. The averages described in the preceding sentence must be determined by averaging the per-gallon fuel costs and miles-per-gallon rates of a representative sample of the automobiles in the fleet equal to the greater of ten percent of the automobiles in the fleet or 20 automobiles for a representative period, such as a two month period.

(iii) *All other services excluded.* The fair market value of any service not specifically identified in paragraph (d)(3)(i) of this section that is provided by the employer with respect to an automobile (such as the services of a chauffeur) must be added to the Annual Lease Value of the automobile in determining the fair market value of the benefit provided.

(4) *Availability of an automobile for less than an entire calendar year*—(i) *Prorated Annual Lease Value used for continuous availability of 30 or more days.* Except as otherwise provided in paragraph (d)(4)(iv) of this section, for periods of continuous availability of 30 or more days, but less than an entire calendar year, the value of the availability of the employer-provided automobile is the pro-rated Annual Lease Value. The pro-rated Annual Lease Value is calculated by multiplying the applicable Annual Lease Value by a fraction, the numerator of which is the number of days of availability and the denominator of which is 365.

(ii) *Daily Lease Value used for continuous availability of less than 30 days.* Except as otherwise provided in paragraph (d)(4)(iii) of this section, for periods of continuous availability of one or more but less than 30 days, the value of the availability of the employer-provided automobile is the Daily Lease Value. The Daily Lease Value is calculated by multiplying the applicable Annual Lease Value by a fraction, the numerator of which is four times the number of days of availability and the denominator of which is 365.

(iii) *Election to treat all periods as periods of at least 30 days.* A pro-rated Annual Lease Value may be applied with respect to a period of continuous availability of less than 30 days, by treating the automobile as if it had been available for 30 days, if to do so would result in a lower valuation than applying the Daily Lease Value to the shorter period of actual availability.

(iv) *Periods of unavailability*—(A) *General rule.* In general, a pro-rated Annual Lease Value (as provided in paragraph (d)(4)(i) of this section) is used to value the availability of an employer-provided automobile when the automobile is available to an employee for a period of continuous availability of at least 30 days but less than the entire calendar year. Neither an employer nor an employee may use a pro-rated Annual Lease Value when the reduction of Federal taxes is the primary reason the automobile is unavailable to an employee during the calendar year.

(B) *Unavailability for personal reasons of the employee.* If an automobile is unavailable to an employee because of personal reasons of the employee, such as while the employee is on vacation, a pro-rated Annual Lease Value may not be used. For example, assume an automobile is available to an employee during the first five months of the year and during the last five months of the year. Assume further that the period of unavailability occurs because the employee is on vacation. The Annual Lease Value, if it is applied, must be applied with respect to the entire 12 month period. The Annual Lease Value may not be pro-rated to take into account the two-month period of unavailability.

(5) *Fair market value*—(i) *In general.* For purposes of determining the Annual Lease Value of an automobile under the Annual Lease Value Table, the fair market value of an automobile

is that amount a hypothetical person would have to pay a hypothetical third party to purchase the particular automobile provided. Thus, for example, any special relationship that may exist between the employee and the employer must be disregarded. Also, the employee's subjective perception of the value of the automobile is not relevant to the determination of the automobile's fair market value. In addition, except as provided in paragraph (d)(5)(ii) of this section, the cost incurred by the employer of either purchasing of leasing the automobile is not determinative of the fair market value of the automobile.

(ii) *Safe-harbor valuation rule.* For purposes of calculating the Annual Lease Value of an automobile under this paragraph (d), the safe-harbor value of the automobile may be used as the fair market value of the automobile For an automobile owned by the employer, the safe-harbor value of the automobile is the employer's cost of purchasing the automobile, provided the purchase is made at arm's length. For an automobile leased by the employer, the safe-harbor value of the automobile is the value determined under paragraph (d)(5)(iii) of this section.

(iii) *Use of nationally recognized pricing guides.* The fair market value of an automobile that is (A) provided to an employee prior to January 1, 1985, (B) being revalued pursuant to paragraphs (d)(2) (iv) or (v) of this section, or (C) is a leased automobile being valued pursuant to paragraph (d)(5)(ii) of this section, may be determined by using the retail value of such automobile as reported in a nationally recognized publication that regularly reports new or used automobile retail values, whichever is applicable. The values contained in (and obtained from) the publication must be reasonable with respect to the automobile being valued.

(iv) *Fair market value of special equipment*—(A) *Certain equipment excluded.* The fair market value of an automobile does not include the fair market value of any telephone or any specialized equipment that is added to or carried in the automobile if the presence of such equipment is necessitated by, and attributable to, the business needs of the employer.

(B) *Use of specialized equipment outside of employer's business.* The value of specialized equipment must be included, however, if the employee to whom the automobile is available uses the specialized equipment in a trade of business of the employee other than the employee's trade or business of being an employee of the employer.

(C) *Equipment susceptible to personal use.* The exclusion rule provided in this paragraph (d)(5)(iv) does not apply to specialized equipment susceptible to personal use.

(v) *Fleet-average valuation rule*—(A) *In general.* An employer with a fleet of 20 or more automobiles may use a fleet-average value for purposes of calculating the Annual Lease Values of the automobiles in the fleet. The fleet-average value is the average of the fair market values of each automobile in the fleet. The fair market value of each automobile in the fleet shall be determined, pursuant to the rules of paragraphs (d)(5) (i) through (iv) of this section, as of the later of January 1, 1985, or the first date on which the automobile is made available to any employee of the employer for personal use.

(B) *Period for use of rule.* The fleet-average valuation rule of this paragraph (d)(5)(v) may be used by an employer as of January 1 of any calendar year following the calendar year in which the employer acquires a fleet of 20 or more automobiles. The Annual Lease Value calculated for the automobiles in the fleet, based on the fleet-average value, shall remain in effect for the period that begins with the first January 1 the fleet-average valuation rule of this paragraph (d)(5)(v) is applied by the employer to the automobiles in the fleet and ends on December 31 of the subsequent calendar year. The Annual Lease Value for each subsequent two year period is calculated by determining the fleet-average value of the automobiles in the fleet as of the first January 1 of such period. An employer may cease using the fleet-average valuation rule as of any January 1. The fleet-average valuation rule does not apply as of January 1 of the year in which the number of automobiles in the employer's fleet declines to fewer than 20. If, however, the employer is using the special accounting rule provided in Announcement 85–113 (I.R.B. No. 31, August 5, 1985), the employer may apply the rules of this paragraph (d)(5)(v)(B) on the basis of the special accounting period rather than the calendar year. (This is accomplished by substituting (1) the beginning of the special accounting period that begins immediately prior to the January 1 described in this paragraph (d)(5)(v)(B) for January 1 wherever it appears in this paragraph (d)(5)(v)(B) and (2) the end of such accounting period for December 31.) The revaluation rules of paragraph (d)(2) (iv) and (v) of this section do not apply to automobiles valued under this paragraph (d)(5)(v).

(C) *Limitations on use of fleet-average rule.* The rule provided in this paragraph (d)(5)(v) may not be used for any automobile whose fair market value (determined pursuant to paragraphs (d)(5) (i) through (iv) of this section as of either the first date on which the automobile is made available to any employee of the employer for personal use or, if later, January 1, 1985) exceeds $16,500. In addition, the rule provided in this paragraph (d)(5)(v) may only be used for automobiles that the employer reasonably expects will regularly be used in the employer's trade or business. Infrequent use of the vehicle, such as for trips to the airport or between the employer's multiple business premises, does not constitute regular use of the vehicle in the employer's trade or business.

(D) *Additional automobiles added to the fleet.* If the rule provided in this paragraph (d)(5)(v) is used by an employer, it must be used for every automobile included in or added to the fleet that meets the requirements of paragraph (d)(5)(v)(C) of this section. The fleet-average value in effect at the time an automobile is added to the fleet is treated as the fair market value of the automobile for purposes of determining the Annual Lease Value of the automobile until the fleet-average value changes pursuant to paragraph (d)(5)(v)(B) of this section.

(E) *Use of the fleet-average rule by employees.* An employee can only use the fleet-average value if it is used by the employer. If an employer uses the fleet-average value, and the employee uses the special valuation rule of paragraph (d) of this section, the employee must use the fleet-average value.

(6) *Consistency rules*—(i) *Use of the automobile lease valuation rule by an employer.* Except as provided in paragraph (d)(5) (v)(B) of this section, an employer may adopt the automobile lease valuation rule of this paragraph (d) for an automobile only if the rule is adopted with respect to the later of the period that begins on January 1, 1987, or the first period in which the automobile is made available to an employee of the employer for personal use or, if the commuting valuation rule of paragraph (f) of this section is used when the automobile is first made available to an employee of the employer for personal use, the first period in which the commuting valuation rule is not used.

(ii) *An employer must use the automobile lease valuation rule for all subsequent periods.* Once the automobile lease valuation rule has been adopted for an automobile by an employer, the rule must be used by the employer for all subsequent periods in which the employer makes the automobile available to any employee, except that the employer may, for any period during which use of the automobile qualifies for the commuting valuation rule of paragraph (f) of this section, use the commuting valuation rule with respect to the automobile.

(iii) *Use of the automobile lease valuation rule by an employee.* Except as provided in paragraph (c)(2)(ii)(C) of this section, an employee may adopt the automobile lease valuation rule for an automobile only if the rule is adopted (A) by the employer and (B) with respect to the first period in which the automobile for which the employer (consistent with paragraph (d)(6)(i) of this section) adopted the rule is made available to that employee for personal use, or, if the commuting valuation rule of paragraph (f) of this section is used when the automobile is first made available to that employee for personal use, the first period in which the commuting valuation rule is not used.

(iv) *An employee must use the automobile lease valuation rule for all subsequent periods.* Once the automobile lease valuation rule has been adopted for an automobile by an employee, the rule must be used by the employee for all subsequent periods in which the automobile for which the rule is used is available to the employee, except that the employee may, for any period during which use of the automobile qualifies for use of the commuting valuation rule of paragraph (f) of this section and for which the employer uses the rule, use the commuting valuation rule with respect to the automobile.

(v) *Replacement automobiles.* Notwithstanding anything in this paragraph (D)(6) to the contrary, if the automobile lease valuation rule is used by an employer, or by an employer and an employee, with respect to a particular automobile, and a replacement automobile is provided to the employee for the primary purpose of reducing Federal taxes, then the employer, or the employer and the employee, using the rule must continue to use the rule with respect to the replacement automobile.

(e) *Vehicle cents-per-mile valuation rule*—(1) *In general*—(i) *General rule.* Under the vehicle cents-per-mile valuation rule of this paragraph (e), if an employer provides an employee with the use of a vehicle that (A) the employer reasonably expects will be regularly used in the employer's trade or business throughout the calendar year (or such shorter period as the vehicle may be owned or leased by the employer) or (B) satisfies the requirements of paragraph (e)(1)(ii) of this section, the value of the benefit provided in the calendar year is the standard mileage rate provided in the applicable Revenue Ruling or Revenue Procedure (''cents-per-mile rate'') multiplied by the total number of miles the vehicle is driven by the employee for personal purposes. For 1985, the standard mileage rate is 21 cents per mile for the first 15,000 miles and 11 cents per mile for all miles over 15,000. See Rev. Proc. 85–49. The standard mileage rate must be applied to personal miles independent of business miles. Thus, for example, if an employee drives 20,000 personal miles and 35,000 business miles in 1985, the value of the personal use of the vehicle is $3,700 (15,000×$.21+5,000×$.11). For purposes of this section, the use of a vehicle for personal purposes is any use of the vehicle other than use in the employee's trade or business of being an employee of the employer. Infrequent use of the vehicle, such as for trips to the airport or between the employer's multiple business premises, does not constitute regular use of the vehicle in the employer's trade or business.

(ii) *Mileage rule.* A vehicle satisfies the requirements of this paragraph (e)(1)(ii) in a calendar year if (A) it is actually driven at least 10,000 miles in the year, and (B) use of the vehicle during the year is primarily by employees. For example, if a vehicle is used by only one employee during the year and that employee drives a vehicle at least 10,000 miles in a calendar year, such vehicle satisfies the requirements of this paragraph (e)(1)(ii) even if all miles driven by the employee are personal. The requirements of this paragraph (e)(1)(ii), however, will not be satisfied if during the year the vehicle is transferred among employees in such a way which enables an employee whose use was at a rate significantly less that 10,000 miles per year to meet the 10,000 mile threshold. Assume that an employee uses a vehicle for the first six months of the year and drives 2,000 miles, and that vehicle is then used by other employees who drive the vehicle 8,000 miles in the last six months of the year. Because the rate at which miles were driven in the first six months of the year would result in only 4,000 miles being driven in the year, and because the first employee did not use the vehicle during the last six months of the year, the requirements of this paragraph (e)(1)(ii) are not satisfied. The requirement of paragraph (e)(1)(ii)(B) of this section is deemed satisfied if employees use the vehicle on a consistent basis for commuting. If the employer does not own or lease the vehicle during a portion of the year, the 10,000 mile threshold is to be reduced proportionately to reflect the periods when the employer owned or leased the vehicle. For purposes of this paragraph (e)(1)(ii), use of the vehicle by an individual (other than the employee) whose use would be taxed to the employee is not considered use by the employee.

(iii) *Limitation on use of the vehicle cents-per-mile valuation rule.* The value of the use of an automobile (as defined in paragraph (d)(1)(ii) of this section) may not be determined under the vehicle cents-per-mile valuation rule of this paragraph (e) if the fair market value of the automobile (determined pursuant to paragraphs (d)(5) (i) through (iv) of this section as of the later of January 1, 1985, or the first date on which the automobile is made available to any employee of the employer for personal use) exceeds $12,800. No inference may be drawn from the promulgation or terms of this section concerning the application of law in effect prior to January 1, 1985.

(2) *Definition of vehicle.* For purposes of this paragraph (e), the term ''vehicle'' means any motorized wheeled vehicle manufactured primarily for use on public streets, roads, and highways. The term ''vehicle'' includes an automobile as defined in paragraph (d)(1)(ii) of this section.

(3) *Services included in, or excluded from, the cents-per-mile rate*—(i) *Maintenance and insurance included.* The cents-per-mile rate includes the fair market value of maintenance of, and insurance for, the vehicle. An employer may not reduce the cents-per-mile rate by the fair market value of any service included in the cents-per-mile rate but not provided by the employer. An employer or employee may take into account the services provided with respect to the automobile by valuing the availability of the automobile under the general valuation rules of paragraph (b) of this section.

(ii) *Fuel provided by the employer*—(A) *Miles driven in the United States, Canada, and Mexico.* With respect to miles driven in the United States, Canada, and Mexico, the cents-per-mile rate includes the fair market value of fuel provided by the employer. If fuel is not provided by the employer, the cents-per-mile rate may be reduced by no more than 5.5 cents or the amount specified in any applicable Revenue Ruling or Revenue Procedure. For purposes of this section, the United States includes the United States and its territories.

(B) *Miles driven outside the United States, Canada, and Mexico.* With respect to miles driven outside the United States, Canada, and Mexico, the fair market value of fuel provided by the employer is not reflected in the cents-per-mile rate. Accordingly, the cents-per-mile rate may be reduced but by no more than 5.5 cents or the amount specified in any applicable Revenue Ruling or Revenue Procedure. If the employer provides the fuel in kind, it must be valued based on all the facts and circumstances. If the employer reimburses the employee for the cost of fuel or allows the employee to charge the employer for the cost of fuel, the fair market value of the fuel is generally the amount of the actual reimbursement or the amount charged, provided the purchase of fuel is at arm's length.

(4) *Valuation of personal use only.* The vehicle cents-per-mile valuation rule of this paragraph (e) may only be used to value the miles driven for personal purposes. Thus, the employer must include an amount in an employee's income with respect to the use of a vehicle that is equal to the product of the number of personal miles driven by the employee and the appropriate cents-per-mile rate. The employer may not include in income a greater or lesser amount; for example, the employer may not include in income 100 percent (all business and personal miles) of the value of the use of the vehicle. The term ''personal miles'' means all miles driven by the employee except miles driven by the employee is the employee's trade or business of being an employee of the employer.

(5) *Consistency rules*—(i) *Use of the vehicle cents-per-mile valuation rule by an employer.* An employer must adopt the vehicle cents-per-mile valuation rule of this paragraph (e) for a vehicle by the later of the period that begins on January 1, 1987, or the first period in which the vehicle is used by an employee of the employer for personal use or, if the commuting valuation rule of paragraph (f) of this section is used when the vehicle is first used by an employee of the employer for personal use, the first period in which the commuting valuation rule is not used.

(ii) *An employer must use the vehicle cents-per-mile valuation rule for all subsequent periods.* Once the vehicle cents-per-mile valuation rule has been adopted for a vehicle by an employer, the rule must be used by the employer for all subsequent periods in which the vehicle qualifies for use of the rule, except that (A) the employer may, for any period during which use of the vehicle qualifies for the commuting valuation rule of paragraph (f) of this section, use the commuting valuation rule with respect to the vehicle, and (B) if the employer elects to use the automobile lease valuation rule of paragraph (d) of this section for a period in which the vehicle does not qualify for use of the vehicle cents-per-mile valuation rule, then the employer must comply with the requirements of paragraph (d)(6) of this section. If the vehicle fails to qualify for use of the vehicle cents-per-mile valuation rule during a subsequent period, the employer may adopt for such subsequent period and thereafter any other special valuation rule for which the vehicle then qualifies. For purposes of paragraph (d)(6) of this section, the first day on which an automobile with respect to which the vehicle cents-per-mile rule had been used fails to qualify for use of the vehicle cents-per-mile valuation rule may be deemed to be the first day on which the automobile is available to an employee of the employer for personal use.

(iii) *Use of the vehicle cents-per-mile valuation rule by an employee.* An employee may adopt the vehicle cents-per-mile valuation rule for a vehicle only if the rule is adopted (A) by the employer and (B) with respect to the first period in which the vehicle for which the employer (consistent with paragraph (e)(5)(i) of this section) adopted the rule is available to that employee for personal use or, if the commuting valuation rule of paragraph (f) of this section is used by both the employer and the employee when the vehicle is first used by an employee for personal use, the first period in which the commuting valuation rule is not used.

(iv) *An employee must use the vehicle cents-per-mile valuation rule for all subsequent periods.* Once the vehicle cents-per-mile valuation rule has been adopted for a vehicle by an employee, the rule must be used by the employee for all subsequent periods of personal use of the vehicle by the employee for which the rule is used by the employer, except that the employee may, for any period during which use of the vehicle qualifies for use of the commuting valuation rule of paragraph (f) of this section and for which such rule is used by the employer, use the commuting valuation rule with respect to the vehicle.

(v) *Replacement vehicles.* Notwithstanding anything in this paragraph (e)(5) to the contrary, if the vehicle cents-per-mile valuation rule is used by an employer, or by an employer and an employee, with respect to a particular vehicle, and a replacement vehicle is provided to the employee for the primary purpose of reducing Federal taxes, then the employer, or the employer and the employee, using the rule must continue to use the rule with respect to the replacement vehicle if the replacement vehicle qualifies for use of the rule.

(f) *Commuting valuation rule*—(1) *In general.* Under the commuting valuation rule of this paragraph (f), the value of the commuting use of an employer-provided vehicle may be determined pursuant to paragraph (f)(3) of this section if the following criteria are met by the employer and employees with respect to the vehicle:

(i) The vehicle is owned or leased by the employer and is provided to one or more employees for use in connection with the employer's trade or business and is used in the employer's trade or business;

(ii) For bona fide noncompensatory business reasons, the employer requires the employee to commute to and/or from work in the vehicle;

(iii) The employer has established a written policy under which the employee may not use the vehicle for personal purposes, other than for commuting or de minimis personal use (such as a stop for a personal errand on the way between a business delivery and the employee's home);

(iv) Except for de minimis personal use, the employee does not use the vehicle for any personal purpose other than commuting; and

(v) The employee required to use the vehicle for commuting is not a control employee of the employer (as defined in paragraphs (f) (5) and (6) of this section).

If the vehicle is a chauffeur-driven vehicle, the commuting valuation rule of this paragraph (f) may not be used to value the commuting use of any passenger who commutes in the vehicle. The rule may be used, however, to value the commuting use of the chauffeur. Personal use of a vehicle is all use of the vehicle by the employee that is not used in the employee's trade or business of being an employee of the employer.

(2) *Special rules.* Notwithstanding anything in paragraph (f)(1) of this section to the contrary, the following special rules apply—

(i) *Written policy not required in 1985.* The policy described in paragraph (f)(1)(iii) of this section prohibiting personal use need not be written with respect to the commuting use which occurs prior to January 1, 1986;

(ii) *Commuting use during 1985.* For commuting use that occurs after December 31, 1984, but before January 1, 1986, the restrictions of paragraph (f)(1)(v) of this section shall be applied by substituting ''an employee who is an officer or a five-percent owner of the employer'' in lieu of ''a control employee''. For purposes of determining who is a five-percent owner, any individual who owns (or is considered as owning) five or more percent of the fair market value of an entity (the ''owned entity'') is considered a five-percent owner of all entities that would be aggregated with the owned entity under the rules of section 414 (b), (c), or (m). An employee who is an officer of an employer shall be treated as an officer of all entities treated as a single employer pursuant to section 414 (b), (c), or (m). The definitions provided in paragraphs (f)(5)(i) and (f)(6) of this section may be used to define an officer; and

(iii) *Control employee exception.* If the vehicle in which the employee is required to commute is not an automobile as defined in paragraph (d)(1)(ii) of this section, the restrictions of paragraph (f)(1)(v) of this section do not apply.

(3) *Commuting value*—(i) *$1.50 per one-way commute.* If the requirements of this paragraph (f) are satisfied, the value of the commuting use of an employer-provided vehicle is $1.50 per one-way commute (e.g., from home to work or from work to home).

(ii) *Value per employee.* If there is more than one employee who commutes in the vehicle, such as in the case of an employer-sponsored car pool, the amount includible in the income of each employee is $1.50 per one-way commute. Thus, the amount includible for each round-trip commute is $3.00 per employee.

(4) *Definition of vehicle.* For purposes of this paragraph (f), the term ''vehicle'' means any motorized wheeled vehicle manufactured primarily for use on public streets, roads, and highways. The term ''vehicle'' includes an automobile as defined in paragraph (d)(1)(ii) of this section.

(5) *Control employee defined—Non-government employer.* For purposes of this paragraph (f), a control employee of a non-government employer is any employee—

(i) Who is a Board- or shareholder-appointed, confirmed, or elected officer of the employer,

(ii) Who is a director of the employer, or

(iii) Who owns a one-percent or greater equity, capital, or profits interest in the employer.

For purposes of determining who is a one-percent owner under paragraph (f)(5)(iii) of this section, any individual who owns (or is considered as owning under section 318(a) or principles similar to section 318(a) for entities other than corporations) one percent or more of the fair market value of an entity (the ''owned entity'') is considered a one-percent owner of all entities which would be aggregated with the owned entity under the rules of section 414 (b), (c), or (m). An employee who is an officer of an employer shall be treated as an officer of all entities treated as a single employer pursuant to section 414 (b), (c) or (m).

(6) *Control employee defined—Government employer*. For purposes of this paragraph (f), a control employee of a government employer if any—

(i) Elected official,

(ii) Federal employee who is appointed by the President and confirmed by the Senate. In the case of commissioned officers of the United States Armed Forces, an officer is any individual with the rank of brigadier general or above or the rank of rear admiral (lower half) or above; or

(iii) State or local executive officer comparable to the individuals described in paragraph (f)(6) (i) and (ii) of this section.

For purposes of this paragraph (f), the term ''government'' includes any Federal, state, or local governmental unit, and any agency or instrumentality thereof.

(g) *Non-commercial flight valuation rule*—(1) *In general*. Under the non-commercial flight valuation rule of this paragraph (g), if an employee is provided with a flight on an employer-provided aircraft, the value of the flight is calculated using the aircraft valuation formula provided in paragraph (g)(5) of this section. Except as otherwise provided, for purposes of this paragraph (g), a flight provided to a person whose flight would be taxable to an employee as the recipient is referred to as provided to the employee, and a flight taken by such person is considered a flight taken by the employee.

(2) *Eligible flights and eligible aircraft*. The valuation rule of this paragraph (g) may be used to value flights on all employer-provided aircraft, including helicopters. The valuation rule of this paragraph (g) may be used to value international as well as domestic flights. The valuation rule of this paragraph (g) may not be used to value a flight on any commercial aircraft on which air transportation is sold to the public on a per-seat basis. For a special valuation rule relating to certain flights on commercial aircraft, see paragraph (h) of this section.

(3) *Definition of a flight*—(i) *General rule*. Except as otherwise provided in paragraph (g)(3)(iii) of this section (relating to intermediate stops), for purposes of this paragraph (g), an individual's flight is the distance (in statute miles) between the place at which the individual boards the aircraft and the place at which the individual deplanes.

(ii) *Valuation of each flight*. Under the valuation rule of this paragraph (g), value is determined separately for each flight. Thus, a round-trip is comprised of at least two flights. For example, an employee who takes a personal trip on an employer-provided aircraft from New York, New York to Denver, Colorado, Denver to Los Angeles, California, and Los Angeles to New York has taken three flights and must apply the aircraft valuation formula separately to each flight. The value of a flight must be determined on a passenger-by-passenger basis. For example, if an individual accompanies an employee and the flight taken by the individual would be taxed to the employee, the employee would be taxed on the special rule value of the flight by the employee and by the individual.

(iii) *Intermediate stop*. If the primary purpose of a landing is necessitated by weather conditions, by an emergency, for purposes of refueling or obtaining other services relating to the aircraft, or for purposes of the employer's business unrelated to the employee whose flight is being valued (''an intermediate stop''), the distance between the place at which the trip originates and the place at which the intermediate stop occurs is not considered a flight. For example, assume that an employee's trip originates in St. Louis, Missouri, on route to Seattle, Washington, but, because of weather conditions, the aircraft lands in Denver, Colorado, and the employee stays in Denver overnight. Assume further that the next day the aircraft flies to Seattle where the employee deplanes. The employee's flight is the distance between the airport in St. Louis and the airport in Seattle. Assume that a trip originates in New York, New York, with five passengers and makes an intermediate stop in Chicago, Illinois, before going on to Los Angeles, California. If one of the five passengers deplanes in Chicago, the distance of that passenger's flight would be the distance between the airport in New York and the airport in Chicago. The intermediate stop is disregarded when measuring the flights taken by each of the other passengers. Their flights would be the distance between the airport in New York and the airport in Los Angeles.

(4) *Personal and non-personal flights*—(i) *In general*. The valuation rule of this paragraph (g) applies to personal flights on employer-provided aircraft. A personal flight is one the value of which is not excludable under another section of subtitle A, such as under section 132(d) (relating to a working condition fringe). However, solely for purposes of paragraphs (g)(4)(ii) and (g)(4)(iii) of this section, references to personal flights do not include flights a portion of which would not be excludable by reason of section 274.(c).

(ii) *Trip primarily for employer's business*. If an employee combines, in one trip, personal and business flights on an employer-provided aircraft and the employee's trip is primarily for the employer's business (see §1.162–2(b)(2)), the employee must include in income the excess of the value of all the flights that comprise the trip over the value of the flights that would have been taken had there been no personal flights but only business flights. For example, assume that an employee flies on an employer-provided aircraft from Chicago, Illinois to Miami, Florida, for the employer's business and that from Miami the employee flies on the employer-provided aircraft to Orlando, Florida, for personal purposes and then flies back to Chicago. Assume further that the primary purpose of the trip is for the employer's business. The amount includible in income is the excess of the value of the three flights (Chicago to Miami, Miami to Orlando, and Orlando to Chicago), over the value of the flights that would have been taken had there been no personal flights but only business flights (Chicago to Miami and Miami to Chicago).

(iii) *Primarily personal trip*. In an employee combines, in one trip, personal and business flights on an employer-provided aircraft and the aircraft's trip is primarily personal (see §1.162–2(b)(2)), the amount includible in the employee's income is the value of the personal flights that would have been taken had there been no business flights but only personal flights. For example, assume that an employee flies on an employer-provided aircraft from San Francisco, California, to Los Angeles, California, for the employer's business and that from Los Angeles the employee flies on an employer-provided aircraft to Palm Springs, California, primarily for personal reasons and then flies back to San Francisco. Assume further that the primary purpose of the trip is personal. The amount includible in the employee's income is the value of personal flights that would have been taken had there been no business flights but only personal flights (San Francisco to Palm Springs and Palm Springs to San Francisco).

(iv) *Application of section 274(c)*. The value of employer-provided travel outside the United States away from home may not be excluded from the employee's gross income as a working condition fringe, by either the employer or the employee, to the extent not deductible by reason of section 274(c). The valuation rule of this paragraph (g) applies to that portion of the value of any flight not excludable by reason of section 274(c). Such value must be included in income in addition to the amounts determined under paragraphs (g)(4)(ii) and (g)(4)(iii) of this section.

(v) *Flight by individuals who are not personal guests*. If an individual who is not an employee of the employer providing the aircraft is on a flight, and the individual is not the personal guest of any employee, the flight by the individual is not taxable to any employee of the employer providing the aircraft. The rule in the preceding sentence applies where the individual is provided the flight by the employer for non-compensatory business reasons of the employer. For example, assume that G, and employee of company Y, accompanies A, an employee of company X, on company X's aircraft for the purpose of inspecting land under consideration for purchase by company X from company Y. The flight by G is not taxable to A.

(5) *Aircraft valuation formula*. Under the valuation rule of this paragraph (g), the value of a flight is determined by multiplying the base aircraft valuation formula for the period during which the flight was taken by the appropriate aircraft multiple (as provided in paragraph (g)(7) of this section) and

then adding the applicable terminal charge. The base aircraft valuation formula (also known as the Standard Industry Fare Level formula or SIFL) in effect on June 30, 1985, is as follows: ($.1402 per mile for the first 500 miles, $.1069 per mile for miles between 501 and 1500, and $.1028 per mile for miles over 1500). The terminal charge in effect on June 30, 1985, is $25.62. The SIFL cents-per-mile rates in the formula and the terminal charge are calculated by the Department of Transportation and are revised semi-annually.

(6) *SIFL formula in effect for a particular flight.* For purposes of this paragraph (g), in determining the value of a particular flight during the first six months of a calendar year, the SIFL formula (and terminal charge) in effect on December 31 of the preceding year applies, and in determining the value of a particular flight during the last six months of a calendar year, the SIFL formula (and terminal charge) in effect on June 30 of that year applies. The following is the SIFL formula in effect on December 31, 1984: ($.1480 per mile for the first 500 miles, $.1128 per mile for miles between 501 and 1500, and $.1085 per mile for miles over 1500). The terminal charge in effect on December 31, 1984, is $27.05.

(7) *Aircraft multiples*—(i) *In general.* The aircraft multiples are based on the maximum certified takeoff weight of the aircraft. For purposes of applying the aircraft valuation formula described in paragraph (g)(5) of this section, the aircraft multiples are as follows:

[In percent]

Maximum certified takeoff weight of the aircraft	Aircraft multiple for a—	
	Control employee	Non-control employee
6,000 lbs. or less	62.5	15.6
6,001 to 10,000 lbs	125.0	23.4
10,001 to 25,000 lbs	300.0	31.3
25,001 lbs. or more	400.0	31.3

(ii) *Flights treated as provided a to control employee.* Except as provided in paragraph (g)(10) of this section, any flight provided to an individual whose flight would be taxable to a control employee (as defined in paragraph (g)(8) and (9) of this section) as the recipient shall be valued as if such flight has been provided to that control employee. For example, assume that the chief executive officer of an employer, his spouse, and his two children fly on an employer-provided aircraft for personal purposes. Assume further that the maximum certified takeoff weight of the aircraft is 12,000 lbs. The amount includible in the employee's income is 4 × ((300 percent × base aircraft valuation formula) plus the applicable terminal charge).

(8) *Control employee defined—Non-government employer.* For purposes of this paragraph (g), a control employee of a non-government employer is any employee—

(i) Who is a Board- or shareholder-appointed, confirmed, or elected officer of the employer, limited to the lesser of (A) one-percent of all employees (increased to the next highest integer, if not an integer) or (B) ten employees;

(ii) Whose compensation equals or exceeds the compensation of the top one percent most highly-paid employees of the employer (increased to the next highest integer, if not an integer) limited to a maximum of 25 employees;

(iii) Who owns a ten-percent or greater equity, capital or profits interest in the employer; or

(iv) Who is a director of the employer.

For purposes of this paragraph (g), any employee who is a family member (within the meaning of section 267(c)(4)) of a control employee is also a control employee. Pursuant to this paragraph (g)(8), an employee may be a control employee under more than one of the requirements listed in paragraphs (g)(8) (i) through (iv) of this section. For example, an employee may be both an officer under paragraph (g)(8)(i) of this section and a highly-paid employee under paragraph (g)(8)(ii) of this section. In this case, for purposes of the officer limitation rule of paragraph (g)(8)(i) of this section and the highly-paid employee limitation rule of paragraph (g)(8)(ii) of this section, the employee would be counted as reducing both such limitation rules. In no event shall an employee whose compensation is less than $50,000 be a control employee under paragraph (g)(8)(ii) of this section. For purposes of determining who is a ten-percent owner under paragraph (g)(8)(iii) of this section, any individual who owns (or is considered as owning under section 318(a) or principles similar to section 318(a) for entities other than corporations) ten percent or more of the fair market value of an entity (the ''owned entity'') is considered a ten-percent owner of all entities which would be aggregated with the owned entity under the rules of section 414 (b), (c), or (m). For purposes of determining who is an officer under paragraph (g)(8)(i) of this section, notwithstanding anything in this section to the contrary, if the employer would be aggregated with other employers under the rules of section 414 (b), (c), or (m), the officer definition and the limitations are applied to each separate employer rather than to the aggregated employer. If applicable, the officer limitation rule of paragraph (g)(8)(i) of this section is applied to employees in descending order of their compensation. Thus, if an employer has 11 board-appointed officers, the employee with the least compensation of those officers would not be an officer under paragraph (g)(8)(i) of this section. For purposes of this paragraph (g), the term ''compensation'' means the amount reported on a Form W-2 as income for the prior calendar year. Compensation includes all amounts received from all entities treated as a single employer under section 414 (b), (c), or (m).

(9) *Control employee defined—Government*. For purposes of this paragraph (g), a control employee of a government employer is any—

(i) Elected officials;

(ii) Federal employee who is appointed by the President and confirmed by the Senate. In the case of commissioned officers of the United States Armed Forces, an officer is any individual with the rank or brigadier general or above or the rank of rear admiral (lower half) or above; or

(iii) State or local executive officer comparable to the individuals in paragraph (g)(9)(i) and (ii) of this section.

For purposes of this paragraph (g), the term ''government'' includes any Federal, state, or local government unit, and any agency or instrumentality thereof.

(10) *Seating capacity rule*—(i) *In general*. Where 50 percent of more of the regular passenger seating capacity of an aircraft (as used by the employer) is occupied by individuals whose flights are primarily for the employer's business (and whose flights are excludable from income under section 132(d)), the value of a flight on that aircraft by any employee who is not flying primarily for the employer's business (or who is flying primarily for the employer's business but the value of whose flight is not excludable under section 132(d) by reason of section 274(c)) is deemed to be zero. See §1.132–5T which limits the exclusion under section 132(d) to situations where the employee receives the flight in connection with the performance of services for the employer providing the aircraft. For purposes of this paragraph (g)(10), the term ''employee'' includes only employees and partners of the employer providing the aircraft and does not include independent contractors and directors of the employer.

For purposes of this paragraph (g)(10), the second sentence of paragraph (g)(1) of this section will not apply. Instead, a flight taken by an individual who is either treated as an employee pursuant to section 132(f)(1) or whose flight is treated as a flight taken by an employee pursuant to section 132(f)(2) is considered a flight taken by an employee. If (A) a flight is considered taken by an individual other than an employee (as defined in this paragraph (g)(10)), (B) the value of that individual's flight is not excludable under section 132(d), and (C) the seating capacity rule of this paragraph (g)(10) otherwise applies, then the value of the flight provided to such an individual is the value of a flight provided to a non-control employee (even if the individual who would be taxed on the value of such individual's flight is a control employee).

(ii) *Application of 50-percent test to multiple flights*. The seating capacity rule of this paragraph (g)(10) must be met both at the time the individual whose flight is being valued boards the aircraft and at the time the individual deplanes. For example, assume that employee A boards an employer-provided aircraft for personal purposes in

New York, New York, and that at that time 80 percent of the regular passenger seating capacity of the aircraft is occupied by individuals whose flights are primarily for the employer's business (and whose flights are excludable from income under section 132(d)) (''the business passengers''). If the aircraft flies directly to Hartford, Connecticut where all of the passengers, including A, deplane, the requirements of the seating capacity rule of this paragraph (g)(10) have been satisfied. If instead, some of the passengers, including A, remain on the aircraft in Hartford and the aircraft continues on to Boston, Massachusetts, where they all deplane, the requirements of the seating capacity rule of this paragraph (g)(10) will not be satisfied unless at least 50 percent of the seats comprising the aircraft's regular passenger seating capacity were occupied by the business passengers at the time A deplanes in Boston.

(iii) *Regular passenger seating capacity.* The regular passenger seating capacity of an aircraft is the maximum number of seats that have at any time been on the aircraft (while owned or leased by the employer). Except to the extent excluded pursuant to paragraph (g)(10)(v) of this section, regular seating capacity includes all seats which may be occupied by members of the flight crew. It is irrelevant that on a particular flight, less than the maximum number of seats are available for use, because, for example, some of the seats are removed. When determining the maximum number of seats, those seats that cannot at any time be legally used during takeoff and are not any time used during takeoff are not counted.

(iv) *Examples.* The rules of paragraph (g)(10)(iii) of this section are illustrated by the following examples:

Example 1. Employer A and employer B order the same aircraft, except that A orders it with 10 seats and B orders it with eight seats. A always uses its aircraft as a 10-seat aircraft; B always uses its aircraft as an eight-seat aircraft. The regular passenger seating capacity of A's aircraft is 10 and of B's aircraft is eight.

Example 2. Assume the same facts as in example (1), except that whenever A's chief executive officer and spouse use the aircraft eight seats are removed. Even if substantially all of the use of the aircraft is by the chief executive officer and spouse the regular passenger seating capacity of the aircraft is 10.

Example 3. Assume the same facts as in example (1), except that whenever more than eight people want to fly in B's aircraft, two extra seats are added. Even if substantially all of the use of the aircraft occurs with eight seats, the regular passenger seating capacity of the aircraft is 10.

(v) *Seats occupied by flight crew.* When determining the regular passenger seating capacity of an aircraft, any seat occupied by a member of the flight crew (whether or not such individual is an employee of the employer providing the aircraft) shall not be counted, unless the purpose of the flight by such individual is not primarily to serve as a member of the flight crew. If the seat occupied by a member of the flight crew is not counted as a passenger seat pursuant to the previous sentence, such member of the flight crew is disregarded in applying the 50 percent test described in the first sentence of paragraph (g)(10)(i) of this section. For example, assume that, prior to the application of this paragraph (g)(10)(v), the regular passenger seating capacity of an aircraft is two seats.

Assume further that an employee pilots the aircraft and that the employee's flight is not primarily for the employer's business. If the employee's spouse occupies the other seat for personal purposes, the seating capacity rule is not met and the value of both flights must be included in the employee's income. If, however, the employee's flight were primarily for the employer's business (unrelated to serving as a member of the flight crew), then the seating capacity rule is met and the value of the flight for the employee's spouse is deemed to be zero. If the employee's flight were primarily to serve as a member of the flight crew, then the seating capacity rule is not met and the value of a flight by any passenger for primarily personal reasons is not deemed to be zero.

(11) *Erroneous use of the non-commercial flight valuation rule*—(i) *In general.* If the non-commercial flight valuation rule of this paragraph (g) is used by an employer or a control employee, as the case may be, on a return as originally filed, on the grounds that either the

control employee is not in fact a control employee, or that the aircraft is within a specific weight classification, and either position is subsequently determined to be erroneous, the valuation rule of this paragraph (g) (including paragraph (g)(13) of this section) is not available to value the flight taken by that control employee by the person or persons taking the erroneous position. With respect to the weight classifications, the previous sentence does not apply if the position taken is that the weight of the aircraft is greater than it is subsequently determined to be. If, with respect to a flight by a control employee, the seating capacity rule of paragraph (g)(10) of this section is used by an employer or the control employee, as the case may be, on a return as originally filed, and it is subsequently determined that the requirements of paragraph (g)(10) of this section were not met, the valuation rule of this paragraph (g) (including paragraph (g)(13) of this section) is not available to value the flight taken by that control employee by the person or persons taking the erroneous position.

(ii) *Value of flight excluded as a working condition fringe.* If either an employer or an employee, on a return as originally filed, excludes from the employee's income or wages the value of a flight on the grounds that the flight was excludable as a working condition fringe under section 132, and that position is subsequently determined to be erroneous, the valuation rule of this paragraph (g) (including paragraph (g)(13) of this section) is not available to value the flight taken by that employee by the person or persons taking the erroneous position.

(12) *Consistency rules*—(i) *Use by the employer.* Except as otherwise provided in paragraphs (g)(11) and (g)(13)(iv) of this section, if the non-commercial flight valuation rule of this paragraph (g) is used by an employer to value flights provided in a calendar year, the rule must be used to value all flights provided in the calendar year.

(ii) *Use by the employee.* Except as otherwise provided in paragraphs (g)(11) and (g)(13)(iv) of this section, if the non-commercial flight valuation rule of this paragraph (g) is used by an employee to value a flight taken in a calendar year, the rule must be used to value all flights taken in the calendar year.

(13) *Transitional valuation rule*—(i) *In general.* If the value of a flight determined under this paragraph (g)(13) is lower than the value of the flight otherwise determined under paragraph (g) of this section, the value of the flight is the lower amount. The transitional valuation rule of this paragraph (g)(13) is available only for flights provided after December 31, 1984, and before January 1, 1986.

(ii) *Transitional valuation rule aircraft multiples.* The appropriate aircraft multiples under the transitional valuation rule are as follows:

(A) 125 percent of the base aircraft valuation formula, plus the applicable terminal charge, for any flight by any employee who is not a key employee (as defined in paragraph (g)(13)(iii) of this section.)

(B) 125 percent of the base aircraft valuation formula, plus the applicable terminal charge, for a flight by a key employee if there is a primary business purpose of the trip by the aircraft. For purposes of this paragraph (g)(13)(ii)(B), entertaining an employee or other individual is not a business purpose.

(C) 600 percent of the base aircraft valuation formula, plus the applicable terminal charge, for a flight by a key employee if there is not primary business for the trip by the aircraft.

Where there is no business purpose for the trip by the aircraft, the alternative valuation rule may not be used to value a flight by a key employee. For purposes of this section, compensating an employee is not a business purpose.

(iii) *Key employee defined.* A ''key employee'' is any employee who is a five-percent owner or an officer of the employer, or who, with respect to a particular trip by the aircraft, controls the use of the aircraft. For purposes of determining who is a five-percent owner, any individual who owns (or is considered as owning) five or more percent of the fair market value of an entity (the ''owned entity'') is considered a five-percent owner of all entities that would be aggregated with the owned entity under the rules of section 414(b), (c), or (m).

(iv) *Erroneous use of transitional valuation rule.* If the transitional valuation rule is used by an employer or a key employee, as the case may be, on a return as originally filed, on the grounds that—

(A) The key employee is not in fact a key employee,

(B) An aircraft trip had a primary business purpose, or

(C) An aircraft trip had some business purpose,

and such position is subsequently determined to be erroneous, neither the transitional valuation rule nor the non-commercial flight valuation rule of this paragraph (g) is available to value such flight taken by that key employee by the person or persons taking the erroneous position.

(h) *Commercial flight valuation rule*—(1) *In general.* Under the commercial flight valuation rule of this paragraph (h), the value of a space-available flight (as defined in paragraph (h)(2) of this section) on a commercial aircraft is 25 percent of the actual carrier's highest unrestricted coach fare in effect for the particular flight taken.

(2) *Space-available flight.* The commercial flight valuation rule of this paragraph (h) is available to value a space-available flight. The term ''space-available flight'' means a flight on a commercial aircraft (i) for which the airline (the acutal carrier) incurs no substantial additional cost (including forgone revenue) determined without regard to any amount paid for the flight and (ii) which is subject to the same types of restrictions customarily associated with flying on an employee ''standby'' or ''space-available'' basis. A flight may be a space-available flight even if the airline that is the actual carrier is not the employer of the employee.

(3) *Commercial aircraft.* If the actual carrier does not offer, in the ordinary course of its business, air transportation to customers on a per-seat basis, the commercial flight valuation rule of this paragraph (h) is not available. Thus, if, in the ordinary course of its line of business, the employer only offers air transportation to customers on a charter basis, the commerical flight valuation rule of this paragraph (h) may not be used to value a space-available flight on the employer's aircraft. Similarly, if, in the ordinary course of its line of business, an employer only offers air transportation to customers for the transport of cargo, the commercial flight valuation rule of this paragraph (h) may not be used to value a space-available flight on the employer's aircraft.

(4) *Timing of inclusion.* The date that the flight is taken is the relevant date for purposes of applying section 61(a)(1) and this section to a space-available flight on a commercial aircraft. The date of purchase or issuance of a pass or ticket is not relevant. Thus, this section applies to a flight taken on or after January 1, 1985, regardless of the date on which the pass or ticket for the flight was purchased or issued.

(5) *Consistency rules*—(i) *Use by employer.* If the commercial flight valuation rule of this paragraph (h) is used by an employer to value flights provided in a calendar year, the rule must be used to value all flights provided in the calendar year.

(ii) *Use by employee.* If the commercial flight valuation rule of this paragraph (h) is used by an employee to value a flight taken in a calendar year, the rule must be used to value all flights taken by such employee in the calendar year.

(i) [Reserved]

(j) *Valuation of meals provided at an employer-operated eating facility for employees*—(1) *In general.* The valuation rule of this paragraph (j) may be used to value a meal provided at an employer-operated eating facility for employees (as defined in §1.132–7T). For rules relating to an exclusion for the value of meals provided at an employer-operated eating facility for employees, see §1.132–7T.

(2) *Valuation formula*—(i) *In general.* The value of all meals provided at an employer-operated eating facility for employees during a calendar year is 150 percent of the direct operating costs of the eating facility (''total meal value''). For purposes of this paragraph (j), the definition of direct operating costs provided in §1.132–7T applies. The taxable value of meals provided at an eating facility may be determined in two ways. The ''individual meal subsidy'' may be treated as the taxable

value of a meal provided at the eating facility (see paragraph (j)(2)(ii) of this section). Alternatively, the employer may allocate the ''total meal subsidy'' among employees (see paragraph (j)(2)(iii) of this section).

(ii) *''Individual meal subsidy'' defined.* The ''individual meal subsidy'' is determined by multiplying the price charged for a particular meal by a fraction, the numerator of which is the total meal value and the denominator of which is the gross receipts of the eating facility, and then subtracting the amount paid for the meal. The taxable value of meals provided to a particular employee during a calendar year, therefore, is the sum of the individual meal subsidies provided to the employee during the calendar year.

(iii) *Allocation of ''total meal subsidy.''* Instead of using the individual meal value method, the employer may allocate the ''total meal subsidy'' (total meal value less the gross receipts of the facility) among employees in any manner reasonable under the circumstances.

[T.D. 8063, 50 FR 52285, Dec. 23, 1985, as amended by T.D. 8256, 54 FR 28582, July 6, 1989; T.D. 8457, 57 FR 62195, Dec. 30, 1992]

§ 1.61–3 Gross income derived from business.

(a) *In general.* In a manufacturing, merchandising, or mining business, ''gross income'' means the total sales, less the cost of goods sold, plus any income from investments and from incidental or outside operations or sources. Gross income is determined without subtraction of depletion allowances based on a percentage of income to the extent that it exceeds cost depletion which may be required to be included in the amount of inventoriable costs as provided in § 1.471–11 and without subtraction of selling expenses, losses or other items not ordinarily used in computing costs of goods sold or amounts which are of a type for which a deduction would be disallowed under section 162 (c), (f), or (g) in the case of a business expense. The cost of goods sold should be determined in accordance with the method of accounting consistently used by the taxpayer. Thus, for example, an amount cannot be taken into account in the computation of cost of goods sold any earlier than the taxable year in which economic performance occurs with respect to the amount (see § 1.446–1(c)(1)(ii)).

(b) *State contracts.* The profit from a contract with a State or political subdivision thereof must be included in gross income. If warrants are issued by a city, town, or other political subdivision of a State, and are accepted by the contractor in payment for public work done, the fair market value of such warrants should be returned as income. If, upon conversion of the warrants into cash, the contractor does not receive and cannot recover the full value of the warrants so returned, he may deduct any loss sustained from his gross income for the year in which the warrants are so converted. If, however, he realizes more than the value of the warrants so returned, he must include the excess in his gross income for the year in which realized.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960; 25 FR 14021, Dec. 31, 1960, as amended by T.D. 7207, 37 FR 20767, Oct. 5, 1972; T.D. 7285, 38 FR 26184, Sept. 19, 1973; T.D. 8408, 57 FR 12419, Apr. 10, 1992]

§ 1.61–4 Gross income of farmers.

(a) *Farmers using the cash method of accounting.* A farmer using the cash receipts and disbursements method of accounting shall include in his gross income for the taxable year—

(1) The amount of cash and the value of merchandise or other property received during the taxable year from the sale of livestock and produce which he raised,

(2) The profits from the sale of any livestock or other items which were purchased,

(3) All amounts received from breeding fees, fees from rent of teams, machinery, or land, and other incidental farm income,

(4) All subsidy and conservation payments received which must be considered as income, and

(5) Gross income from all other sources.

The profit from the sale of livestock or other items which were purchased is to be ascertained by deducting the cost from the sales price in the year in which the sale occurs, except that in the case of the sale of purchased animals held for draft, breeding, or dairy purposes, the profits shall be the amount of any excess of the sales price over the amount representing the difference between the cost and the depreciation allowed or allowable (determined in accordance with the rules applicable under section 1016(a) and the regulations thereunder). However, see section 162 and the regulations thereunder with respect to the computation of taxable income on other than the crop method where the cost of seeds or young plants purchased for further development and cultivation prior to sale is involved. Crop shares (whether or not considered rent under State law) shall be included in gross income as of the year in which the crop shares are reduced to money or the equivalent of money. See section 263A for rules regarding costs that are required to be capitalized.

(b) *Farmers using an accrual method of accounting.* A farmer using an accrual method of accounting must use inventories to determine his gross income. His gross income on an accrual method is determined by adding the total of the items described in subparagraphs (1) through (5) of this paragraph and subtracting therefrom the total of the items described in subparagraphs (6) and (7) of this paragraph. These items are as follows:

(1) The sales price of all livestock and other products held for sale and sold during the year;

(2) The inventory value of livestock and products on hand and not sold at the end of the year;

(3) All miscellaneous items of income, such as breeding fees, fees from the rent of teams, machinery, or land, or other incidental farm income;

(4) Any subsidy or conservation payments which must be considered as income;

(5) Gross income from all other sources;

(6) The inventory value of the livestock and products on hand and not sold at the beginning of the year; and

(7) The cost of any livestock or products purchased during the year (except livestock held for draft, dairy, or breeding purposes, unless included in inventory).

All livestock raised or purchased for sale shall be added in the inventory at their proper valuation determined in accordance with the method authorized and adopted for the purpose. Livestock acquired for draft, breeding, or dairy purposes and not for sale may be included in the inventory (see subparagraphs (2), (6), and (7) of this paragraph) instead of being treated as capital assets subject to depreciation, provided such practice is followed consistently from year to year by the taxpayer. When any livestock included in an inventory are sold, their cost must not be taken as an additional deduction in computing taxable income, because such deduction is reflected in the inventory. See the regulations under section 471. See section 263A for rules regarding costs that are required to be capitalized. Crop shares (whether or not considered rent under State law) shall be included in gross income as of the year in which the crop shares are reduced to money or the equivalent of money.

(c) *Special rules for certain receipts.* In the case of the sale of machinery, farm equipment, or any other property (except stock in trade of the taxpayer, or property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business), any excess of the proceeds of the sale over the adjusted basis of such property shall be included in the taxpayer's gross income for the taxable year in which such sale is made. See, however, section 453 and the regulations thereunder for special rules relating to certain installment sales. If farm produce is exchanged for merchandise, groceries, or the like, the market value of the article received in exchange is to be included in gross income. Proceeds of insurance, such as hail or fire insurance on growing crops, should be included in gross income to the extent of the amount received in cash or its equivalent for the crop injured or destroyed. See section 451(d) for special rule relating to election to include crop insurance proceeds in income for taxable year following taxable year of destruction. For taxable years beginning after July 12, 1972, where a farmer is engaged in producing crops and the process of gathering and disposing of such crops is not completed within the taxable year in which such crops are planted, the income therefrom may, with the consent of the Commissioner (see section 446 and the regulations thereunder), be computed upon the crop method. For taxable years beginning on or before July 12, 1972, where a farmer is engaged in producing crops which take more than a year from the time of planting to the time of gathering and disposing, the income therefrom may, with the consent of the Commissioner (see section 446 and the regulations thereunder), be computed upon the crop method. In any case in which the crop method is used, the entire cost of producing the crop must be taken as a deduction for the year in which the gross income from the crop is realized, and not earlier.

(d) *Definition of ''farm''*. As used in this section, the term ''farm'' embraces the farm in the ordinarily accepted sense, and includes stock, dairy, poultry, fruit, and truck farms; also plantations, ranches, and all land used for farming operations. All individuals, partnerships, or corporations that cultivate, operate, or manage farms for gain or profit, either as owners or tenants, are designated as farmers. For more detailed rules with respect to the determination of whether or not an individual is engaged in farming, see § 1.175–3. For rules applicable to persons cultivating or operating a farm for recreation or pleasure, see sections 162 and 165, and the regulations thereunder.

(e) *Cross references*. (1) For election to include Commodity Credit Corporation loans as income, see section 77 and regulations thereunder.

(2) For definition of gross income derived from farming for purposes of limiting deductibility of soil and water conservation expenditures, see section 175 and regulations thereunder.

(3) For definition of gross income from farming in connection with declarations of estimated income tax, see section 6073 and regulations thereunder.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960; 25 FR 14021, Dec. 31, 1960, as amended by T.D. 7198, 37 FR 13679, July 13, 1972; T.D. 8729, 62 FR 44546, Aug. 22, 1997]

§ 1.61–5 Allocations by cooperative associations; per-unit retain certificates—tax treatment as to cooperatives and patrons.

(a) *In general*. Amounts allocated on the basis of the business done with or for a patron by a cooperative association, whether or not entitled to tax treatment under section 522, in cash, merchandise, capital stock, revolving fund certificates, retain certificates, certificates of indebtedness, letters of advice or in some other manner disclosing to the patron the dollar amount allocated, shall be included in the computation of the gross income of such patron for the taxable year in which received to the extent prescribed in paragraph (b) of this section, regardless of whether the allocation is deemed, for the purpose of section 522, to be made at the close of a preceding taxable year of the cooperative association. The determination of the extent of taxability of such amounts is in no way dependent upon the method of accounting employed by the patron or upon the method, cash, accrual, or otherwise, upon which the taxable income of such patron is computed.

(b) *Extent of taxability*. (1) Amounts allocated to a patron on a patronage basis by a cooperative association with respect to products marketed for such patron, or with respect to supplies, equipment, or services, the cost of which was deductible by the patron under section 162 or section 212, shall be included in the computation of the gross income of such patron, as ordinary income, to the following extent:

(i) If the allocation is in cash, the amount of cash received.

(ii) If the allocation is in merchandise, the amount of the fair market value of such merchandise at the time of receipt by the patron.

(iii) If the allocation is in the form of revolving fund certificates, retain certificates, certificates of indebtedness, letters of advice, or similar documents, the amount of the fair market value of such document at the time of its receipt by the patron. For purposes of this subdivision, any document containing an unconditional promise to pay a fixed sum of money on demand or at a fixed or determinable time shall be considered to have a fair market value at the time of its receipt by the patron, unless it is clearly established to the contrary. However, for purposes of this subdivision, any document which is payable only in the discretion of the cooperative association, or which is otherwise subject to conditions beyond the control of the patron, shall be considered not to have any fair market value at the time of its receipt by the patron, unless it is clearly established to the contrary.

(iv) If the allocation is in the form of capital stock, the amount of the fair market value, if any, of such capital stock at the time of its receipt by the patron.

(2) If any allocation to which subparagraph (1) of this paragraph applies is received in the form of a document of the type described in subparagraph (1) (iii) or (iv) of this paragraph and is redeemed in full or in part or is otherwise disposed of, there shall be included in the computation of the gross income of the patron, as ordinary income, in the year of redemption or other disposition, the excess of the amount realized on the redemption or other disposition over the amount previously included in the computation of gross income under such subparagraph.

(3)(i) Amounts which are allocated on a patronage basis by a cooperative association with respect to supplies, equipment, or services, the cost of which was not deductible by the patron under section 162 or section 212, are not includible in the computation of the gross income of such patron. However, in the case of such amounts which are allocated with respect to capital assets (as defined in section 1221) or property used in the trade or business within the meaning of section 1231, such amounts shall, to the extent set forth in subparagraph (1) of this paragraph, be taken into account by such patron in determining the cost of the property to which the allocation relates. Notwithstanding the preceding sentence, to the extent that such amounts are in excess of the unrecovered cost of such property, and to the extent that such amounts relate to such property which the patron no longer owns, they shall be included in the computation of the gross income of such patron.

(ii) If any patronage dividend is allocated to the patron in the form of a document of the type described in subparagraph (1) (iii) or (iv) of this paragraph, and if such allocation is with respect to capital assets (as defined in section 1221) or property used in the trade or business within the meaning of section 1231, any amount realized on the redemption or other disposition of such document which is in excess of the amount which was taken into account upon the receipt of the document by the patron shall be taken into account by such patron in the year of redemption or other disposition as an adjustment to basis or as an inclusion in the computation of gross income, as the case may be.

(iii) Any adjustment to basis in respect of an amount to which subdivision (i) or (ii) of this subparagraph applies shall be made as of the first day of the taxable year in which such amount is received.

(iv) The application of the provisions of this subparagraph may be illustrated by the following examples:

Example 1. On July 1, 1959, P, a patron of a cooperative association, purchases a tractor for use in his farming business from such association for $2,200. The tractor has an estimated useful life of five years and an estimated salvage value of $200. P files his income tax returns on a calendar year basis and claims depreciation on the tractor for the year 1959 of $200 pursuant to his use of the straight-line method at the rate of $400 per year. On July 1, 1960, the cooperative association allocates to P with respect to his purchase of the tractor a dividend of $300 in cash. P will reduce his depreciation allowance with respect to the tractor for 1960 (and subsequent taxable years) to $333.33, determined as follows:

Cost of tractor, July 1, 1959		$2,200
Less:		
Depreciation for 1959 (6 mos.)	$200	
Adjustment as of Jan. 1, 1960, for cash patronage dividend	300	
Salvage value	200	
	700	
Basis for depreciation for the remaining 4½ years of estimated life		1,500

Basis for depreciation divided by the 4½ years of remaining life	333.33

Example 2. Assume the same facts as in example (1), except that on July 1, 1960, the cooperative association allocates a dividend to P with respect to his purchase of the tractor in the form of a revolving fund certificate having a face amount of $300. The certificate is redeemable in cash at the discretion of the directors of the association and is subject to diminution by any future losses of the association, and has no fair market value when received by P. Since the certificate had no fair market value when received by P, no amount with respect to such certificate was taken into account by him in the year 1960. In 1965, P receives $300 cash from the association in full redemption of the certificate. Prior to 1965, he had recovered through depreciation $2,000 of the cost of the tractor, leaving an unrecovered cost of $200 (the salvage value). For the year 1965, the redemption proceeds of $300 are applied against the unrecovered cost of $200, reducing the basis to zero, and the balance of the redemption proceeds, $100, is includible in the computation of P's gross income.

Example 3. Assume the same facts as in example (2), except that the certificate is redeemed in full on July 1, 1962. The full $300 received on redemption of the certificate will be applied against the unrecovered cost of the tractor as of January 1, 1962, computed as follows:

Cost of tractor, July 1, 1959		$2,200
Less:		
Depreciation for 1959 (6 mos.)	$200	
Depreciation for 1960	400	
Depreciation for 1961	400	
	1,000	
Unrecovered cost on Jan. 1, 1962		1,200
Adjustment as of Jan. 1, 1962, for proceeds of the redemption of the revolving fund certificate		300
Unrecovered cost on Jan. 1, 1962, after adjustment		900
Less: Salvage value		200
Basis for depreciation on Jan. 1, 1962		700
If P uses the tractor in his business until June 30, 1964, he would be entitled to the following depreciation allowances with respect to the tractor:		
For 1962	280	
For 1963	280	
For 1964 (6 mos.)	140	
	700	
Balance to be depreciated		0

Example 4. Assume the same facts as in example (3), except that P sells the tractor in 1961. The entire $300 received in 1962 in redemption of the revolving fund certificate is includible in the computation of P's gross income for the year 1962.

(c) *Special rule.* If, for any taxable year ending before December 3, 1959, a taxpayer treated any patronage dividend received in the form of a document described in paragraph (b) (1) (iii) or (iv) of this section in accordance with the regulations then applicable (whether such dividend is subject to paragraph (b) (1) or (3) of this section), such taxpayer is not required to change the treatment of such patronage dividends for any such prior taxable year. On the other hand, the taxpayer may, if he so desires, amend his income tax returns to treat the receipt of such patronage dividend in accordance with the provisions of this section, but no provision in this paragraph shall be construed as extending the period of limitations within which a claim for credit or refund may be filed under section 6511.

(d) *Per-unit retain certificates; tax treatment of cooperative associations; distribution and reinvestment alternative.* (1)(i) In the case of a taxable year to which this paragraph applies to a cooperative association, such association shall, in computing the amount paid or returned to a patron with respect to products marketed for such patron, take into account the stated dollar amount of any per-unit retain certificate (as defined in paragraph (g) of this section)—

(*a*) Which is issued during the payment period for such year (as defined in subparagraph (3) of this paragraph) with respect to such products,

(*b*) With respect to which the patron is a qualifying patron (as defined in subparagraph (2) of this paragraph), and

(*c*) Which clearly states the fact that the patron has agreed to treat the stated dollar amount thereof as representing a cash distribution to him which he has reinvested in the cooperative association.

(ii) No amount shall be taken into account by a cooperative association by reason of the issuance of a per-unit retain certificate to a patron who was not a qualifying patron with respect to such certificate. However, any amount paid in redemption of a per-unit retain certificate which was issued to a patron who was not a qualifying patron with respect to such certificate shall be taken into account by the cooperative in the year of redemption, as an amount paid or returned to such patron with respect to products marketed for him. This subdivision shall apply only to per-unit retain certificates issued with respect to taxable years of the cooperative association to which this paragraph applied to the association (that is, taxable years with respect to which per-unit retain certificates were issued to one or more patrons who are qualifying patrons).

(2)(i) A patron shall be considered to be a "qualifying patron" with respect to a per-unit retain certificate if there is in effect an agreement between the cooperative association and such patron which clearly provides that such patron agrees to treat the stated dollar amounts of all per-unit retain certificates issued to him by the association as representing cash distributions which he has constructively received and which he has, of his own choice, reinvested in the cooperative association. Such an agreement may be included in a by-law of the cooperative which is adopted prior to the time the products to which the per-unit retain certificates relate are marketed. However, except where there is in effect a "written agreement" described in subdivision (ii) of this subparagraph, a patron shall not be considered to be a "qualifying patron" with respect to a per-unit retain certificate if it has been established by a determination of the Tax Court of the United States, or any other court of competent jurisdiction, which has become final, that the stated dollar amount of such certificate, or of a similar certificate issued under similar circumstances to such patron or any other patron by the cooperative association, is not required to be included (as ordinary income) in the gross income of such patron, or such other patron, for the taxable year of the patron in which received.

(ii) The "written agreement" referred to in subdivision (i) of this subparagraph is an agreement in writing, signed by the patron, on file with the cooperative association, and revocable as provided in this subdivision. Unless such an agreement specifically provides to the contrary, it shall be effective for per-unit retain certificates issued with respect to the taxable year of the cooperative association in which the agreement is received by the association, and unless revoked, for per-unit retain certificates issued with respect to all subsequent taxable years. A "written agreement" must be revocable by the patron at any time after the close of the taxable year in which it is made. To be effective, a revocation must be in writing, signed by the patron, and furnished to the cooperative association. A revocation shall be effective only for per-unit retain certificates issued with respect to taxable years of the cooperative association following the taxable year in which it is furnished to the association. Notwithstanding the preceding sentence, a revocation shall not be effective for per-unit retain certificates issued with respect to products marketed for the patron under a pooling arrangement in which such patron participated before such revocation. The following is an example of an agreement which would meet the requirements of this subparagraph:

I agree that, for purposes of determining the amount I have received from this cooperative in payment for my goods, I shall treat the face amount of any per-unit retain certificates issued to me on and after ________ as representing a cash distribution which I have constructively received and which I have reinvested in the cooperative.

____

(*Signed*)

(3) For purposes of this paragraph and paragraph (e) of this section, the payment period for any taxable year of the cooperative is the period beginning with the first day of such taxable year and ending with the 15th day of the 9th month following the close of such year.

(4) This paragraph shall apply to any taxable year of a cooperative association if, with respect to such taxable year, the association has issued per-unit retain certificates to one or more of its patrons who are qualifying patrons with respect to such certificates within the meaning of subparagraph (2) of this paragraph.

(e) *Tax treatment of cooperative association; taxable years for which paragraph (d) does not apply.* (1) In the case of a taxable year to which paragraph (d) of this section does not apply to a cooperative association, such association shall, in computing the amount paid or returned to a patron with respect to products marketed for such patron, take into account the fair market value (at the time of issue) of any per-unit retain certificates which are issued by the association with respect to such products during the payment period for such taxable year.

(2) An amount paid in redemption of a per-unit retain certificate issued with respect to a taxable year of the cooperative association for which paragraph (d) of this section did not apply to the association, shall, to the extent such amount exceeds the fair market value of the certificate at the time of its issue, be taken into account by the association in the year of redemption, as an amount paid or returned to a patron with respect to products marketed for such patron.

(3) For purposes of this paragraph and paragraph (f)(2) of this section, any per-unit retain certificate containing an unconditional promise to pay a fixed sum of money on demand or at a fixed or determinable time shall be considered to have a fair market value at the time of its issue, unless it is clearly established to the contrary. On the other hand, any per-unit retain certificate (other than capital stock) which is redeemable only in the discretion of the cooperative association, or which is otherwise subject to conditions beyond the control of the patron, shall be considered not to have any fair market value at the time of its issue, unless it is clearly established to the contrary.

(f) *Tax treatment of patron.* (1) The following rules apply for purposes of computing the amount includible in gross income with respect to a per-unit retain certificate which was issued to a patron by a cooperative association with respect to a taxable year of such association for which paragraph (d) of this section applies.

(i) If the patron is a qualifying patron with respect to such certificate (within the meaning of paragraph (d)(2) of this section), he shall, in accordance with his agreement, include (as ordinary income) the stated dollar amount of the certificate in gross income for his taxable year in which the certificate is received by him.

(ii) If the patron is not a qualifying patron with respect to such certificate, no amount is includible in gross income on the receipt of the certificate; however, any gain on the redemption, sale, or other disposition of such certificate shall, to the extent of the stated dollar amount thereof, be considered as gain from the sale or exchange of property which is not a capital asset.

(2) The amount of the fair market value of a per-unit retain certificate which is issued to a patron by a cooperative association with respect to a taxable year of the association for which paragraph (d) of this section does not apply shall be included, as ordinary income, in the gross income of the patron for the taxable year in which the certificate is received. Any gain on the redemption, sale, or other disposition of such a per-unit retain certificate shall, to the extent its stated dollar amount exceeds its fair market value at the time of issue, be treated as gain on the redemption, sale, or other disposition of property which is not a capital asset.

(g) *''Per-unit retain certificate'' defined.* For purposes of paragraphs (d), (e), and (f), of this section, the term ''per-unit retain certificate'' means any capital stock, revolving fund certificate, retain certificate, certificate of indebtedness, letter of advice, or other written notice—

(1) Which is issued to a patron with respect to products marketed for such patron;

(2) Which discloses to the patron the stated dollar amount allocated to him on the books of the cooperative association; and

(3) The stated dollar amount of which is fixed without reference to net earnings.

(h) *Effective date.* This section shall not apply to any amount the tax treatment of which is prescribed in section 1385 and §1.1385–1. Paragraphs (d), (e), and (f) of this section shall apply to per-unit retain certificates as defined in paragraph (g) of this section issued by a cooperative association during taxable years of the association beginning after April 30, 1966, with respect to products marketed for patrons during such years.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6855, 30 FR 13134, Oct. 15, 1965]

§ 1.61–6 Gains derived from dealings in property.

(a) *In general.* Gain realized on the sale or exchange of property is included in gross income, unless excluded by law. For this purpose property includes tangible items, such as a building, and intangible items, such as goodwill. Generally, the gain is the excess of the amount realized over the unrecovered cost or other basis for the property sold or exchanged. The specific rules for computing the amount of gain or loss are contained in section 1001 and the regulations thereunder. When a part of a larger property is sold, the cost or other basis of the entire property shall be equitably apportioned among the several parts, and the gain realized or loss sustained on the part of the entire property sold is the difference between the selling price and the cost or other basis allocated to such part. The sale of each part is treated as a separate transaction and gain or loss shall be computed separately on each part. Thus, gain or loss shall be determined at the time of sale of each part and not deferred until the entire property has been disposed of. This rule may be illustrated by the following examples:

Example 1. A, a dealer in real estate, acquires a 10-acre tract for $10,000, which he divides into 20 lots. The $10,000 cost must be equitably apportioned among the lots so that on the sale of each A can determine his taxable gain or deductible loss.

Example 2. B purchases for $25,000 property consisting of a used car lot and adjoining filling station. At the time, the fair market value of the filling station is $15,000 and the fair market value of the used car lot is $10,000. Five years later B sells the filling station for $20,000 at a time when $2,000 has been properly allowed as depreciation thereon. B's gain on this sale is $7,000, since $7,000 is the amount by which the selling price of the filling station exceeds the portion of the cost equitably allocable to the filling station at the time of purchase reduced by the depreciation properly allowed.

(b) *Nontaxable exchanges.* Certain realized gains or losses on the sale or exchange of property are not "recognized", that is, are not included in or deducted from gross income at the time the transaction occurs. Gain or loss from such sales or exchanges is generally recognized at some later time. Examples of such sales or exchanges are the following:

(1) Certain formations, reorganizations, and liquidations of corporations, see sections 331, 333, 337, 351, 354, 355, and 361;

(2) Certain formations and distributions of partnerships, see sections 721 and 731;

(3) Exchange of certain property held for productive use or investment for property of like kind, see section 1031;

(4) A corporation's exchange of its stock for property, see section 1032;

(5) Certain involuntary conversions of property if replaced, see section 1033;

(6) Sale or exchange of residence if replaced, see section 1034;

(7) Certain exchanges of insurance policies and annuity contracts, see section 1035; and

(8) Certain exchanges of stock for stock in the same corporation, see section 1036.

(c) *Character of recognized gain.* Under Subchapter P, Chapter 1 of the Code, relating to capital gains and losses, certain gains derived from dealings in property are treated specially, and under certain circumstances the maximum rate of tax on such gains is 25 percent, as provided in section 1201. Generally, the property subject to this treatment is a "capital asset", or treated as a "capital asset". For definition of such assets, see sections 1221 and 1231, and the regulations thereunder. For some of the rules either granting or denying this special treatment, see the following sections and the regulations thereunder:

(1) Transactions between partner and partnership, section 707;

(2) Sale or exchange of property used in the trade or business and involuntary conversions, section 1231;

(3) Payment of bonds and other evidences of indebtedness, section 1232;

(4) Gains and losses from short sales, section 1233;

(5) Options to buy or sell, section 1234;

(6) Sale or exchange of patents, section 1235;

(7) Securities sold by dealers in securities, section 1236;

(8) Real property subdivided for sale, section 1237;

(9) Amortization in excess of depreciation, section 1238;

(10) Gain from sale of certain property between spouses or between an individual and a controlled corporation, section 1239;

(11) Taxability to employee of termination payments, section 1240.

§ 1.61–7 Interest.

(a) *In general.* As a general rule, interest received by or credited to the taxpayer constitutes gross income and is fully taxable. Interest income includes interest on savings or other bank deposits; interest on coupon bonds; interest on an open account, a promissory note, a mortgage, or a corporate bond or debenture; the interest portion of a condemnation award; usurious interest (unless by State law it is automatically converted to a payment on the principal); interest on legacies; interest on life insurance proceeds held under an agreement to pay interest thereon; and interest on refunds of Federal taxes. For rules determining the taxable year in which interest, including interest accrued or constructively received, is included in gross income, see section 451 and the regulations thereunder. For the inclusion of interest in income for the purpose of the retirement income credit, see section 37 and the regulations thereunder. For credit of tax withheld at source on interest on tax-free covenant bonds, see section 32 and the regulations thereunder. For rules relating to interest on certain deferred payments, see section 483 and the regulations thereunder.

(b) *Interest on Government obligations*—(1) *Wholly tax-exempt interest.* Interest upon the obligations of a State, Territory, or a possession of the United States, or any political subdivision of any of the foregoing, or of the District of Columbia, is wholly exempt from tax. Interest on certain United States obligations issued before March 1, 1941, is exempt from tax to the extent provided in the acts of Congress authorizing the various issues. See section 103 and the regulations thereunder.

(2) *Partially tax-exempt interest.* Interest earned on certain United States obligations is partly tax exempt and partly taxable. For example, the interest on United States Treasury bonds issued before March 1, 1941, to the extent that the principal of such bonds exceeds $5,000, is exempt from normal tax but is subject to surtax. See sections 35 and 103, and the regulations thereunder.

(3) *Fully taxable interest.* In general, interest on United States obligations issued on or after March 1, 1941, and obligations issued by any agency or instrumentality of the United States after that date, is fully taxable; but see section 103 and the regulations thereunder. A taxpayer using the cash receipts and disbursements method of accounting who owns United States savings bonds issued at a discount has an election as to when he will report the interest; see section 454 and the regulations thereunder.

(c) *Obligations bought at a discount; bonds bought when interest defaulted or accrued.* When notes, bonds, or other certificates of indebtedness are issued by a corporation or the Government at a discount and are later redeemed by the debtor at the face amount, the original discount is interest, except as otherwise provided by law. See also paragraph (b) of this section for the rules relating to Government bonds. If a taxpayer purchases bonds when interest has been defaulted or when the interest has accrued but has not been paid, any interest which is in arrears but has accrued at the time of purchase is not income and is not taxable as interest if subsequently paid. Such payments are returns of capital which reduce the remaining cost basis. Interest which accrues after the date of purchase, however, is taxable interest income for the year in which received or accrued (depending on the method of accounting used by the taxpayer).

(d) *Bonds sold between interest dates; amounts received in excess of original issue discount; interest on life insurance.* When bonds are sold between interest dates, part of the sales price represents interest accrued to the date of the sale and must be reported as interest income. Amounts received in excess of the original issue discount upon the retirement or sale of a bond or other evidence of indebtedness may under some circumstances constitute capital gain instead of ordinary income. See section 1232 and the regulations thereunder. Interest payments on amounts payable as employees' death benefits (whether or not section 101(b) applies thereto) and on the proceeds of life insurance policies payable by reason of the insured's death constitute gross income under some circumstances. See section 101 and the regulations thereunder for details. Where accrued interest on unwithdrawn insurance policy dividends is credited annually and is subject to withdrawal annually by the taxpayer, such interest credits constitute gross income to such taxpayer as of the year of credit. However, if under the terms of the insurance policy the interest on unwithdrawn policy dividends is subject to withdrawal only on the anniversary date of the policy (or some other date specified therein), then such interest shall constitute gross income to the taxpayer for the taxable year in which such anniversary date (or other specified date) falls.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6723, 29 FR 5342, Apr. 21, 1964; T.D. 6873, 31 FR 941, Jan. 25, 1966]

§ 1.61–8 Rents and royalties.

(a) *In general.* Gross income includes rentals received or accrued for the occupancy of real estate or the use of personal property. For the inclusion of rents in income for the purpose of the retirement income credit, see section 37 and the regulations thereunder. Gross income includes royalties. Royalties may be received from books, stories, plays, copyrights, trademarks, formulas, patents, and from the exploitation of natural resources, such as coal, gas, oil, copper, or timber. Payments received as a result of the transfer of patent rights may under some circumstances constitute capital gain instead of ordinary income. See section 1235 and the regulations thereunder. For special rules for certain income from natural resources, see Subchapter I (section 611 and following), Chapter 1 of the Code, and the regulations thereunder.

(b) *Advance rentals; cancellation payments.* Except as provided in section 467 and the regulations thereunder and except as otherwise provided by the Commissioner in published guidance (see § 601.601(d)(2) of this chapter), gross income includes advance rentals, which must be included in income for the year of receipt regardless of the period covered or the method of accounting employed by the taxpayer. An amount received by a lessor from a lessee for cancelling a lease constitutes gross income for the year in which it is received, since it is essentially a substitute for rental payments. As to amounts received by a lessee for the cancellation of a lease, see section 1241 and the regulations thereunder.

(c) *Expenditures by lessee.* As a general rule, if a lessee pays any of the expenses of his lessor such payments are additional rental income of the lessor. If a lessee places improvements on real estate which constitute, in whole or in part, a substitute for rent, such improvements constitute rental income to the lessor. Whether or not improvements made by a lessee result in rental income to the lessor in a particular case depends upon the intention of the parties, which may be indicated either by the terms of the lease or by the surrounding circumstances. For the exclusion from gross income of income (other than rent) derived by a lessor of real property on the termination of a lease, representing the value of such property attributable to buildings erected or other improvements made by a lessee, see section 109 and the regulations thereunder. For the exclusion from gross income of a lessor corporation of certain of its income taxes on rental income paid by a lessee corporation under a lease entered into before January 1, 1954, see section 110 and the regulations thereunder.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960; 25 FR 14021, Dec. 31, 1960, as amended by T.D. 8820, 64 FR 26851, May 18, 1999; T.D. 9135, 69 FR 41192, July 8, 2004]

§ 1.61–9 Dividends.

(a) *In general.* Except as otherwise specifically provided, dividends are included in gross income under sections 61 and 301. For the principal rules with respect to dividends includible in gross income, see section 316 and the regulations thereunder. As to distributions made or deemed to be made by regulated investment companies, see sections 851 through 855, and the regulations thereunder. As to distributions made by real estate investment trusts, see sections 856 through 858, and the regulations thereunder. See section 116 for the exclusion from gross income of $100 ($50 for dividends received in taxable years beginning before January 1, 1964) of dividends received by an individual, except those from certain corporations. Furthermore, dividends may give rise to a credit against tax under section 34, relating to dividends received by individuals (for dividends received on or before December 31, 1964), and under section 37, relating to retirement income.

(b) *Dividends in kind; stock dividends; stock redemptions.* Gross income includes dividends in property other than cash, as well as cash dividends. For amounts to be included in gross income when distributions of property are made, see section 301 and the regulations thereunder. A distribution of stock, or rights to acquire stock, in the corporation making the distribution is not a dividend except under the circumstances described in section 305(b). However, the term ''dividend'' includes a distribution of stock, or rights to acquire stock, in a corporation other than the corporation making the distribution. For determining when distributions in complete liquidation shall be treated as dividends, see section 333 and the regulations thereunder. For rules determining when amounts received in exchanges under section 354 or exchanges and distributions under section 355 shall be treated as dividends, see section 356 and the regulations thereunder.

(c) *Dividends on stock sold.* When stock is sold, and a dividend is both declared and paid after the sale, such dividend is not gross income to the seller. When stock is sold after the declaration of a dividend and after the date as of which the seller becomes entitled to the dividend, the dividend ordinarily is income to the seller. When stock is sold between the time of declaration and the time of payment of the dividend, and the sale takes place at such time that the purchaser becomes entitled to the dividend, the dividend ordinarily is income to him. The fact that the purchaser may have included the amount of the dividend in his purchase price in contemplation of receiving the dividend does not exempt him from tax. Nor can the purchaser deduct the added amount he advanced to the seller in anticipation of the dividend. That added amount is merely part of the purchase price of the stock. In some cases, however, the purchaser may be considered to be the recipient of the dividend even though he has not received the legal title to the stock itself and does not himself receive the dividend. For example, if the seller retains the legal title to the stock as trustee solely for the purpose of securing the payment of the purchase price, with the understanding that he is to apply the dividends received from time to time in reduction of the purchase price, the dividends are considered to be income to the purchaser.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6777, 29 FR 17807, Dec. 16, 1964]

§ 1.61–10 Alimony and separate maintenance payments; annuities; income from life insurance and endowment contracts.

(a) *In general.* Alimony and separate maintenance payments, annuities, and income from life insurance and endowment contracts in general constitute gross income, unless excluded by law. Annuities paid by religious, charitable, and educational corporations are generally taxable to the same extent as other annuities. An annuity charged upon devised land is taxable to the donee-annuitant to the extent that it becomes payable out of the rents or other income of the land, whether or not it is a charge upon the income of the land.

(b) *Cross references.* For the detailed rules relating to—

(1) Alimony and separate maintenance payments, see section 71 and the regulations thereunder;

(2) Annuities, certain proceeds of endowment and life insurance contracts, see section 72 and the regulations thereunder;

(3) Life insurance proceeds paid by reason of death of insured, employees' death benefits, see section 101 and the regulations thereunder;

(4) Annuities paid by employees' trusts, see section 402 and the regulations thereunder;

(5) Annuities purchased for employee by employer, see section 403 and the regulations thereunder.

§ 1.61–11 Pensions.

(a) *In general.* Pensions and retirement allowances paid either by the Government or by private persons constitute gross income unless excluded by law. Usually, where the taxpayer did not contribute to the cost of a pension and was not taxable on his employer's contributions, the full amount of the pension is to be included in his gross income. But see sections 72, 402, and 403, and the regulations thereunder. When amounts are received from other types of pensions, a portion of the payment may be excluded from gross income. Under some circumstances, amounts distributed from a pension plan in excess of the employee's contributions may constitute long-term capital gain, rather than ordinary income.

(b) *Cross references.* For the inclusion of pensions in income for the purpose of the retirement income credit, see section 37 and the regulations thereunder. Detailed rules concerning the extent to which pensions and retirement allowances are to be included in or excluded from gross income are contained in other sections of the Code and the regulations thereunder. Amounts received as pensions or annuities under the Social Security Act (42 U.S.C. ch. 7) or the Railroad Retirement Act (45 U.S.C. ch. 9) are excluded from gross income. For other partial and total exclusions from gross income, see the following:

(1) Annuities in general, section 72 and the regulations thereunder;

(2) Employees' annuities, sections 402 and 403 and the regulations thereunder;

(3) References to other acts of Congress exempting veterans' pensions and railroad retirement annuities and pensions, section 122.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6856, 30 FR 13316, Oct. 20, 1965]

§ 1.61–12 Income from discharge of indebtedness.

(a) *In general.* The discharge of indebtedness, in whole or in part, may result in the realization of income. If, for example, an individual performs services for a creditor, who in consideration thereof cancels the debt, the debtor realizes income in the amount of the debt as compensation for his services. A taxpayer may realize income by the payment or purchase of his obligations at less than their face value. In general, if a shareholder in a corporation which is indebted to him gratuitously forgives the debt, the transaction amounts to a contribution to the capital of the corporation to the extent of the principal of the debt.

(b) *Proceedings under Bankruptcy Act.* (1) Income is not realized by a taxpayer by virtue of the discharge, under section 14 of the Bankruptcy Act (11 U.S.C. 32), of his indebtedness as the result of an adjudication in bankruptcy, or by virtue of an agreement among his creditors not consummated under any provision of the Bankruptcy Act, if immediately thereafter the taxpayer's liabilities exceed the value of his assets. Furthermore, unless one of the principal purposes of seeking a confirmation under the Bankruptcy Act is the avoidance of income tax, income is not realized by a taxpayer in the case of a cancellation or reduction of his indebtedness under—

(i) A plan of corporate reorganization confirmed under Chapter X of the Bankruptcy Act (11 U.S.C., ch. 10);

(ii) An ''arrangement'' or a ''real property arrangement'' confirmed under Chapter XI or XII, respectively, of the Bankruptcy Act (11 U.S.C., ch. 11, 12); or

(iii) A ''wage earner's plan'' confirmed under Chapter XIII of the Bankruptcy Act (11 U.S.C., ch. 13).

(2) For adjustment of basis of certain property in the case of cancellation or reduction of indebtedness resulting

from a proceeding under the Bankruptcy Act, see the regulations under section 1016.

(c) *Issuance and repurchase of debt instruments*—(1) *Issuance.* An issuer does not realize gain or loss upon the issuance of a debt instrument. For rules relating to an issuer's interest deduction for a debt instrument issued with bond issuance premium, see § 1.163–13.

(2) *Repurchase*—(i) *In general.* An issuer does not realize gain or loss upon the repurchase of a debt instrument. However, if a debt instrument provides for payments denominated in, or determined by reference to, a nonfunctional currency, an issuer may realize a currency gain or loss upon the repurchase of the instrument. See section 988 and the regulations thereunder. For purposes of this paragraph (c)(2), the term *repurchase* includes the retirement of a debt instrument, the conversion of a debt instrument into stock of the issuer, and the exchange (including an exchange under section 1001) of a newly issued debt instrument for an existing debt instrument.

(ii) *Repurchase at a discount.* An issuer realizes income from the discharge of indebtedness upon the repurchase of a debt instrument for an amount less than its adjusted issue price (within the meaning of § 1.1275–1(b)). The amount of discharge of indebtedness income is equal to the excess of the adjusted issue price over the repurchase price. See section 108 and the regulations thereunder for additional rules relating to income from discharge of indebtedness. For example, to determine the repurchase price of a debt instrument that is repurchased through the issuance of a new debt instrument, see section 108(e)(10).

(iii) *Repurchase at a premium.* An issuer may be entitled to a repurchase premium deduction upon the repurchase of a debt instrument for an amount greater than its adjusted issue price (within the meaning of § 1.1275–1(b)). See § 1.163–7(c) for the treatment of repurchase premium.

(iv) *Effective date.* This paragraph (c)(2) applies to debt instruments repurchased on or after March 2, 1998.

(d) *Cross references.* For exclusion from gross income of—

(1) Income from discharge of indebtedness in certain cases, see sections 108 and 1017, and regulations thereunder;

(2) Forgiveness of Government payments to encourage exploration, development, and mining for defense purposes, see section 621 and regulations thereunder.

(e) *Cross reference.* For rules relating to the treatment of liabilities on the sale or other disposition of encumbered property, see § 1.1001–2.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6984, 33 FR 19174, Dec. 24, 1968; T.D. 7741, 45 FR 81745, Dec. 12, 1980; T.D. 8746, 62 FR 68175, Dec. 31, 1997]

§ 1.61–13 Distributive share of partnership gross income; income in respect of a decedent; income from an interest in an estate or trust.

(a) *In general.* A partner's distributive share of partnership gross income (under section 702(c)) constitutes gross income to him. Income in respect of a decedent (under section 691) constitutes gross income to the recipient. Income from an interest in an estate or trust constitutes gross income under the detailed rules of Part I (section 641 and following), Subchapter J, Chapter 1 of the Code. In many cases, these sections also determine who is to include in his gross income the income from an estate or trust.

(b) *Creation of sinking fund by corporation.* If a corporation, for the sole purpose of securing the payment of its bonds or other indebtedness, places property in trust or sets aside certain amounts in a sinking fund under the control of a trustee who may be authorized to invest and reinvest such sums from time to time, the property or fund thus set aside by the corporation and held by the trustee is an asset of the corporation, and any gain arising therefrom is income of the corporation and shall be included as such in its gross income.

§ 1.61–14 Miscellaneous items of gross income.

(a) *In general.* In addition to the items enumerated in section 61(a), there are many other kinds of gross income. For example, punitive damages such as treble damages under the antitrust laws and exemplary damages for fraud are gross income. Another person's payment of the taxpayer's income taxes constitutes gross income to the taxpayer unless excluded by law. Illegal gains constitute gross income. Treasure trove, to the extent of its value in United States currency, constitutes gross income for the taxable year in which it is reduced to undisputed possession.

(b) *Cross references.* (1) Prizes and awards, see section 74 and regulations thereunder;

(2) Damages for personal injury or sickness, see section 104 and the regulations thereunder;

(3) Income taxes paid by lessee corporation, see section 110 and regulations thereunder;

(4) Scholarships and fellowship grants, see section 117 and regulations thereunder;

(5) Miscellaneous exemptions under other acts of Congress, see section 122;

(6) Tax-free covenant bonds, see section 1451 and regulations thereunder.

(7) Notional principal contracts, see § 1.446–3.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6856, 30 FR 13316, Oct. 20, 1965; T.D. 8491, 58 FR 53127, Oct. 14, 1993]

§ 1.61–15 Options received as payment of income.

(a) *In general.* Except as otherwise provided in § 1.61–2(d)(6)(i) (relating to certain restricted property transferred after June 30, 1969), if any person receives an option in payment of an amount constituting compensation of such person (or any other person), such option is subject to the rules contained in § 1.421–6 for purposes of determining when income is realized in connection with such option and the amount of such income. In this regard, the rules of § 1.421–6 apply to an option received in payment of an amount constituting compensation regardless of the form of the transaction. Thus, the rules of § 1.421–6 apply to an option transferred for less than its fair market value in a transaction taking the form of a sale or exchange if the difference between the amount paid for the option and its fair market value at the time of transfer is the payment of an amount constituting compensation of the transferee or any other person. This section, for example, makes the rules of § 1.421–6 applicable to options granted in whole or partial payment for services of an independent contractor. If an amount of money or property is paid for an option to which this paragraph applies, then the amount paid shall be part of the basis of such option.

(b) *Options to which paragraph (a) does not apply.* (1) Paragraph (a) of this section does not apply to:

(i) An option which is subject to the rules contained in section 421; and

(ii) An option which is not granted as the payment of an amount constituting compensation, such as an option which is acquired solely as an investment (including an option which is part of an investment unit described in paragraph (b) of § 1.1232–3). For rules relating to the taxation of options described in this subdivision, see section 1234 and the regulations thereunder.

(2) If a person acquires an option which is not subject to the rules contained in section 421, and if such option has a readily ascertainable fair market value, such person may establish that such option was not acquired as payment of an amount constituting compensation by showing that the amount of money or its equivalent paid for the option equaled the readily ascertainable fair market value of the option. If a person acquires an option which is not subject to the rules contained in section 421, and if such option does not have a readily ascertainable fair market value, then to establish that such option was not acquired as payment of an amount constituting compensation, such person must show that, from an examination of all the surrounding circumstances, there was no reason for the option to have been granted as the payment of an amount constituting compensation. For example, such person must show that he had neither rendered nor was obligated to render substantial services in consideration for the granting of the option. In determining whether an option, such as an option acquired in connection with an obligation as part of an investment unit, has been granted as compensation for services, the ordinary services performed by an investor in his own self-interest in connection with his investing activities will not be treated as the

consideration for the grant of the option. For example, if a small business investment company takes an active part in the management of its debtor small business company, the rendering of such management services will not be treated as the consideration for the granting of the option, provided such services are rendered for an independent consideration, or are merely protective of the small business investment company's investment in the borrower. See paragraph (c) of §1.421–6 for the meaning of the term ''readily ascertainable fair market value.''

(c) *Statement required in connection with certain options.* (1) Any person acquiring any option to purchase securities (other than an option described in subparagraph (2) of this paragraph) shall attach a statement to his income tax return for the taxable year in which the option was acquired. For the definition of the term ''securities'', see section 165(g)(2).

(2) The statement otherwise required by subparagraph (1) of this paragraph shall not be required with respect to the following options:

(i) Options subject to the rules contained in section 305(a) or section 421;

(ii) Options acquired as part of an investment unit consisting of an option and a debenture, note, or other similar obligation—

(*a*) If such unit is acquired as part of a public offering and the amount of money or its equivalent paid for such unit is not less than the public offering price, or

(*b*) If such unit is actively traded on an established market and the amount of money or its equivalent paid for such unit is not less than the price paid for such unit in contemporaneous purchases of such unit by persons independent of both the seller and the taxpayer;

(iii) Options acquired as part of a public offering, if the amount of money or its equivalent paid for such option is not less than the public offering price; and

(iv) Options which are actively traded on an established market and which are acquired for money or its equivalent at a price not less than the price paid for such options in contemporaneous purchases of such options by persons independent of both the seller and the taxpayer.

(3) The statement required by subparagraph (1) of this paragraph shall contain the following information:

(i) Name and address of the taxpayer;

(ii) Description of the securities subject to the option (including number of shares of stock);

(iii) Period during which the option is exercisable;

(iv) Whether the option had a readily ascertainable fair market value at date of grant; and

(v) Whether the option is subject to paragraph (a) of this section.

(4) If the statement required by subparagraph (1) of this paragraph indicates either that the option is not subject to paragraph (a) of this section, or that the option is subject to paragraph (a) of this section but that such option had a readily ascertainable fair market value at date of grant, then such statement shall contain the following additional information:

(i) Option price;

(ii) Value at date of grant of securities subject to the option;

(iii) Restrictions (if any) on exercise or transfer of option;

(iv) Restrictions (if any) on transfer of securities subject to the option;

(v) Value of the option (if readily ascertainable);

(vi) How value of option was determined;

(vii) Amount of money (or its equivalent) paid for the option;

(viii) Person from whom the option was acquired;

(ix) A concise description of the circumstances surrounding the acquisition of the option and any other factors relied upon by the taxpayer to establish that the option is not subject to paragraph (a) of this section, or, if the option is treated by the taxpayer as subject to paragraph (a) of this section, that the option had a readily ascertainable fair market value at date of grant.

(d) *Effective date.* This section shall apply to options granted after July 11, 1963, other than options required to be granted pursuant to the terms of a written contract entered into on or before such date.

[T.D. 6696, 28 FR 13450, Dec. 12, 1963, as amended by T.D. 6706, 29 FR 2911, Mar. 3, 1964; T.D. 6984, 33 FR 19175, Dec. 24, 1968; T.D. 7554, 43 FR 31913, July 24, 1978]

§ 1.61–21 Taxation of fringe benefits.

(a) *Fringe benefits*—(1) *In general.* Section 61(a)(1) provides that, except as otherwise provided in subtitle A of the Internal Revenue Code of 1986, gross income includes compensation for services, including fees, commissions, fringe benefits, and similar items. For an outline of the regulations under this section relating to fringe benefits, see paragraph (a)(7) of this section. Examples of fringe benefits include: an employer-provided automobile, a flight on an employer-provided aircraft, an employer-provided free or discounted commercial airline flight, an employer-provided vacation, an employer-provided discount on property or services, an employer-provided membership in a country club or other social club, and an employer-provided ticket to an entertainment or sporting event.

(2) *Fringe benefits excluded from income.* To the extent that a particular fringe benefit is specifically excluded from gross income pursuant to another section of subtitle A of the Internal Revenue Code of 1986, that section shall govern the treatment of that fringe benefit. Thus, if the requirements of the governing section are satisfied, the fringe benefits may be excludable from gross income. Examples of excludable fringe benefits include qualified tuition reductions provided to an employee (section 117(d)); meals or lodging furnished to an employee for the convenience of the employer (section 119); benefits provided under a dependent care assistance program (section 129); and no-additional-cost services, qualified employee discounts, working condition fringes, and de minimis fringes (section 132). Similarly, the value of the use by an employee of an employer-provided vehicle or a flight provided to an employee on an employer-provided aircraft may be excludable from income under section 105 (because, for example, the transportation is provided for medical reasons) if and to the extent that the requirements of that section are satisfied. Section 134 excludes from gross income ''qualified military benefits.'' An example of a benefit that is not a qualified military benefit is the personal use of an employer-provided vehicle. The fact that another section of subtitle A of the Internal Revenue Code addresses the taxation of a particular fringe benefit will not preclude section 61 and the regulations thereunder from applying, to the extent that they are not inconsistent with such other section. For example, many fringe benefits specifically addressed in other sections of subtitle A of the Internal Revenue Code are excluded from gross income only to the extent that they do not exceed specific dollar or percentage limits, or only if certain other requirements are met. If the limits are exceeded or the requirements are not met, some or all of the fringe benefit may be includible in gross income pursuant to section 61. See paragraph (b)(3) of this section.

(3) *Compensation for services.* A fringe benefit provided in connection with the performance of services shall be considered to have been provided as compensation for such services. Refraining from the performance of services (such as pursuant to a covenant not to compete) is deemed to be the performance of services for purposes of this section.

(4) *Person to whom fringe benefit is taxable*—(i) *In general.* A taxable fringe benefit is included in the income of the person performing the services in connection with which the fringe benefit is furnished. Thus, a fringe benefit may be taxable to a person even though that person did not actually receive the fringe benefit. If a fringe benefit is furnished to someone other than the service provider such benefit is considered in this section as furnished to the service provider, and use by the other person is considered use by the service provider. For example, the provision of an automobile by an employer to an employee's spouse in connection with the performance of services by the employee is taxable to the employee. The automobile is considered available to the employee and use by the employee's spouse is considered use by the employee.

(ii) *All persons to whom benefits are taxable referred to as employees.* The person to whom a fringe benefit is taxable need not be an employee of the provider of the fringe benefit, but may be, for example, a partner, director, or an independent contractor. For convenience, the term ''employee'' includes any person performing services in connection with which a fringe benefit is furnished, unless otherwise specifically provided in this section.

(5) *Provider of a fringe benefit referred to as an employer.* The ''provider'' of a fringe benefit is that person for whom the services are performed, regardless of whether that person actually provides the fringe benefit to the recipient. The provider of a fringe benefit need not be the employer of the recipient of the fringe benefit, but may be, for example, a client or customer of the employer or of an independent contractor. For convenience, the term ''employer'' includes any provider of a fringe benefit in connection with payment for the performance of services, unless otherwise specifically provided in this section.

(6) *Effective date.* Except as otherwise provided, this section is effective as of January 1, 1989 with respect to fringe benefits provided after December 31, 1988. See §1.61–2T for rules in effect from January 1, 1985, to December 31, 1988.

(7) *Outline of this section.* The following is an outline of the regulations in this section relating to fringe benefits:

§1.61–21 (a) *Fringe benefits.*
(1) In general.
(2) Fringe benefits excluded from income.
(3) Compensation for services.
(4) Person to whom fringe benefit is taxable.
(5) Provider of a fringe benefit referred to as an employer.
(6) Effective date.
(7) Outline of this section.

§1.61–21 (b) *Valuation of fringe benefits*
(1) In general.
(2) Fair market value.
(3) Exclusion from income based on cost.
(4) Fair market value of the availability of an employer-provided vehicle.
(5) Fair market value of chauffeur services.
(6) Fair market value of a flight on an employer-provided piloted aircraft.
(7) Fair market value of the use of an employer-provided aircraft for which the employer does not furnish a pilot.

§1.61–21 (c) *Special valuation rules.*
(1) In general.
(2) Use of the special valuation rules.
(3) Additional rules for using special valuation.
(4) Application of section 414 to employers.
(5) Valuation formulae contained in the special valuation rules.
(6) Modification of the special valuation rules.
(7) Special accounting rule.

§1.61–21 (d) *Automobile lease valuation rule.*
(1) In general.
(2) Calculation of Annual Lease Value.
(3) Services included in, or excluded from, the Annual Lease Value Table.
(4) Availability of an automobile for less than an entire calendar year.
(5) Fair market value.
(6) Special rules for continuous availability of certain automobiles.
(7) Consistency rules.

§1.61–21 (e) *Vehicle cents-per-mile valuation rule.*
(1) In general.
(2) Definition of vehicle.
(3) Services included in, or excluded from, the cents-per-mile rate.
(4) Valuation of personal use only.
(5) Consistency rules.

§1.61–21 (f) *Commuting valuation rule.*
(1) In general.
(2) Special rules.
(3) Commuting value.
(4) Definition of vehicle.
(5) Control employee defined—Non-government employer.
(6) Control employee defined—Government employer.
(7) ''Compensation'' defined.

§1.61–21 (g) *Non-commercial flight valuation rule.*
(1) In general.
(2) Eligible flights and eligible aircraft.
(3) Definition of a flight.
(4) Personal and non-personal flights.
(5) Aircraft valuation formula.
(6) Discretion to provide new formula.
(7) Aircraft multiples.
(8) Control employee defined—Non-government employer.
(9) Control employee defined—Government employer.
(10) ''Compensation'' defined.
(11) Treatment of former employees.
(12) Seating capacity rule.
(13) Erroneous use of the non-commercial flight valuation rule.
(14) Consistency rules.

§1.61–21 (h) *Commercial flight valuation rule.*
(1) In general.
(2) Space-available flight.
(3) Commercial aircraft.
(4) Timing of inclusion.

(b) *Valuation of fringe benefits*—(1) *In general.* An employee must include in gross income the amount by which the fair market value of the fringe benefit exceeds the sum of—

(i) The amount, if any, paid for the benefit by or on behalf of the recipient, and

(ii) The amount, if any, specifically excluded from gross income by some other section of subtitle A of the Internal Revenue Code of 1986.

Therefore, for example, if the employee pays fair market value for what is received, no amount is includible in the gross income of the employee. In general, the determination of the fair market value of a fringe benefit must be made before subtracting out the amount, if any, paid for the benefit and the amount, if any, specifically excluded from gross income by another section of subtitle A. See paragraphs (d)(2)(ii) and (e)(1)(iii) of this section.

(2) *Fair market value.* In general, fair market value is determined on the basis of all the facts and circumstances. Specifically, the fair market value of a fringe benefit is the amount that an individual would have to pay for the particular fringe benefit in an arm's-length transaction. Thus, for example, the effect of any special relationship that may exist between the employer and the employee must be disregarded. Similarly, an employee's subjective perception of the value of a fringe benefit is not relevant to the determination of the fringe benefit's fair market value nor is the cost incurred by the employer determinative of its fair market value. For special rules relating to the valuation of certain fringe benefits, see paragraph (c) of this section.

(3) *Exclusion from income based on cost.* If a statutory exclusion phrased in terms of cost applies to the provision of a fringe benefit, section 61 does not require the inclusion in the recipient's gross income of the difference between the fair market value and the excludable cost of that fringe benefit. For example, section 129 provides an exclusion from an employee's gross income for amounts contributed by an employer to a dependent care assistance program for employees. Even if the fair market value of the dependent care assistance exceeds the employer's cost, the excess is not subject to inclusion under section 61 and this section. However, if the statutory cost exclusion is a limited amount, the fair market value of the fringe benefit attributable to any excess cost is subject to inclusion. This would be the case, for example, where an employer pays or incurs a cost of more than $5,000 to provide dependent care assistance to an employee.

(4) *Fair market value of the availability of an employer-provided vehicle*—(i) *In general.* If the vehicle special valuation rules of paragraph (d), (e), or (f) of this section do not apply with respect to an employer-provided vehicle, the value of the availability of that vehicle is determined under the general valuation principles set forth in this section. In general, that value equals the amount that an individual would have to pay in an arm's-length transaction to lease the same or comparable vehicle on the same or comparable conditions in the geographic area in which the vehicle is available for use. An example of a comparable condition is the amount of time that the vehicle is available to the employee for use, e.g., a one-year period. Unless the employee can substantiate that the same or comparable vehicle could have been leased on a cents-per-mile basis, the value of the availability of the vehicle cannot be computed by applying a cents-per-mile rate to the number of miles the vehicle is driven.

(ii) *Certain equipment excluded.* The fair market value of a vehicle does not include the fair market value of any specialized equipment not susceptible to personal use or any telephone that is added to or carried in the vehicle, provided that the presence of that equipment or telephone is necessitated by, and attributable to, the business needs of the employer. However, the value of specialized equipment must be included, if the employee to whom the vehicle is available uses the specialized equipment in a trade or business of the employee other than the employee's trade or business of being an employee of the employer.

(5) *Fair market value of chauffeur services*—(i) *Determination of value*—(A) *In general.* The fair market value of chauffeur services provided to the employee by the employer is the amount that an individual would have to pay in an arm's-length transaction to obtain the same or comparable chauffeur services in the geographic area for the period in which the services are provided. In determining the applicable fair market value, the amount of time, if any, the chauffeur remains on-call to perform chauffeur services must be included. For example, assume that A, an employee of corporation M, needs a chauffeur to be on-call to provide services to A during a twenty-four hour period. If during that twenty-four hour period, the chauffeur actually drives A for only six hours, the fair market value of the chauffeur services would have to be the value of having a chauffeur on-call for a twenty-four hour period. The cost of taxi fare or limousine service for the six hours the chauffeur actually drove A would not be an accurate measure of the fair market value of chauffeur services provided to A. Moreover, all other aspects of the chauffeur's services (including any special qualifications of the chauffeur (e.g., training in evasive driving skills) or the ability of the employee to choose the particular chauffeur) must be taken into consideration.

(B) *Alternative valuation with reference to compensation paid.* Alternatively, the fair market value of the chauffeur services may be determined by reference to the compensation (as defined in paragraph (b)(5)(ii) of this section) received by the chauffeur from the employer.

(C) *Separate valuation for chauffeur services.* The value of chauffeur services is determined separately from the value of the availability of an employer-provided vehicle.

(ii) *Definition of compensation*—(A) *In general.* For purposes of this paragraph (b)(5)(ii), the term ''compensation'' means compensation as defined in section 414(q)(7) and the fair market value of nontaxable lodging (if any) provided by the employer to the chauffeur in the current year.

(B) *Adjustments to compensation*—For purposes of this paragraph (b)(5)(ii), a chauffeur's compensation is reduced proportionately to reflect the amount of time during which the chauffeur performs substantial services for the employer other than as a chauffeur and is not on-call as a chauffeur. For example, assume a chauffeur is paid $25,000 a year for working a ten-hour day, five days a week and also receives $5,000 in nontaxable lodging. Further assume that during four hours of each day, the chauffeur is not on-call to perform services as a chauffeur because that individual is performing secretarial functions for the employer. Then, for purposes of determining the fair market value of this chauffeur's services, the employer may reduce the chauffeur's compensation by $\frac{4}{10}$ or $12,000 (.4× ($25,000+$5,000) = $12,000). Therefore, in this example, the fair market value of the chauffeur's services is $18,000 ($30,000 −$12,000). However, for purposes of this paragraph (b)(5)(ii), a chauffeur's compensation is not to be reduced by any amounts paid to the chauffeur for time spent ''on-call,'' even though the chauffeur actually performs other services for the employer during such time. For purposes of this paragraph (b)(5)(ii), a determination that a chauffeur is performing substantial services for the employer other than as a chauffeur is based upon the facts and circumstances of each situation. An employee will be deemed to be performing substantial services for the employer other than as a chauffeur if a certain portion of each working day is regularly spent performing other services for the employer.

(iii) *Calculation of chauffeur services for personal purposes of the employee.* The fair market value of chauffeur services provided to the employee for personal purposes may be determined by multiplying the fair market value of chauffeur services, as determined pursuant to paragraph (b)(5)(i) (A) or (B) of this section, by a fraction, the numerator of which is equal to the sum of the hours spent by the chauffeur actually providing personal driving services to the employee and the hours spent by the chauffeur in ''personal on-call time,'' and the denominator of which is equal to all hours the chauffeur spends in driving services of any kind paid for by the employer, including all hours that are ''on-call.''

(iv) *Definition of on-call time.* For purposes of this paragraph, the term ''on-call time'' means the total amount of time that the chauffeur is not engaged in the actual performance of driving services, but during which time the chauffeur is available to perform such services. With respect to a round-trip, time spent by a chauffeur waiting for an employee to make a return trip is generally not treated as on-call time; rather such time is treated as part of the round-trip.

(v) *Definition of personal on-call time.* For purposes of this paragraph, the term ''personal on-call time'' means the amount of time outside the employee's normal working hours for the employer when the chauffeur is available to the employee to perform driving services.

(vi) *Presumptions.* (A) An employee's normal working hours will be presumed to consist of a ten hour period during which the employee usually conducts business activities for that employer.

(B) It will be presumed that if the chauffeur is on-call to provide driving services to an employee during the employee's normal working hours, then that on-call time will be performed for business purposes.

(C) Similarly, if the chauffeur is on-call to perform driving services to an employee after normal working hours, then that on-call time will be presumed to be ''personal on-call time.''

(D) The presumptions set out in paragraph (b)(5)(vi) (A), (B), and (C) of this section may be rebutted. For example, an employee may demonstrate by adequate substantiation that his or her normal working hours consist of more than ten hours. Furthermore, if the employee keeps adequate records and is able to substantiate that some portion of the driving services performed by the chauffeur after normal working hours is attributable to business purposes, then personal on-call time may be reduced by an amount equal to such personal on-call time multiplied by a fraction, the numerator of which is equal to the time spent by the chauffeur after normal working hours driving the employee for business purposes, and the denominator of which is equal to the total time spent by the chauffeur driving the employee after normal working hours for all purposes.

(vii) *Examples.* The rules of this paragraph (b)(5) may be illustrated by the following examples:

Example 1. An employer makes available to employee A an automobile and a full-time chauffeur B (who performs no other services for A's employer) for an entire calendar year. Assume that the automobile lease valuation rule of paragraph (d) of this section is used and that the Annual Lease Value of the automobile is $9,250. Assume further that B's compensation for the year is $12,000 (as defined in section 414(q)(7)) and that B is furnished lodging with a value of $3,000 that is excludable from B's gross income. The maximum amount subject to inclusion in A's gross income for use of the automobile and chauffeur is therefore $24,250 ($12,000+$3,000+$9,250). If 70 percent of the miles placed on the automobile during the year are for A's employer's business, then $6,475 is excludable from A's gross income with respect to the automobile as a working condition fringe ($9,250×.70). Thus, $2,775 is includible in A's gross income with respect to the automobile ($9,250−$6,475). With respect to the chauffeur, if 20 percent of the chauffeur's time is spent actually driving A or being on-call to drive A for personal purposes; then $3,000 is includible in A's income (.20×$15,000). Eighty percent of $15,000, or $12,000, is excluded from A's income as a working condition fringe.

Example 2. Assume the same facts as in example (1) except that in addition to providing chauffeur services, B is responsible for performing substantial non-chauffeur-related duties (such as clerical or secretarial functions) during which time B is not ''on-call'' as a chauffeur. If B spends only 75 percent of the time performing chauffeur services, then the maximum amount subject to inclusion in A's gross income for use of the automobile and chauffeur is $20,500 (($15,000×.75)+$9,250). If B is actually driving A for personal purposes or is on-call to drive A for personal purposes for 20 percent of the time during which B is available to provide chauffeur services, then $2,250 is includible in A's gross income (.20×$11,250). The income inclusion with respect to the automobile is the same as in example (1).

Example 3. Assume the same facts as in example (2) except that while B is performing non-chauffeur-related duties, B is on call as A's chauffeur. No part of B's compensation is excluded when determining the value of the benefit provided to A. Thus, as in example (1), $3,000 is includible in A's gross income with respect to the chauffeur.

(6) *Fair market value of a flight on an employer-provided piloted aircraft*—(i) *In general.* If the non-commercial flight special valuation rule of paragraph (g) of this section does not apply, the value of a flight on an employer-provided piloted aircraft is determined under the general valuation principles set forth in this paragraph.

(ii) *Value of flight.* If an employee takes a flight on an employer-provided piloted aircraft and that employee's flight is primarily personal (see §1.162–2(b)(2)), the value of the flight is equal to the amount that an individual would have to pay in an arm's-length transaction to charter the same or a comparable piloted aircraft for that period for the same or a comparable flight. A flight taken under these circumstances may not be valued by reference to the cost of commercial airfare for the same or a comparable flight. The cost to charter the aircraft must be allocated among all employees on board the aircraft based on all the facts and circumstances unless one or more of the employees controlled the use of the aircraft. Where one or more employees control the use of the aircraft, the value of the flight shall be allocated solely among such controlling employees, unless a written agreement among all the employees on the flight otherwise allocates the value of such flight. Notwithstanding the allocation required by the preceding sentence, no additional amount shall be included in the income of any employee whose flight is properly valued under the special valuation rule of paragraph (g) of this section. For purposes of this paragraph (b)(6), "control" means the ability of the employee to determine the route, departure time and destination of the flight. The rules provided in paragraph (g)(3) of this section will be used for purposes of this section in defining a flight. Notwithstanding the allocation required by the preceding sentence, no additional amount shall be included in the income of an employee for that portion of any such flight which is excludible from income pursuant to section 132(d) or §1.132–5 as a working condition fringe.

(iii) *Examples.* The rules of paragraph (b)(6) of this section may be illustrated by the following examples:

Example 1. An employer makes available to employees A and B a piloted aircraft in New York, New York. A wants to go to Los Angeles, California for personal purposes. B needs to go to Chicago, Illinois for business purposes, and then wants to go to Los Angeles, California for personal purposes. Therefore, the aircraft first flies to Chicago, and B deplanes and then boards the plane again. The aircraft then flies to Los Angeles, California where A and B deplane. The value of the flight to employee A will be no more than the amount that an individual would have to pay in an arm's length transaction to charter the same or a comparable piloted aircraft for the same or comparable flight from New York City to Los Angeles. No amount will be imputed to employee A for the stop at Chicago. As to employee B, the value of the personal flight will be no more than the value or the flight from Chicago to Los Angeles. Pursuant to the rules set forth in §1.132–5(k), the flight from New York to Chicago will not be included in employee B's income since that flight was taken solely for business purposes. The charter cost must be allocated between A and B, since both employees controlled portions of the flight. Assume that the employer allocates according to the relative value of each employee's flight. If the charter value of A's flight from New York City to Los Angeles is $1,000 and the value of B's flight from Chicago to Los Angeles is $600 and the value of the actual flight from New York to Chicago to Los Angeles is $1,200, then the amount to be allocated to employee A is $750 ($1,000/($1,000+$600)×$1,200) and the amount to be allocated to employee B is $450 ($600/($1000+$600)×$1,200).

Example 2. Assume the same facts as in example (1), except that employee A also deplanes at Chicago, Illinois, but for personal purposes. The value of the flight to employee A then becomes the value of a flight from New York to Chicago to Los Angeles, *i.e.*, $1,200. Therefore, the amount to be allocated to employee A is $800 ($1,200/($1,200+$600)×$1,200) and the amount to be allocated to employee B is $400 ($600/($1,200+$600)× $1,200).

(7) *Fair market value of the use of an employer-provided aircraft for which the*

employer does not furnish a pilot—(i) *In general.* If the non-commercial flight special valuation rule of paragraph (g) of this section does not apply and if an employer provides an employee with the use of an aircraft without a pilot, the value of the use of the employer-provided aircraft is determined under the general valuation principles set forth in this paragraph (b)(7).

(ii) *Value of flight.* In general, if an employee takes a flight on an employer-provided aircraft for which the employer does not furnish a pilot, the value of that flight is equal to the amount that an individual would have to pay in an arm's-length transaction to lease the same or comparable aircraft on the same or comparable terms for the same period in the geographic area in which the aircraft is used. For example, if an employer makes its aircraft available to an employee who will pilot the aircraft for a two-hour flight, the value of the use of the aircraft is the amount that an individual would have to pay in an arm's-length transaction to rent a comparable aircraft for that period in the geographic area in which the aircraft is used. As another example, assume that an employee uses an employer-provided aircraft to commute between home and work. The value of the use of the aircraft is the amount that an individual would have to pay in an arm's-length transaction to rent a comparable aircraft for commuting in the geographic area in which the aircraft is used. If the availability of the flight is of benefit to more than one employee, then such value shall be allocated among such employees on the basis of the relevant facts and circumstances.

(c) *Special valuation rules*—(1) *In general.* Paragraphs (d) through (k) of this section provide special valuation rules that may be used under certain circumstances for certain commonly provided fringe benefits. For general rules relating to the valuation of fringe benefits not eligible for valuation under the special valuation rules or fringe benefits with respect to which the special valuation rules are not used, see paragraph (b) of this section.

(2) *Use of the special valuation rules*—(i) *For benefits provided before January 1, 1993.* The special valuation rules may be used for income tax, employment tax, and reporting purposes. The employer has the option to use any of the special valuation rules. However, an employee may only use a special valuation rule if the employer uses the rule. Moreover, an employee may only use the special rule that the employer uses to value the benefit provided; the employee may not use another special rule to value that benefit. The employee may always use general valuation rules based on facts and circumstances (see paragraph (b) of this section) even if the employer uses a special rule. If a special rule is used, it must be used for all purposes. If an employer properly uses a special rule and the employee uses the special rule, the employee must include in gross income the amount determined by the employer under the special rule reduced by the sum of—

(A) Any amount reimbursed by the employee to the employer, and

(B) Any amount excludable from income under another section of subtitle A of the Internal Revenue Code of 1986. If an employer properly uses a special rule and properly determines the amount of an employee's working condition fringe under section 132 and §1.132–5 (under the general rule or under a special rule), and the employee uses the special valuation rule, the employee must include in gross income the amount determined by the employer less any amount reimbursed by the employee to the employer. The employer and employee may use the special rules to determine the amount of the reimbursement due the employer by the employee. Thus, if an employee reimburses an employer for the value of a benefit as determined under a special valuation rule, no amount is includable in the employee's gross income with respect to the benefit. The provisions of this paragraph are effective for benefits provided before January 1, 1993.

(ii) *For benefits provided after December 31, 1992.* The special valuation rules may be used for income tax, employment tax, and reporting purposes. The employer has the option to use any of the special valuation rules. An employee may use a special valuation rule only if the employer uses that rule or the employer does not meet the condition of paragraph (c)(3)(ii)(A) of this section, but one of the other conditions of paragraph (c)(3)(ii) of this section is met. The employee may always use general valuation rules based on facts and circumstances (see paragraph (b) of this section) even if the employer uses a special rule. If a special rule is used, it must be used for all purposes. If an employer properly uses a special rule and the employee uses the special rule, the employee must include in gross income the amount determined by the employer under the special rule reduced by the sum of—

(A) Any amount reimbursed by the employee to the employer; and

(B) Any amount excludable from income under another section of subtitle A of the Internal Revenue Code of 1986. If an employer properly uses a special rule and properly determines the amount of an employee's working condition fringe under section 132 and §1.132–5 (under the general rule or under a special rule), and the employee uses the special valuation rule, the employee must include in gross income the amount determined by the employer less any amount reimbursed by the employee to the employer. The employer and employee may use the special rules to determine the amount of the reimbursement due the employer by the employee. Thus, if an employee reimburses an employer for the value of a benefit as determined under a special valuation rule, no amount is includible in the employee's gross income with respect to the benefit. The provisions of this paragraph are effective for benefits provided after December 31, 1992.

(iii) *Vehicle special valuation rules*—(A) *Vehicle by vehicle basis.* Except as provided in paragraphs (d)(7)(v) and (e)(5)(v) of this section, the vehicle special valuation rules of paragraphs (d), (e), and (f) of this section apply on a vehicle by vehicle basis. An employer need not use the same vehicle special valuation rule for all vehicles provided to all employees. For example, an employer may use the automobile lease valuation rule for automobiles provided to some employees, and the commuting and vehicle cents-per-mile valuation rules for automobiles provided to other employees. For purposes of valuing the use or availability of a vehicle, the consistency rules provided in paragraphs (d)(7) and (e)(5) of this section (relating to the automobile lease valuation rule and the vehicle cents-per-mile valuation rule, respectively) apply.

(B) *Shared vehicle usage.* If an employer provides a vehicle to employees for use by more than one employee at the same time, such as with an employer-sponsored vehicle commuting pool, the employer may use any of the special valuation rules that may be applicable to value the use of the vehicle by the employees. The employer must use the same special valuation rule to value the use of the vehicle by each employee who shares such use. The employer must allocate the value of the use of the vehicle based on the relevant facts and circumstances among the employees who share use of the vehicle. For example, assume that an employer provides an automobile to four of its employees and that the employees use the automobile in an employer-sponsored vehicle commuting pool. Assume further that the employer uses the automobile lease valuation rule of paragraph (d) of this section and that the Annual Lease Value of the automobile is $5,000.

The employer must treat $5,000 as the value of the availability of the automobile to the employees, and must apportion the $5,000 value among the employees who share the use of the automobile based on the relevant facts and circumstances. Each employee's share of the value of the availability of the automobile is then to be reduced by the amount, if any, of each employee's working condition fringe exclusion and the amount reimbursed by the employee to the employer.

(iv) *Commercial and noncommercial flight valuation rules.* Except as otherwise provided, if either the commercial flight valuation rule or the non-commercial flight valuation rule is used, that rule must be used by an employer to value all eligible flights taken by all employees in a calendar year. See paragraph (g)(14) of this section for the applicable consistency rules.

(3) *Additional rules for using special valuation*—(i) *Election to use special*

valuation rules for benefits provided before January 1, 1993. A particular special valuation rule is deemed to have been elected by the employer (and, if applicable, by the employee), if the employer (and, if applicable, the employee) determines the value of the fringe benefit provided by applying the special valuation rule and treats that value as the fair market value of the fringe benefit for income, employment tax, and reporting purposes. Neither the employer nor the employee must notify the Internal Revenue Service of the election. The provisions of this paragraph are effective for benefits provided before January 1, 1993.

(ii) *Conditions on the use of special valuation rules for benefits provided after December 31, 1992.* Neither the employer nor the employee may use a special valuation rule to value a benefit provided after December 31, 1992, unless one of the following conditions is satisfied—

(A) The employer treats the value of the benefit as wages for reporting purposes within the time for filing the returns for the taxable year (including extensions) in which the benefit is provided;

(B) The employee includes the value of the benefit in income within the time for filing the returns for the taxable year (including extensions) in which the benefit is provided;

(C) The employee is not a control employee as defined in paragraphs (f)(5) and (f)(6) of this section; or

(D) The employer demonstrates a good faith effort to treat the benefit correctly for reporting purposes.

(4) *Application of section 414 to employers.* For purposes of paragraphs (c) through (k) of this section, except as otherwise provided therein, the term ''employer'' includes all entities required to be treated as a single employer under section 414 (b), (c), (m), or (o).

(5) *Valuation formulae contained in the special valuation rules.* The valuation formula contained in the special valuation rules are provided only for use in connection with those rules. Thus, when a special valuation rule is properly applied to a fringe benefit, the Commissioner will accept the value calculated pursuant to the rule as the fair market value of that fringe benefit. However, when a special valuation rule is not properly applied to a fringe benefit (see, for example, paragraph (g)(13) of this section), or when a special valuation rule is used to value a fringe benefit by a taxpayer not entitled to use the rule, the fair market value of that fringe benefit may not be determined by reference to any value calculated under any special valuation rule. Under the circumstances described in the preceding sentence, the fair market value of the fringe benefit must be determined pursuant to the general valuation rules of paragraph (b) of this section.

(6) *Modification of the special valuation rules.* The Commissioner may, to the extent necessary for tax administration, add, delete, or modify any special valuation rule, including the valuation formulae contained herein, on a prospective basis by regulation, revenue ruling or revenue procedure.

(7) *Special accounting rule.* If the employer is using the special accounting rule provided in Announcement 85–113 (1985–31 I.R.B. 31, August 5, 1985) (see § 601.601(d)(2)(ii)(*b*) of this chapter) (relating to the reporting of and withholding on the value of noncash fringe benefits), benefits which are deemed provided in a subsequent calendar year pursuant to that rule are considered as provided in that subsequent calendar year for purposes of the special valuation rules. Thus, if a particular special valuation rule is in effect for a calendar year, it applies to benefits deemed provided during that calendar year under the special accounting rule.

(d) *Automobile lease valuation rule*—(1) *In general*—(i) *Annual Lease Value.* Under the special valuation rule of this paragraph (d), if an employer provides an employee with an automobile that is available to the employee for an entire calendar year, the value of the benefit provided is the Annual Lease Value (determined under paragraph (d)(2) of this section) of that automobile. Except as otherwise provided, for an automobile that is available to an employee for less than an entire calendar year, the value of the benefit provided is either a pro-rated Annual Lease Value or the Daily Lease Value (both as defined in paragraph (d)(4) of this section), whichever is applicable. Absent any statutory exclusion relating to the employer-provided automobile (see, for example, section 132(a)(3) and § 1.132–5(b)), the amount of the Annual Lease Value (or a pro-rated Annual Lease Value or the Daily Lease Value, as applicable) is included in the gross income of the employee.

(ii) *Definition of automobile.* For purposes of this paragraph (d), the term ''automobile'' means any four-wheeled vehicle manufactured primarily for use on public streets, roads, and highways.

(2) *Calculation of Annual Lease Value*—(i) *In general.* The Annual Lease Value of a particular automobile is calculated as follows:

(A) Determine the fair market value of the automobile as of the first date on which the automobile is made available to any employee of the employer for personal use. For an automobile first made available to any employee for personal use prior to January 1, 1985, determine the fair market value as of January 1 of the first year the special valuation rule of this paragraph (d) is used with respect to the automobile. For rules relating to determination of the fair market value of an automobile for purposes of this paragraph (d), see paragraph (d)(5) of this section.

(B) Select the dollar range in column 1 of the Annual Lease Value Table, set forth in paragraph (d)(2)(iii) of this section corresponding to the fair market value of the automobile. Except as otherwise provided in paragraphs (d)(2) (iv) and (v) of this section, the Annual Lease Value for each year of availability of the automobile is the corresponding amount in column 2 of the Table.

(ii) *Calculation of Annual Lease Value of automobile owned or leased by both an employer and an employee*—(A) *Purchased automobiles.* Notwithstanding anything in this section to the contrary, if an employee contributes an amount toward the purchase price of an automobile in return for a percentage ownership interest in the automobile, the Annual Lease Value or the Daily Lease Value, whichever is applicable, is determined by reducing the fair market value of the employer-provided automobile by the lesser of—

(*1*) The amount contributed, or

(*2*) An amount equal to the employee's percentage ownership interest multiplied by the unreduced fair market value of the automobile.

If the automobile is subsequently revalued, the revalued amount (determined without regard to this paragraph (d)(2)(ii)(A)) is reduced by an amount which is equal to the employee's percentage ownership interest in the vehicle). If the employee does not receive an ownership interest in the employer-provided automobile, then the Annual Lease Value or the Daily Lease Value, whichever is applicable, is determined without regard to any amount contributed. For purposes of this paragraph (d)(2)(ii)(A), an employee's ownership interest in an automobile will not be recognized unless it is reflected in the title of the automobile. An ownership interest reflected in the title of an automobile will not be recognized if under the facts and circumstances the title does not reflect the benefits and burdens of ownership.

(B) *Leased automobiles.* Notwithstanding anything in this section to the contrary, if an employee contributes an amount toward the cost to lease an automobile in return for a percentage interest in the automobile lease, the Annual Lease Value or the Daily Lease Value, whichever is applicable, is determined by reducing the fair market value of the employer-provided automobile by the amount specified in the following sentence. The amount specified in this sentence is the unreduced fair market value of a vehicle multiplied by the lesser of—

(*1*) The employee's percentage interest in the lease, or

(*2*) A fraction, the numerator of which is the amount contributed and the denominator of which is the entire lease cost.

If the automobile is subsequently revalued, the revalued amount (determined without regard to this paragraph (d)(2)(ii)(B)) is reduced by an amount which is equal to the employee's percentage interest in the lease) multiplied by the revalued amount. If the employee does not receive an interest in the automobile lease, then the Annual Lease Value or the Daily Lease

Value, whichever is applicable, is determined without regard to any amount contributed. For purposes of this paragraph (d)(2)(ii)(B), an employee's interest in an automobile lease will not be recognized unless the employee is a named co-lessee on the lease. An interest in a lease will not be recognized if under the facts and circumstances the lease does not reflect the true obligations of the lessees.

(C) *Example.* The rules of paragraph (d)(2)(ii) (A) and (B) of this section are illustrated by the following example:

Example. Assume that an employer pays $15,000 and an employee pays $5,000 toward the purchase of an automobile. Assume further that the employee receives a 25 percent interest in the automobile and is named as a co-owner on the title to the automobile. Under the rule of paragraph (d)(2)(ii)(A) of this section, the Annual Lease Value of the automobile is determined by reducing the fair market value of the automobile ($20,000) by the $5,000 employee contribution. Thus, the Annual Lease Value of the automobile under the table in paragraph (d)(2)(iii) of this section is $4,350. If the employee in this example does not receive an ownership interest in the automobile and is provided the use of the automobile for two years, the Annual Lease Value would be determined without regard to the $5,000 employee contribution. Thus, the Annual Lease Value would be $5,600. The $5,000 employee contribution would reduce the amount includible in the employee's income after taking into account the amount, if any, excluded from income under another provision of subtitle A of the Internal Revenue Code, such as the working condition fringe exclusion. Thus, if the employee places 50 percent of the mileage on the automobile for the employer's business each year, then the amount includible in the employee's income in the first year would be ($5,600–2,800–2,800), or $0, the amount includible in the employee's income in the second year would be ($5,600–2,800–2,200 ($5,000–2,800)) or $600 and the amount includible in the third year would be ($5,600–2,800) or $2,800 since the employee's contribution has been completely used in the first two years.

(iii) *Annual Lease Value Table.*

Automobile fair market value (1)	Annual lease value (2)
$0 to 999	$600
1,000 to 1,999	850
2,000 to 2,999	1,100
3,000 to 3,999	1,350
4,000 to 4,999	1,600
5,000 to 5,999	1,850
6,000 to 6,999	2,100
7,000 to 7,999	2,350
8,000 to 8,999	2,600
9,000 to 9,999	2,850
10,000 to 10,999	3,100
11,000 to 11,999	3,350
12,000 to 12,999	3,600
13,000 to 13,999	3,850
14,000 to 14,999	4,100
15,000 to 15,999	4,350
16,000 to 16,999	4,600
17,000 to 17,999	4,850
18,000 to 18,999	5,100
19,000 to 19,999	5,350
20,000 to 20,999	5,600
21,000 to 21,999	5,850
22,000 to 22,999	6,100
23,000 to 23,999	6,350
24,000 to 24,999	6,600
25,000 to 25,999	6,850
26,000 to 27,999	7,250
28,000 to 29,999	7,750
30,000 to 31,999	8,250
32,000 to 33,999	8,750
34,000 to 35,999	9,250
36,000 to 37,999	9,750
38,000 to 39,999	10,250
40,000 to 41,999	10,750
42,000 to 43,999	11,250
44,000 to 45,999	11,750
46,000 to 47,999	12,250
48,000 to 49,999	12,750
50,000 to 51,999	13,250
52,000 to 53,999	13,750
54,000 to 55,999	14,250
56,000 to 57,999	14,750
58,000 to 59,999	15,250

For vehicles having a fair market value in excess of $59,999, the Annual Lease Value is equal to: (.25 × the fair market value of the automobile) + $500.

(iv) *Recalculation of Annual Lease Value.* The Annual Lease Values determined under the rules of this paragraph (d) are based on four-year lease terms. Therefore, except as otherwise provided in paragraph (d)(2)(v) of this section, the Annual Lease Value calculated by applying paragraph (d)(2) (i) or (ii) of this section shall remain in effect for the period that begins with the first date the special valuation rule of paragraph (d) of this section is applied by the employer to the automobile and ends on December 31 of the fourth full calendar year following that date. The Annual Lease Value for each subsequent four-year period is calculated by determining the fair market value of the automobile as of the first January 1 following the period described in the previous sentence and selecting the amount in column 2 of the Annual Lease Value Table corresponding to the appropriate dollar range in column 1 of the Table. If, however, the employer is using the special accounting rule provided in Announcement 85–113 (1985–31 I.R.B. 31, August 5, 1985) (relating to the reporting of and withholding on the value of noncash fringe benefits), the employer may calculate the Annual Lease Value for each subsequent four-year period as of the beginning of the special accounting period that begins immediately prior to the January 1 described in the previous sentence. For example, assume that pursuant to Announcement 85–113, an employer uses the special accounting rule. Assume further that beginning on November 1, 1988, the special accounting period is November 1 to October 31 and that the employer elects to use the special valuation rule of this paragraph (d) as of January 1, 1989. The employer may recalculate the Annual Lease Value as of November 1, 1992, rather than as of January 1, 1993.

(v) *Transfer of the automobile to another employee.* Unless the primary purpose of the transfer is to reduce Federal taxes, if an employer transfers the use of an automobile from one employee to another employee, the employer may recalculate the Annual Lease Value based on the fair market value of the automobile as of January 1 of the calendar year of transfer. If, however, the employer is using the special accounting rule provided in Announcement 85–113 (1985–31 I.R.B. 31, August 5, 1985) (relating to the reporting of and withholding on the value of noncash fringe benefits), the employer may recalculate the Annual Lease Value based on the fair market value of the automobile as of the beginning of the special accounting period in which the transfer occurs. If the employer does not recalculate the Annual Lease Value, and the employee to whom the automobile is transferred uses the special valuation rule, the employee may not recalculate the Annual Lease Value.

(3) *Services included in, or excluded from, the Annual Lease Value Table*—(i) *Maintenance and insurance included.* The Annual Lease Values contained in the Annual Lease Value Table include the fair market value of maintenance of, and insurance for, the automobile. Neither an employer nor an employee may reduce the Annual Lease Value by the fair market value of any service included in the Annual Lease Value that is not provided by the employer, such as reducing the Annual Lease Value by the fair market value of a maintenance service contract or insurance. An employer or employee who wishes to take into account only the services actually provided with respect to an automobile may value the availability of the automobile under the general valuation rules of paragraph (b) of this section.

(ii) *Fuel excluded*—(A) *In general.* The Annual Lease Values do not include the fair market value of fuel provided by the employer, whether fuel is provided in kind or its cost is reimbursed by or charged to the employer. Thus, if an employer provides fuel, the fuel must be valued separately for inclusion in income.

(B) *Valuation of fuel provided in kind.* The provision of fuel in kind may be valued at fair market value based on all the facts and circumstances or, in the alternative, it may be valued at 5.5 cents per mile for all miles driven by the employee. However, the provision of fuel in kind may not be valued at 5.5 cents per mile for miles driven outside the United States, Canada or Mexico. For purposes of this section, the United States includes the United States, its possessions and its territories.

(C) *Valuation of fuel where cost reimbursed by or charged to an employer.* The fair market value of fuel, the cost of which is reimbursed by or charged to an employer, is generally the amount of the actual reimbursement or the amount charged, provided the purchase of the fuel is at arm's-length.

(D) *Fleet-average cents-per-mile fuel cost.* If an employer with a fleet of at least 20 automobiles that meets the requirements of paragraph (d)(5)(v)(D) of this section reimburses employees for the cost of fuel or allows employees to charge the employer for the cost of fuel, the fair market value of fuel provided to those automobiles may be determined by reference to the employer's fleet-average cents-per-mile fuel cost. The fleet-average cents-per-mile fuel cost is equal to the fleet-average per-gallon fuel cost divided by the fleet-average miles-per-gallon rate. The averages described in the preceding sentence must be determined by averaging the per-gallon fuel costs and miles-per-gallon rates of a representative sample of the automobiles in the fleet equal to the greater of ten percent of the automobiles in the fleet or 20 automobiles for a representative period, such as a two-month period. In lieu of determining the fleet-average cents-per-mile fuel cost, if an employer is using the fleet-average valuation rule of paragraph (d)(5)(v) of this section and if determining the amount of the actual reimbursement or the amount charged for the purchase of fuel would impose unreasonable administrative burdens on the employer, the provision of fuel may be valued under the rule provided in paragraph (d)(3)(ii)(B) of this section.

(iii) *Treatment of other services.* The fair market value of any service not specifically identified in paragraph (d)(3)(i) of this section that is provided by the employer with respect to an automobile (other than the services of a chauffeur) must be added to the Annual Lease Value of the automobile in determining the fair market value of the benefit provided. See paragraph (b)(5) of this section for rules relating to the valuation of chauffeur services.

(4) *Availability of an automobile for less than an entire calendar year*—(i) *Prorated Annual Lease Value used for continuous availability of at least 30 days*—(A) *In general.* Except as otherwise provided in paragraph (d)(4)(iv) of this section, for periods of continuous availability of at least 30 days, but less than an entire calendar year, the value of the availability of an automobile provided by an employer electing to use the automobile lease valuation rule of this paragraph (d) is the pro-rated Annual Lease Value. The pro-rated Annual Lease Value is calculated by multiplying the applicable Annual Lease Value by a fraction, the numerator of which is the number of days of availability and the denominator of which is 365.

(B) *Special rule for continuous availability of at least 30 days that straddles two reporting years.* If an employee is provided with the continuous availability of an automobile for at least 30 days, but the continuous period straddles two calendar years (or two special accounting periods if the special accounting rule of Announcement 85–113 (1985–31 I.R.B. 31, August 5, 1985) (relating to the reporting of and withholding on noncash fringe benefits) is used), the pro-rated Annual Lease Value, rather than the Daily Lease Value, may be applied with respect to such period of continuous availability.

(ii) *Daily Lease Value used for continuous availability of less than 30 days.* Except as otherwise provided in paragraph (d)(4)(iii) of this section, for periods of continuous availability of one or more but less than 30 days, the value of the availability of the employer-provided automobile is the Daily Lease Value. The Daily Lease Value is calculated by multiplying the applicable Annual Lease Value by a fraction, the numerator of which is four times the number of days of availability and the denominator of which is 365.

(iii) *Election to treat all periods as periods of at least 30 days.* The value of the availability of an employer-provided automobile for a period of continuous availability of less than 30 days may be determined by applying the pro-rated Annual Lease Value by treating the automobile as if it had been available for 30 days, if doing so would result in a lower valuation than applying the Daily Lease Value to the shorter period of actual availability.

(iv) *Periods of unavailability*—(A) *General rule.* In general, a pro-rated Annual Lease Value (as provided in paragraph (d)(4)(i) of this section) is used to value the availability of an employer-provided automobile when the automobile is available to an employee for a continuous period of at least 30 days but less than the entire calendar year. Neither an employer nor an employee, however, may use a pro-rated Annual Lease Value when the reduction of Federal taxes is the primary reason the automobile is unavailable to an employee at certain times during the calendar year.

(B) *Unavailability for personal reasons of the employee.* If an automobile is unavailable to an employee because of personal reasons of the employee, such as while the employee is on vacation, a pro-rated Annual Lease Value, if used, must not take into account such periods of unavailability. For example, assume that an automobile is available to an employee during the first five months of the year and during the last five months of the year. Assume further that the period of unavailability occurs because the employee is on vacation. The Annual Lease Value, if it is applied, must be applied with respect to the entire 12-month period. The Annual Lease Value may not be pro-rated to take into account the two-month period of unavailability.

(5) *Fair market value*—(i) *In general.* For purposes of determining the Annual Lease Value of an automobile under the Annual Lease Value Table, the fair market value of an automobile is the amount that an individual would have to pay in an arm's-length transaction to purchase the particular automobile in the jurisdiction in which the vehicle is purchased or leased. That amount includes all amounts attributable to the purchase of an automobile such as sales tax and title fees as well as the purchase price of the automobile. Any special relationship that may exist between the employee and the employer must be disregarded. Also, the employee's subjective perception of the value of the automobile is not relevant to the determination of the automobile's fair market value, and, except as provided in paragraph (d)(5)(ii) of this section, the cost incurred by the employer in connection with the purchase or lease of the automobile is not determinative of the fair market value of the automobile.

(ii) *Safe-harbor valuation rule*—(A) *General rule.* For purposes of calculating the Annual Lease Value of an automobile under this paragraph (d), the safe-harbor value of the automobile may be used as the fair market value of the automobile.

(B) *Automobiles owned by the employer.* For an automobile owned by the employer, the safe-harbor value of the automobile is the employer's cost of purchasing the automobile (including sales tax, title, and other expenses attributable to such purchase), provided the purchase is made at arm's-length. Notwithstanding the preceding sentence, the safe-harbor value of this paragraph (d)(5)(ii)(B) is not available with respect to an automobile manufactured by the employer. Thus, for example, if one entity manufactures an automobile and sells it to an entity with which it is aggregated pursuant to paragraph (c)(4) of this section, this paragraph (d)(5)(ii)(B) does not apply to value the automobile by the aggregated employer. In this case, value must be determined under paragraph (d)(5)(i) of this section.

(C) *Automobiles leased by the employer.* For an automobile leased but not manufactured by the employer, the safe-harbor value of the automobile is either the manufacturer's suggested retail price of the automobile less eight percent (including sales tax, title, and other expenses attributable to such purchase), or the value determined under paragraph (d)(5)(iii) of this section.

(iii) *Use of nationally recognized pricing sources.* The fair market value of an automobile that is—

(A) Provided to an employee prior to January 1, 1985,

(B) Being revalued pursuant to paragraph (d)(2) (iv) or (v) of this section, or

(C) A leased automobile being valued pursuant to paragraph (d)(5)(ii) of this section, may be determined by reference to the retail value of such automobile as reported by a nationally recognized pricing source that regularly reports new or used automobile retail values, whichever is applicable. That retail value must be reasonable with respect to the automobile being valued. Pricing sources consist of publications and electronic data bases.

(iv) *Fair market value of special equipment.* When determining the fair market value of an automobile, the employer may exclude the fair market value of any specialized equipment or telephone that is added to or carried in the automobile provided that the presence of that equipment or telephone is necessitated by, and attributable to, the business needs of the employer. The value of the specialized equipment must be included if the employee to whom the automobile is available uses the specialized equipment in a trade or business of the employee other than the employee's trade or business of being an employee of the employer.

(v) *Fleet-average valuation rule*—(A) *In general*. An employer with a fleet of 20 or more automobiles meeting the requirements of this paragraph (d)(5)(v) (including the business-use and fair market value conditions of paragraph (d)(5)(v)(D) of this section) may use a fleet-average value for purposes of calculating the Annual Lease Values of the automobiles in the fleet. The fleet-average value is the average of the fair market values of all automobiles in the fleet. The fair market value of each automobile in the fleet shall be determined, pursuant to the rules of paragraphs (d)(5) (i) through (iv) of this section, as of the date described in paragraph (d)(2)(i)(A) of this section.

(B) *Period for use of rule*. The fleet-average valuation rule of this paragraph (d)(5)(v) may be used by an employer as of January 1 of any calendar year following the calendar year in which the employer acquires a sufficient number of automobiles to total a fleet of 20 or more automobiles. The Annual Lease Value calculated for the automobiles in the fleet, based on the fleet-average value, shall remain in effect for the period that begins with the first January 1 the fleet-average valuation rule of this paragraph (d)(5)(v) is applied by the employer to the automobiles in the fleet and ends on December 31 of the subsequent calendar year. The Annual Lease Value for each subsequent two-year period is calculated by determining the fleet-average value of the automobiles in the fleet as of the first January 1 of such period. An employer may cease using the fleet-average valuation rule as of any January 1. If, however, the employer is using the special accounting rule provided in Announcement 85–113 (1985–31 I.R.B. 31, August 5, 1985) (relating to the reporting of and withholding on noncash fringe benefits), the employer may apply the rules of this paragraph (d)(5)(v)(B) on the basis of the special accounting period rather than the calendar year. (This is accomplished by substituting (*1*) the beginning of the special accounting period that begins immediately prior to the January 1 described in this paragraph (d)(5)(v)(B) for January 1 wherever it appears in this paragraph (d)(5)(v) (B) and (*2*) the end of such accounting period for December 31.) If the number of qualifying automobiles in the employer's fleet declines to fewer than 20 for more than 50 percent of the days in a year, then the fleet-average valuation rule does not apply as of January 1 of such year. In this case, the Annual Lease Value must be determined separately for each remaining automobile. The revaluation rules of paragraphs (d)(2) (iv) and (v) of this section do not apply to automobiles valued under this paragraph (d)(5)(v).

(C) *Automobiles included in the fleet*. An employer may include in a fleet any automobile that meets the requirements of this paragraph (d)(5)(v) and is available to any employee of the employer for personal use. An employer may include in the fleet only automobiles the availability of which is valued under the automobile lease valuation rule of this paragraph (d). An employer need not include in the fleet all automobiles valued under the automobile lease valuation rule. An employer may have more than one fleet for purposes of the fleet-average rule of this paragraph (d)(5)(v). For example, an employer may group automobiles in a fleet according to their physical type or use.

(D) *Limitations on use of fleet-average rule*. The rule provided in this paragraph (d)(5)(v) may not be used for any automobile the fair market value of which (determined pursuant to paragraphs (d)(5) (i) through (iv) of this section as of either the first date on which the automobile is made available to any employee of the employer for personal use or, if later, January 1, 1985) exceeds $16,500. The fair market value limitation of $16,500 shall be adjusted pursuant to section 280F(d)(7) of the Internal Revenue Code of 1986. The first such adjustment shall be for calendar year 1989 (substitute October 1986 for October 1987 in applying the formula). In addition, the rule provided in this paragraph (d)(5)(v) may only be used for automobiles that the employer reasonably expects will regularly be used in the employer's trade or business. For rules concerning when an automobile is regularly used in the employer's business, see paragraph (e)(1)(iv) of this section.

(E) *Additional automobiles added to the fleet*. The fleet-average value in effect at the time an automobile is added to a fleet is treated as the fair market value of the additional automobile for purposes of determining the Annual Lease Value of the automobile until the fleet-average value changes pursuant to paragraph (d)(5)(v)(B) of this section.

(F) *Use of the fleet-average rule by employees.* An employee may only use the fleet-average rule if it is used by the employer. If an employer uses the fleet-average rule, and the employee uses the special valuation rule of paragraph (d) of this section, the employee must use the fleet-average value determined by the employer.

(6) *Special rules for continuous availability of certain automobiles*—(i) *Fleet automobiles.* If an employer is using the fleet-average valuation rule of paragraph (d)(5)(v) of this section and the employer provides an employee with the continuous availability of an automobile from the same fleet during a period (though not necessarily the same fleet automobile for the entire period), the employee is treated as having the use of a single fleet automobile for the entire period, e.g., an entire calendar year. Thus, when applying the automobile lease valuation rule of this paragraph (d), the employer may treat the fleet-average value as the fair market value of the automobile deemed available to the employee for the period for purposes of calculating the Annual Lease Value, (or pro-rated Annual Lease Value or Daily Lease Value whichever is applicable) of the automobile. If an employer provides an employee with the continuous availability of more than one fleet automobile during a period, the employer may treat the fleet-average value as the fair market value of each automobile provided to the employee provided that the rules of paragraph (d)(5)(v)(D) of this section are satisfied.

(ii) *Demonstration automobiles*—(A) *In general.* If an automobile dealership provides an employee with the continuous availability of a demonstration automobile (as defined in §1.132–5(o)(3)) during a period (though not necessarily the same demonstration automobile for the entire period), the employee is treated as having the use of a single demonstration automobile for the entire period, e.g., an entire calendar year. If an employer provides an employee with the continuous availability of more than one demonstration automobile during a period, the employer may treat the value determined under paragraph (d)(6)(ii)(B) of this section as the fair market value of each automobile provided to the employee. For rules relating to the treatment as a working condition fringe of the qualified automobile demonstration use of a demonstration automobile by a full-time automobile salesman, see §1.132–5(o).

(B) *Determining the fair market value of a demonstration automobile.* When applying the automobile lease valuation rule of this paragraph (d), the employer may treat the average of the fair market values of the demonstration automobiles which are available to an employee and held in the dealership's inventory during the calendar year as the fair market value of the demonstration automobile deemed available to the employee for the period for purposes of calculating the Annual Lease Value of the automobile. If under the facts and circumstances it is inappropriate to take into account, with respect to an employee, certain models of demonstration automobiles, the value of the benefit is determined without reference to the fair market values of such models. For example, assume that an employee has the continuous availability for an entire calendar year of one demonstration automobile, although not the same one for the entire year. Assume further that the fair market values of the automobiles in the dealership inventory during the year range from $8,000 to $20,000. If there is not a substantial period (such as three months) during the year when the employee uses demonstration automobiles valued at less than $16,000, then those automobiles are not considered in determining the value of the benefit provided to the employee. In this case, the average of the fair market values of the demonstration automobiles in the dealership's inventory valued at $16,000 or more is treated as the fair market value of the automobile deemed available to the employee for the calendar year for purposes of calculating the Annual Lease Value of the automobile.

(7) *Consistency rules*—(i) *Use of the automobile lease valuation rule by an employer*. Except as provided in paragraph (d)(5)(v)(B) of this section, an employer may adopt the automobile lease valuation rule of this paragraph (d) for an automobile only if the rule is adopted to take effect by the later of—

(A) January 1, 1989, or

(B) The first day on which the automobile is made available to an employee of the employer for personal use (or, if the commuting valuation rule of paragraph (f) of this section is used when the automobile is first made available to an employee of the employer for personal use, the first day on which the commuting valuation rule is not used).

(ii) *An employer must use the automobile lease valuation rule for all subsequent years*. Once the automobile lease valuation rule has been adopted for an automobile by an employer, the rule must be used by the employer for all subsequent years in which the employer makes the automobile available to any employee except that the employer may, for any year during which (or for any employee for whom) use of the automobile qualifies for the commuting valuation rule of paragraph (f) of this section, use the commuting valuation rule with respect to the automobile.

(iii) *Use of the automobile lease valuation rule by an employee*. An employee may adopt the automobile lease valuation rule for an automobile only if the rule is adopted—

(A) By the employer, and

(B) Beginning with the first day on which the automobile for which the employer (consistent with paragraph (d)(7)(i) of this section) adopted the rule is made available to that employee for personal use (or, if the commuting valuation rule of paragraph (f) of this section is used when the automobile is first made available to that employee for personal use, the first day on which the commuting valuation rule is not used).

(iv) *An employee must use the automobile lease valuation rule for all subsequent years*. Once the automobile lease valuation rule has been adopted for an automobile by an employee, the rule must be used by the employee for all subsequent years in which the automobile for which the rule is used is available to the employee. However, the employee may, for any year during which use of the automobile qualifies for use of the commuting valuation rule of paragraph (f) of this section and for which the employer uses such rule, use the commuting valuation rule with respect to the automobile.

(v) *Replacement automobiles*. Notwithstanding anything in this paragraph (d)(7) to the contrary, if the automobile lease valuation rule is used by an employer, or by an employer and an employee, with respect to a particular automobile, and a replacement automobile is provided to the employee for the primary purpose of reducing Federal taxes, then the employer, or the employer and the employee, using the rule must continue to use the rule with respect to the replacement automobile.

(e) *Vehicle cents-per-mile valuation rule*—(1) *In general*—(i) *General rule*. Under the vehicle cents-per-mile valuation rule of this paragraph (e), if an employer provides an employee with the use of a vehicle that—

(A) The employer reasonably expects will be regularly used in the employer's trade or business throughout the calendar year (or such shorter period as the vehicle may be owned or leased by the employer), or

(B) Satisfies the requirements of paragraph (e)(1)(ii) of this section, the value of the benefit provided in the calendar year is the standard mileage rate provided in the applicable Revenue Ruling or Revenue Procedure (''cents-per-mile rate'') multiplied by the total number of miles the vehicle is driven by the employee for personal purposes. The cents-per-mile rate is to be applied prospectively from the first day of the taxable year following the date of publication of the applicable Revenue Ruling or Revenue Procedure. An employee who uses an employer-provided vehicle, in whole or in part, for a trade or business other than the employer's trade or business, may take a deduction for such business use based upon the vehicle cents-per-mile rule as long as such deduction is at the same standard mileage rate as that used in calculating the employee's income inclusion. The standard mileage rate must be applied to personal miles independent of business miles. Thus, for example, if the standard mileage rate were 24 cents per mile for the first 15,000 miles and 11 cents per mile for all miles over 15,000 and an employee drives 20,000 personal miles and 45,000 business miles in a year, the value of the personal use of the vehicle is $4,150 ((15,000×$.24)+(5,000×$.11)). For purposes of this section, the use of a vehicle for personal purposes is any use of the vehicle other than use in the employee's trade or business of being an employee of the employer.

(ii) *Mileage rule.* A vehicle satisfies the requirements of this paragraph (e)(1)(ii) for a calendar year if—

(A) It is actually driven at least 10,000 miles in that year; and

(B) Use of the vehicle during the year is primarily by employees. For example, if a vehicle is used by only one employee during the calendar year and that employee drives the vehicle at least 10,000 miles during the year, the vehicle satisfies the requirements of this paragraph (e)(1)(ii) even if all miles driven by the employee are personal. A vehicle is considered used during the year primarily by employees in accordance with the requirement of paragraph (e)(1)(ii)(B) of this section if employees use the vehicle on a consistent basis for commuting. If the employer does not own or lease the vehicle during a portion of the year, the 10,000 mile threshold is to be reduced proportionately to reflect the periods when the employer did not own or lease the vehicle. For purposes of this paragraph (e)(1)(ii), use of the vehicle by an individual (other than the employee) whose use would be taxed to the employee is not considered use by the employee.

(iii) *Limitation on use of the vehicle cents-per-mile valuation rule*—(A) *In general.* Except as otherwise provided in the last sentence of this paragraph (e)(1)(iii)(A), the value of the use of an automobile (as defined in paragraph (d)(1)(ii) of this section) may not be determined under the vehicle cents-per-mile valuation rule of this paragraph (e) for a calendar year if the fair market value of the automobile (determined pursuant to paragraphs (d)(5) (i) through (iv) of this section as of the later of January 1, 1985, or the first date on which the automobile is made available to any employee of the employer for personal use) exceeds the sum of the maximum recovery deductions allowable under section 280F(a)(2) for a five-year period for an automobile first placed in service during that calendar year (whether or not the automobile is actually placed in service during that year) as adjusted by section 280F(d)(7). With respect to a vehicle placed in service prior to January 1, 1989, the limitation on value will be not less than $12,800. With respect to a vehicle placed in service in or after 1989, the limitation on value is $12,800 as adjusted by section 280F(d)(7).

(B) *Application of limitation with respect to a vehicle owned by both an employer and an employee.* If an employee contributes an amount towards the purchase price of a vehicle in return for a percentage ownership interest in the vehicle, for purposes of determining whether the limitation of this paragraph (e)(1)(iii) applies, the fair market value of the vehicle is reduced by the lesser of—

(*1*) The amount contributed, or

(*2*) An amount equal to the employee's percentage ownership interest multiplied by the unreduced fair market value of the vehicle. If the employee does not receive an ownership interest in the employer-provided vehicle, then the fair market value of the vehicle is determined without regard to any amount contributed. For purposes of this paragraph (e)(1)(iii)(B), an employee's ownership interest in a vehicle will not be recognized unless it is reflected in the title of the vehicle. An ownership interest reflected in the title of a vehicle will not be recognized if under the facts and circumstances the title does not reflect the benefits and burdens of ownership.

(C) *Application of limitation with respect to a vehicle leased by both an employer and employee.* If an employee contributes an amount toward the cost to lease a vehicle in return for a percentage interest in the vehicle lease, for purposes of determining whether the limitation of this paragraph (e)(1)(iii) applies, the fair market value of the vehicle is reduced by the amount specified in the following sentence. The amount specified in this sentence is the unreduced fair market value of a vehicle multiplied by the lesser of—

(*1*) The employee's percentage interest in the lease, or

(*2*) A fraction, the numerator of which is the amount contributed and the denominator of which is the entire lease cost. If the employee does not receive an interest in the vehicle lease, then the fair market value is determined without regard to any amount contributed. For purposes of this paragraph (e)(1)(iii)(C), an employee's interest in a vehicle lease will not be recognized unless the employee is a named co-lessee on the lease. An interest in a lease will not be recognized if under the facts and circumstances, the lease does not reflect the true obligations of the lessees.

(iv) *Regular use in an employer's trade or business.* Whether a vehicle is regularly used in an employer's trade or business is determined on the basis of all facts and circumstances. A vehicle is considered regularly used in an employer's trade or business for purposes of paragraph (e)(1)(i)(A) of this section if one of the following safe harbor conditions is satisfied:

(A) At least 50 percent of the vehicle's total annual mileage is for the employer's business; or

(B) The vehicle is generally used each workday to transport at least three employees of the employer to and from work in an employer-sponsored commuting vehicle pool. Infrequent business use of the vehicle, such as for occasional trips to the airport or between the employer's multiple business premises, does not constitute regular use of the vehicle in the employer's trade or business.

(v) *Application of rule to shared usage.* If an employer regularly provides a vehicle to employees for use by more than one employee at the same time, such as with an employer-sponsored vehicle commuting pool, the employer may use the vehicle cents-per-mile valuation rule to value the use of the vehicle by each employee who shares such use. See §1.61–21(c)(2)(ii)(B) for provisions relating to the allocation of the value of an automobile to more than one employee.

(2) *Definition of vehicle.* For purposes of this paragraph (e), the term ''vehicle'' means any motorized wheeled vehicle manufactured primarily for use on public streets, roads, and highways. The term ''vehicle'' includes an automobile as defined in paragraph (d)(1)(ii) of this section.

(3) *Services included in, or excluded from, the cents-per-mile rate*—(i) *Maintenance and insurance included.* The cents-per-mile rate includes the fair market value of maintenance of, and insurance for, the vehicle. The cents-per-mile rate may not be reduced by the fair market value of any service included in the cents-per-mile rate but not provided by the employer. An employer or employee who wishes to take into account only the particular services provided with respect to a vehicle may value the availability of the vehicle under the general valuation rules of paragraph (b) of this section.

(ii) *Fuel provided by the employer*—(A) *Miles driven in the United States, Canada, or Mexico.* With respect to miles driven in the United States, Canada, or Mexico, the cents-per-mile rate includes the fair market value of fuel provided by the employer. If fuel is not provided by the employer, the cents-per-mile rate may be reduced by no more than 5.5 cents or the amount specified in any applicable Revenue Ruling or Revenue Procedure. For purposes of this section, the United States includes the United States, its possessions and its territories.

(B) *Miles driven outside the United States, Canada, or Mexico.* With respect to miles driven outside the United States, Canada, or Mexico, the fair market value of fuel provided by the employer is not reflected in the cents-per-mile rate. Accordingly, the cents-per-mile rate may be reduced but by no more than 5.5 cents or the amount specified in any applicable Revenue Ruling or Revenue Procedure. If the employer provides the fuel in kind, it must be valued based on all the facts and circumstances. If the employer reimburses the employee for the cost of fuel or allows the employee to charge the employer for the cost of fuel, the fair market value of the fuel is generally the amount of the actual reimbursement or the amount charged, provided the purchase of fuel is at arm's length.

(iii) *Treatment of other services.* The fair market value of any service not specifically identified in paragraph (e)(3)(i) of this section that is provided by the employer with respect to a vehicle is not reflected in the cents-per-mile rate. See paragraph (b)(5) of this section for rules relating to valuation of chauffeur services.

(4) *Valuation of personal use only.* The vehicle cents-per-mile valuation rule of this paragraph (e) may only be used to value the miles driven for personal purposes. Thus, the employer must include an amount in an employee's income with respect to the use of a vehicle that is equal to the product of the number of personal miles driven by the employee and the appropriate cents-per-mile rate. The term ''personal miles'' means all miles for which the employee used the automobile except miles driven in the employee's trade or business of being an employee of the employer. Unless additional services are provided with respect to the vehicle (see paragraph (e)(3)(iii) of this section), the employer may not include in income a greater amount; for example, the employer may not include in income 100 percent (all business and personal miles) of the value of the use of the vehicle.

(5) *Consistency rules*—(i) *Use of the vehicle cents-per-mile valuation rule by an employer.* An employer must adopt the vehicle cents-per-mile valuation rule of this paragraph (e) for a vehicle to take effect by the later of—

(A) January 1, 1989, or

(B) The first day on which the vehicle is used by an employee of the employer for personal use (or, if the commuting valuation rule of paragraph (f) of this section is used when the vehicle is first used by an employee of the employer for personal use, the first day on which the commuting valuation rule is not used).

(ii) *An employer must use the vehicle cents-per-mile valuation rule for all subsequent years.* Once the vehicle cents-per-mile valuation rule has been adopted for a vehicle by an employer, the rule must be used by the employer for all subsequent years in which the vehicle qualifies for use of the rule, except that the employer may, for any year during which use of the vehicle qualifies for the commuting valuation rule of paragraph (f) of this section, use the commuting valuation rule with respect to the vehicle. If the vehicle fails to qualify for use of the vehicle cents-per-mile valuation rule during a subsequent year, the employer may adopt for such subsequent year and thereafter any other special valuation rule for which the vehicle then qualifies. If the employer elects to use the automobile lease valuation rule of paragraph (d) of this section for a period in which the automobile does not qualify for use of the vehicle cents-per-mile valuation rule, then the employer must comply with the requirements of paragraph (d)(7) of this section. For purposes of paragraph (d)(7) of this section, the first day on which the automobile with respect to which the vehicle cents-per-mile rule had been used fails to qualify for use of the vehicle cents-per-mile valuation rule may be deemed to be the first day on which the automobile is available to an employee of the employer for personal use.

(iii) *Use of the vehicle cents-per-mile valuation rule by an employee.* An employee may adopt the vehicle cents-per-mile valuation rule for a vehicle only if the rule is adopted—

(A) By the employer, and

(B) Beginning with respect to the first day on which the vehicle for which the employer (consistent with paragraph (e)(5)(i) of this section) adopted the rule is available to that employee for personal use (or, if the commuting valuation rule of paragraph (f) of this section is used when the vehicle is first used by an employee for personal use, the first day on which the commuting valuation rule is not used).

(iv) *An employee must use the vehicle cents-per-mile valuation rule for all subsequent years.* Once the vehicle cents-per-mile valuation rule has been adopted for a vehicle by an employee, the rule must be used by the employee for all subsequent years of personal use of the vehicle by the employee for which the rule is used by the employer. However, see paragraph (f) of this section for rules relating to the use of the commuting valuation rule for a subsequent year.

(v) *Replacement vehicles.* Notwithstanding anything in this paragraph (e)(5) to the contrary, if the vehicle cents-per-mile valuation rule is used by an employer, or by an employer and an employee, with respect to a particular vehicle. and a replacement vehicle is provided to the employee for the primary purpose of reducing Federal taxes, then the employer, or the employer and the employee, using the rule must continue to use the rule with respect to the replacement vehicle if the replacement vehicle qualifies for use of the rule.

(f) *Commuting valuation rule*—(1) *In general.* Under the commuting valuation rule of this paragraph (f), the value of the commuting use of an employer-provided vehicle may be determined pursuant to paragraph (f)(3) of this section if the following criteria are met by the employer and employees with respect to the vehicle:

(i) The vehicle is owned or leased by the employer and is provided to one or more employees for use in connection with the employer's trade or business and is used in the employer's trade or business;

(ii) For bona fide noncompensatory business reasons, the employer requires the employee to commute to and/or from work in the vehicle;

(iii) The employer has established a written policy under which neither the employee, nor any individual whose use would be taxable to the employee, may use the vehicle for personal purposes, other than for commuting or de minimis personal use (such as a stop for a personal errand on the way between a business delivery and the employee's home);

(iv) Except for de minimis personal use, the employee does not use the vehicle for any personal purpose other than commuting; and

(v) The employee required to use the vehicle for commuting is not a control employee of the employer (as defined in paragraphs (f) (5) and (6) of this section).

Personal use of a vehicle is all use of the vehicle by an employee that is not used in the employee's trade or business of being an employee of the employer. An employer-provided vehicle that is generally used each workday to transport at least three employees of the employer to and from work in an employer-sponsored commuting vehicle pool is deemed to meet the requirements of paragraphs (f)(1) (i) and (ii) of this section.

(2) *Special rules.* Notwithstanding anything in paragraph (f)(1) of this section to the contrary, the following special rules apply—

(i) *Chauffeur-driven vehicles.* If a vehicle is chauffeur-driven, the commuting valuation rule of this paragraph (f) may not be used to value the commuting use of any person (other than the chauffeur) who rides in the vehicle. (See paragraphs (d) and (e) of this section for other vehicle special valuation rules.) The special rule of this paragraph (f) may be used to value the commuting-only use of the vehicle by the chauffeur if the conditions of paragraph (f)(1) of this section are satisfied. For purposes of this paragraph (f)(2), an individual will not be considered a chauffeur if he or she performs nondriving services for the employer, is not available to perform driving services while performing such other services and whose only driving services consist of driving a vehicle used for commuting by other employees of the employer.

(ii) *Control employee exception.* If the vehicle in which the employee is required to commute is not an automobile as defined in paragraph (d)(1)(ii) of this section, the restriction of paragraph (f)(1)(v) of this section (relating to control employees) does not apply.

(3) *Commuting value*—(i) *$1.50 per one-way commute.* If the requirements of this paragraph (f) are satisfied, the value of the commuting use of an employer-provided vehicle is $1.50 per one-way commute (e.g., from home to work or from work to home). The value provided in this paragraph (f)(3) includes the value of any goods or services directly related to the vehicle (e.g., fuel).

(ii) *Value per employee.* If there is more than one employee who commutes in the vehicle, such as in the case of an employer-sponsored commuting vehicle pool, the amount includible in the income of each employee is $1.50 per one-way commute. Thus, the amount includible for each round-trip commute is $3.00 per employee. See paragraphs (d)(7)(vi) and (e)(5)(vi) of this section for use of the automobile lease valuation and vehicle cents-per-mile valuation special rules for valuing the use or availability of the vehicle in the case of an employer-sponsored vehicle or automobile commuting pool.

(4) *Definition of vehicle.* For purposes of this paragraph (f), the term ''vehicle'' means any motorized wheeled vehicle manufactured primarily for use on public streets, roads, and highways. The term ''vehicle'' includes an automobile as defined in paragraph (d)(1)(ii) of this section.

(5) *Control employee defined—Non-government employer.* For purposes of this paragraph (f), a control employee of a non-government employer is any employee—

(i) Who is a Board- or shareholder-appointed, confirmed, or elected officer of the employer whose compensation equals or exceeds $50,000,

(ii) Who is a director of the employer,

(iii) Whose compensation equals or exceeds $100,000, or

(iv) Who owns a one-percent or greater equity, capital, or profits interest in the employer.

For purposes of determining who is a one-percent owner under paragraph (f)(5)(iv) of this section, any individual who owns (or is considered as owning under section 318(a) or principles similar to section 318(a) for entities other than corporations) one percent or more of the fair market value of an entity (the ''owned entity'') is considered a one-percent owner of all entities which would be aggregated with the owned entity under the rules of section 414 (b), (c), (m), or (o). For purposes of determining who is an officer or director with respect to an employer under this paragraph (f)(5), notwithstanding anything in this section to the contrary, if an entity would be aggregated with other entities under the rules of section 414 (b), (c), (m), or (o), the officer definition (but not the compensation requirement) and the director definition apply to each such separate entity rather tha to the aggregated employer. An employee who is an officer or a director of an entity (the ''first entity'') shall be treated as an officer or a director of all entities aggregated with the first entity under the rules of section 414 (b), (c), (m), or (o). Instead of applying the control employee definition of this paragraph (f)(5), an employer may treat all, and only, employees who are ''highly compensated'' employees (as defined in §1.132–8(g)) as control employees for purposes of this paragraph (f).

(6) *Control employee defined—Government employer.* For purposes of this paragraph (f), a control employee of a government employer is any—

(i) Elected official, or

(ii) Employee whose compensation equals or exceeds the compensation paid to a Federal Government employee holding a position at Executive Level V, determined under Chapter 11 of title 2, United States Code, as adjusted by section 5318 of title 5 United States Code.

For purposes of this paragraph (f), the term ''government'' includes any Federal, state or local governmental unit, and any agency or instrumentality thereof. Instead of applying the control employee definition of paragraph (f)(6), an employer may treat all and only employees who are ''highly compensated'' employees (as defined in §1.132–8(f)) as control employees for purposes of this paragraph (f).

(7) *''Compensation'' defined.* For purposes of this paragraph (f), the term ''compensation'' has the same meaning as in section 414(q)(7). Compensation includes all amounts received from all entities treated as a single employer under section 414 (b), (c), (m), or (o). Levels of compensation shall be adjusted at the same time and in the same manner as provided in section 415(d). The first such adjustment shall be for calendar year 1988.

(g) *Non-commercial flight valuation rule*—(1) *In general.* Under the non-commercial flight valuation rule of this paragraph (g), except as provided in paragraph (g)(12) of this section, if an employee is provided with a flight on an employer-provided aircraft, the value of the flight is calculated using the aircraft valuation formula of paragraph (g)(5) of this section. For purposes of this paragraph (g), the value of a flight on an employer-provided aircraft by an individual who is less than two years old is deemed to be zero. See paragraph (b)(1) of this section for rules relating to the amount includible in income when an employee reimburses the employee's employer for all or part of the fair market value of the benefit provided.

(2) *Eligible flights and eligible aircraft.* The valuation rule of this paragraph (g) may be used to value flights on all employer-provided aircraft, including helicopters. The valuation rule of this paragraph (g) may be used to value international as well as domestic flights. The valuation rule of this paragraph (g) may not be used to value a flight on any commercial aircraft on which air transportation is sold to the public on a per-seat basis. For a special valuation rule relating to certain flights on commercial aircraft, see paragraph (h) of this section.

(3) *Definition of a flight*—(i) *General rule.* Except as otherwise provided in paragraph (g)(3)(iii) of this section (relating to intermediate stops), for purposes of this paragraph (g), a flight is the distance (in statute miles, *i.e.*, 5,280 feet per statute mile) between the place at which the individual boards the aircraft and the place at which the individual deplanes.

(ii) *Valuation of each flight.* Under the valuation rule of this paragraph (g), value is determined separately for each flight. Thus, a round-trip is comprised of at least two flights. For example, an employee who takes a personal trip on an employer-provided aircraft from New York City to Denver, then Denver to Los Angeles, and finally Los Angeles to New York City has taken three flights and must apply the aircraft valuation formula separately to each flight. The value of a flight must be determined on a passenger-by-passenger basis. For example, if an individual accompanies an employee and the flight taken by the individual would be taxed to the employee, the employee would be taxed on the special rule value of the flight by the employee and the flight by the individual.

(iii) *Intermediate stop.* If a landing is necessitated by weather conditions, by an emergency, for purposes of refueling or obtaining other services relating to the aircraft or for any other purpose unrelated to the personal purposes of the employee whose flight is being valued, that landing is an intermediate stop. Additional mileage attributable to an intermediate stop is not considered when determining the distance of an employee's flight.

(iv) *Examples.* The rules of paragraph (g)(3)(iii) of this section may be illustrated by the following examples:

Example 1. Assume that an employee's trip originates in St. Louis, Missouri, with Seattle, Washington as its destination, but, because of weather conditions, the aircraft lands in Denver, Colorado, and the employee stays in Denver overnight. Assume further that the next day the aircraft flies to Seattle where the employee deplanes. The employee's flight is the distance between the airport in St. Louis and the airport in Seattle.

Example 2. Assume that a trip originates in New York, New York, with five passengers and that the aircraft makes a stop in Chicago, Illinois, so that one of the passengers can deplane for a purpose unrelated to the personal purposes of the other passengers whose flights are being valued. The aircraft then goes on to Los Angeles, California, where the other four passengers will deplane. The flight of the passenger who deplaned in Chicago is the distance between the airport in New York and the airport in Chicago. The stop in Chicago is disregarded as an intermediate stop, however, when measuring the flights taken by each of the other four passengers. Their flights would be the distance between the airport in New York and the airport in Los Angeles.

(4) *Personal and non-personal flights*—(i) In *general.* The valuation rule of this paragraph (g) applies to personal flights on employer-provided aircraft. A personal flight is one the value of which is not excludable under another section of subtitle A of the Internal Revenue Code of 1986, such as under section 132(d) (relating to a working condition fringe). However, solely for purposes of paragraphs (g)(4)(ii) and (g)(4)(iii) of this section, references to personal flights do not include flights a portion of which would not be excludable from income by reason of section 274(c).

(ii) *Trip primarily for employer's business.* If an employee combines, in one trip, personal and business flights on an employer-provided aircraft and the employee's trip is primarily for the employer's business (see § 1.162–2(b)(2)), the employee must include in income the excess of the value of all the flights that comprise the trip over the value of the flights that would have been taken had there been no personal flights but only business flights. For example, assume that an employee flies on an employer-provided aircraft from Chicago, Illinois, to Miami, Florida, for the employer's business and that from Miami the employee flies on the employer-provided aircraft to Orlando, Florida, for personal purposes and then flies back to Chicago. Assume further that the primary purpose of the trip is for the employer's business. The amount includible in income is the excess of the value of the three flights (Chicago to Miami, Miami to Orlando, and Orlando to Chicago), over the value of the flights that would have been taken had there been no personal flights but only business flights (Chicago to Miami and Miami to Chicago).

(iii) *Primarily personal trip.* If an employee combines, in one trip, personal and business flights on an employer-provided aircraft and the employee's trip is primarily personal (see § 1.162–2(b)(2)), the amount includible in the employee's income is the value of the personal flights that would have been taken had there been no business flights but only personal flights. For example, assume that an employee flies on an employer-provided aircraft from San Francisco, California, to Los Angeles, California, for the employer's business and that from Los Angeles the employee flies on an employer-provided aircraft to Palm Springs, California, primarily for personal reasons and then flies back to San Francisco. Assume further that the primary purpose of the trip is personal. The amount includible in the employee's income is the value of personal flights that would have been taken had there been no business flights but only personal flights (San Francisco to Palm Springs and Palm Springs to San Francisco).

(iv) *Application of section 274(c).* The value of employer- provided travel outside the United States away from home may not be excluded from the employee's gross income as a working condition fringe, by either the employer or the employee, to the extent not deductible by reason of section 274(c). The valuation rule of this paragraph (g) applies to that portion of the value any flight not excludable by reason of section 274(c). Such value is includible in income in addition to the amounts determined under paragraphs (g)(4)(ii) and (g)(4)(iii) of this section.

(v) *Flights by individuals who are not personal guests.* If an individual who is not an employee of the employer providing the aircraft is on a flight, and the individual is not the personal guest of any employee of the employer, the flight by the individual is not taxable to any employee of the employer providing the aircraft. The rule in the preceding sentence applies where the individual is provided the flight by the employer for noncompensatory business reasons of the employer. For example, assume that G, an employee of company Y, accompanies A, an employee of company X, on company X's aircraft for the purpose of inspecting land under consideration for purchase by company X from company Y. The flight by G is not taxable to A. No inference may be drawn from this paragraph (g)(4)(v) concerning the taxation of a flight provided to an individual who is neither an employee of the employer nor a personal guest of any employee of the employer.

(5) *Aircraft valuation formula.* Under the valuation rule of this paragraph (g), the value of a flight is determined under the base aircraft valuation formula (also known as the Standard Industry Fare Level formula or SIFL) by multiplying the SIFL cents-per-mile rates applicable for the period during which the flight was taken by the appropriate aircraft multiple (as provided in paragraph (g)(7) of this section) and then adding the applicable terminal charge. The SIFL cents-per-mile rates in the formula and the terminal charge are calculated by the Department of Transportation and are revised semiannually. The base aircraft valuation formula in effect from January 1, 1989 through June 30, 1989, is as follows: a terminal charge of $26.48 plus ($.1449 per mile for the first 500 miles, $.1105 per mile for miles between 501 and 1500,

and $.1062 per mile for miles over 1500). For example, if a flight taken on January 15, 1989, by a non-control employee on an employer-provided aircraft with a maximum certified takeoff weight of 26,000 lbs. is 2,000 miles long, the value of the flight determined under this paragraph (g)(5) is: $100.36 ((.313×(($.1449×500)+($.1105×1,000)+($.1062×500)))+$26.48). The aircraft valuation formula applies separately to each flight being valued under this paragraph (g). Therefore, the number of miles an employee has flown on employer-provided aircraft flights prior to the flight being valued does not affect the determination of the value of the flight.

(6) *Discretion to provide new formula.* The Commissioner may prescribe a different base aircraft valuation formula by regulation, Revenue Ruling or Revenue Procedure in the event that the calculation of the Standard Industry Fare Level is discontinued.

(7) *Aircraft multiples*—(i) *In general.* The aircraft multiples are based on the maximum certified takeoff weight of the aircraft. When applying the aircraft valuation formula to a flight, the appropriate aircraft multiple is multiplied by the product of the applicable SIFL cents-per-mile rates multiplied by the number of miles in the flight and then the terminal charge is added to the product. For purposes of applying the aircraft valuation formula described in paragraph (g)(5) of this section, the aircraft multiples are as follows:

Maximum certified take-off weight of the aircraft	Aircraft multiple for a control employee (percent)	Aircraft multiple for a non-control employee (percent)
6,000 lbs. or less	62.5	15.6
6,001–10,000 lbs.	125	23.4
10,001–25,000 lbs.	300	31.3
25,001 lbs. or more	400	31.3

(ii) *Flights treated as provided to a control employee.* Except as provided in paragraph (g)(12) of this section, any flight provided to an individual whose flight would be taxable to a control employee (as defined in paragraphs (g)(8) and (9) of this section) as the recipient shall be valued as if such flight had been provided to that control employee. For example, assume that the chief executive officer of an employer, his spouse, and his two children fly on an employer-provided aircraft for personal purposes. Assume further that the maximum certified takeoff weight of the aircraft is 12,000 lbs. The amount includible in the employee's income is 4×((300 percent×the applicable SIFL cents-per-mile rates provided in paragraph (g)(5) of this section multiplied by the number of miles in the flight) plus the applicable terminal charge).

(8) *Control employee defined—Non-government employer*—(i) *Definition.* For purposes of this paragraph (g), a control employee of a non-government employer is any employee—

(A) Who is a Board- or shareholder-appointed, confirmed, or elected officer of the employer, limited to the lesser of—

(*1*) One percent of all employees (increased to the next highest integer, if not an integer) or

(*2*) Ten employees;

(B) Who is among the top one percent most highly-paid employees of the employer (increased to the next highest integer, if not an integer) limited to a maximum of 50;

(C) Who owns a five-percent or greater equity, capital, or profits interest in the employer; or

(D) Who is a director of the employer.

(ii) *Special rules for control employee definition*—(A) *In general.* For purposes of this paragraph (g), any employee who is a family member (within the meaning of section 267(c)(4)) of a control employee is also a control employee. For purposes of paragraph (g)(8)(i)(B) of this section, the term ''employee'' does not include any individual unless such individual is a common-law employee, partner, or one-percent or greater shareholder of the employer. Pursuant to this paragraph (g)(8), an employee may be a control employee under more than one of the requirements listed in paragraphs (g)(8)(i) (A) through (D) of this section. For example, an employee may be both an officer under paragraph (g)(8)(i)(A) of this section and a highly-paid employee under paragraph (g)(8)(i)(B) of this section. In this case, for purposes of the officer limitation rule of paragraph (g)(8)(i)(A) of this section and the highly-paid employee limitation rule of paragraph (g)(8)(i)(B) of this section, the employee would be counted in applying both limitations. For purposes of determining the one-percent limitation under paragraphs (g)(8)(i) (A) and (B) of this section, an employer shall exclude from consideration employees described in §1.132–8(b)(3). Instead of applying the control employee definition of this paragraph (g)(8), an employer may treat all (and only) employees who are ''highly compensated'' employees (as defined in §1.132–8(f)) as control employees for purposes of this paragraph (g).

(B) *Special rules for officers, owners, and highly-paid control employees.* In no event shall an employee whose compensation is less than $50,000 be a control employee under paragraph (g)(8)(i) (A) or (B) of this section. For purposes of determining who is a five-percent (or one-percent) owner under this paragraph (g)(8), any individual who owns (or is considered as owning under section 318(a) or principles similar to section 318(a) for entities other than corporations) five percent (or one-percent) or more of the fair market value of an entity (the ''owned entity'') is considered a five-percent (or one-percent) owner of all entities which would be aggregated with the owned entity under the rules of section 414(b), (c), (m), or (o). For purposes of determining who is an officer or director with respect to an employer under this paragraph (g)(8), notwithstanding anything in this section to the contrary, if the employer would be aggregated with other employers under the rules of section 414 (b), (c), (m), or (o), the officer definition and the limitations and the director definition are applied to each such separate employer rather than to the aggregated employer. An employee who is an officer or director of one employer (the ''first employer'') shall not be counted as an officer or a director of any other employer aggregated with the first employer under the rules of section 414 (b), (c), or (m). If applicable, the officer limitations rule of paragraph (g)(8)(i)(A) of this section is applied to employees in descending order of their compensation. Thus, if an employer has 11 board-appointed officers and the limit imposed under paragraph (g)(8)(i)(A) of this section is 10 officers, the employee with the least compensation of those officers would not be a control employee under paragraph (g)(8)(i)(A) of this section.

(9) *Control employee defined—Government employer.* For purposes of this paragraph (g), a control employee of a government employer is any—

(i) Elected official, or

(ii) Employee whose compensation equals or exceeds the compensation paid to a Federal Government employee holding a position at Executive Level V, determined under Chapter 11 of title 2, United States Code, as adjusted by section 5318 of title 5 United States Code.

For purposes of paragraph (f), the term ''government'' includes any Federal, state or local governmental unit, and any agency or instrumentality thereof. Instead of applying the control employee definition of paragraph (f)(6), an employer may treat all and only employees who are ''highly compensated'' employees (as defined in §1.132–8(f)) as control employees for purposes of this paragraph (f).

(10) *''Compensation'' defined.* For purposes of this paragraph (g), the term ''compensation'' has the same meaning as in section 414(q)(7). Compensation includes all amounts received from all entities treated as a single employer under section 414 (b), (c), (m), or (o). Levels of compensation shall be adjusted at the same time and in the same manner as provided in section 415(d). The first such adjustment was for calendar year 1988.

(11) *Treatment of former employees.* For purposes of this paragraph (g), an employee who was a control employee of the employer (as defined in this paragraph (g)) at any time after reaching age 55, or within three years of separation from the service of the employer, is a control employee with respect to flights taken after separation from the service of the employer. An individual who is treated as a control employee under this paragraph (g)(11) is not counted when determining the limitation of paragraph (g)(8)(i) (A) and (B) of this section. Thus, the total number of individuals treated as control employees under such paragraphs may exceed the limitations of such paragraphs to

the extent that this paragraph (g)(11) applies.

(12) *Seating capacity rule*—(i) *In general*—(A) *General rule.* Where 50 percent or more of the regular passenger seating capacity of an aircraft (as used by the employer) is occupied by individuals whose flights are primarily for the employer's business (and whose flights are excludable from income under section 132(d)), the value of a flight on that aircraft by any employee who is not flying primarily for the employer's business (or who is flying primarily for the employer's business but the value of whose flight is not excludable under section 132(d) by reason of section 274(c)) is deemed to be zero. See §1.132–5 which limits the working condition fringe exclusion under section 132(d) to situations where the employee receives the flight in connection with the performance of services for the employer providing the aircraft.

(B) *Special rules*—(*1*) *Definition of "employee."* For purposes of this paragraph (g)(12), the term "employee" includes only employees of the employer, including a partner of a partnership, providing the aircraft and does not include independent contractors and directors of the employer. A flight taken by an individual other than an "employee" as defined in the preceding sentence is considered a flight taken by an employee for purposes of this paragraph (g)(12) only if that individual is treated as an employee pursuant to section 132(f)(1) or that individual's flight is treated as a flight taken by an employee pursuant to section 132(f)(2). If—

(*i*) A flight by an individual is not considered a flight taken by an employee (as defined in this paragraph (g)(12)(i)),

(*ii*) The value of that individual's flight is not excludable under section 132(d), and

(*iii*) The seating capacity rule of this paragraph (g) (12) otherwise applies, then the value of the flight provided to such an individual is the value of a flight provided to a non-control employee pursuant to paragraph (g)(5) of this section (even if the individual who would be taxed on the value of the flight is a control employee).

(*2*) *Example.* The special rules of paragraph (g)(12)(i)(B)(*1*) of this section are illustrated by the following example:

Example. Assume that 60 percent of the regular passenger seating capacity of an employer's aircraft is occupied by individuals whose flights are primarily for the employer's business and are excludable from income under section 132(d). If a control employee, his spouse, and his dependent child fly on the employer's aircraft for primarily personal reasons, the value of the three flights is deemed to be zero. If, however, the control employee's cousin were provided a flight on the employer's aircraft, the value of the flight taken by the cousin is determined by applying the aircraft valuation formula of paragraph (g)(5) of this section (including the terminal charge) and the non-control employee aircraft multiples of paragraph (g)(7) of this section.

(ii) *Application of 50-percent test to multiple flights.* The seating capacity rule of this paragraph (g)(12) must be met both at the time the individual whose flight is being valued boards the aircraft and at the time the individual deplanes. For example, assume that employee A boards an employer-provided aircraft for personal purposes in New York, New York, and that at that time 80 percent of the regular passenger seating capacity of the aircraft is occupied by individuals whose flights are primarily for the employer's business (and whose flights are excludable from income under section 132(d)) ("the business passengers"). If the aircraft flies directly to Hartford, Connecticut where all of the passengers, including A, deplane, the requirements of the seating capacity rule of this paragraph (g)(12) have been satisfied. If instead, some of the passengers, including A, remain on the aircraft in Hartford and the aircraft continues on to Boston, Massachusetts, where they all deplane, the requirements of the seating capacity rule of this paragraph (g)(12) will not be satisfied with respect to A's flight from New York to Boston unless at least 50 percent of the seats comprising the aircraft's regular passenger seating capacity were occupied by the business passengers at the time A deplanes in Boston.

(iii) *Regular passenger seating capacity.* (A) *General rule.* Except as otherwise provided, the regular passenger seating capacity of an aircraft is the maximum number of seats that have at any time on or prior to the date of the flight been on the aircraft (while owned or leased by the employer). Except to the extent excluded pursuant to paragraph (g)(12)(v) of this section, regular seating capacity includes all seats which may be occupied by members of the flight crew. It is irrelevant that, on a particular flight, less than the maximum number of seats are available for use because, for example, some of the seats are removed.

(B) *Special rules*. When determining the maximum number of seats that have at any time on or prior to the date of the flight been on the aircraft (while owned or leased by the employer), seats that could not at any time be legally used during takeoff and have not at any time been used during takeoff are not counted. As of the date an employer permanently reduces the seating capacity of an aircraft, the regular passenger seating capacity is the reduced number of seats on the aircraft. The previous sentence shall not apply if at any time within 24 months after such reduction any seats are added in the aircraft. Unless the conditions of this paragraph (g)(12)(iii)(B) are satisfied, jumpseats and removable seats used solely for purposes of flight crew training are counted for purposes of the seating capacity rule of this paragraph (g)(12).

(iv) *Examples*. The rules of paragraph (g)(12)(iii) of this section are illustrated by the following examples:

Example 1. Employer A and employer B order the same aircraft, except that A orders it with 10 seats and B orders it with eight seats. A always uses its aircraft as a 10-seat aircraft; B always uses its aircraft as an eight-seat aircraft. The regular passenger seating capacity of A's aircraft is 10 and of B's aircraft is eight.

Example 2. Assume the same facts as in example (1), except that whenever A's chief executive officer and spouse use the aircraft eight seats are removed. Even if substantially all of the use of the aircraft is by the chief executive officer and spouse, the regular passenger seating capacity of the aircraft is 10.

Example 3. Assume the same facts as in example (1), except that whenever more than eight people want to fly in B's aircraft, two extra seats are added. Even if substantially all of the use of the aircraft occurs with eight seats, the regular passenger seating capacity of the aircraft is 10.

Example 4. Employer C purchases an aircraft with 12 seats. Three months later C remodels the interior of the aircraft and permanently removes four of the seats. Upon completion of the remodeling, the regular passenger seating capacity of the aircraft is eight. If, however, any seats are added within 24 months after the remodeling, the regular seating capacity of the aircraft is treated as 12 throughout the entire period.

(v) *Seats occupied by flight crew*. When determining the regular passenger seating capacity of an aircraft, any seat occupied by a member of the flight crew (whether or not such individual is an employee of the employer providing the aircraft) shall not be counted, unless the purpose of the flight by such individual is not primarily to serve as a member of the flight crew. If the seat occupied by a member of the flight crew is not counted as a passenger seat pursuant to the previous sentence, such member of the flight crew is disregarded in applying the 50-percent test described in the first sentence of paragraph (g)(12)(i) of this section. For example, assume that prior to application of this paragraph (g)(12)(v) the regular passenger seating capacity of an aircraft is one. Assume further that an employee pilots the aircraft and that the employee's flight is nor primarily for the employer's business. If the employee's spouse occupies the other seat for personal purposes, the seating capacity rule is not met and the value of both flights must be included in the employee's income. If, however, the employee's flight were primarily for the employer's business (unrelated to serving as a member of the flight crew), then the seating capacity rule is met and the value of the flight for the employee's spouse is deemed to be zero. If the employee's flight were primarily to serve as a member of the flight crew, then the seating capacity rule is not met and the value of a flight by any passenger for primarily personal reasons is not deemed to be zero.

(13) *Erroneous use of the non-commercial flight valuation rule*—(i) *Certain errors in the case of a flight by a control employee*. If—

(A) The non-commercial flight valuation rule of this paragraph (g) is applied by an employer or a control employee, as the case may be, on a return as originally filed or on an amended return on the grounds that either—

(*1*) The control employee is not in fact a control employee, or

(*2*) The aircraft is within a specific weight classification, and

(B) Either position is subsequently determined to be erroneous, the valuation rule of this paragraph (g) is not available to value the flight taken by that control employee by the person or persons taking the erroneous position. With respect to the weight classifications, the previous sentence does not apply if the position taken is that the weight of the aircraft is greater than it is subsequently determined to be. If, with respect to a flight by a control employee, the seating capacity rule of paragraph (g)(12) of this section is used by an employer or the control employee, as the case may be, on a return as originally filed or on an amended return, the valuation rule of this paragraph (g) is not available to value the flight taken by that control employee by the person or persons taking the erroneous position.

(ii) *Value of flight excluded as a working condition fringe.* If either an employer or an employee, on a return as originally filed or on an amended return, excludes from the employee's income or wages all or any part of the value of a flight on the grounds that the flight was excludable as a working condition fringe under section 132, and that position is subsequently determined to be erroneous, the valuation rule of this paragraph (g) is not available to value the flight taken by that employee by the person or persons taking the erroneous position. Instead, the general valuation rules of paragraphs (b) (5) and (6) of this section apply.

(14) *Consistency rules*—(i) *Use by employer.* Except as otherwise provided in paragraph (g)(13) or paragraph (g)(14)(iii) of this section or in §1.132–5(m)(4), if the non-commercial flight valuation rule of this paragraph (g) is used by an employer to value any flight provided in a calendar year, the rule must be used to value all flights provided to all employees in the calendar year.

(ii) *Use by employee.* Except as otherwise provided in paragraph (g)(13) or (g)(14)(iii) of this section or in §1.132–5(m)(4), if the non-commercial flight valuation rule of this paragraph (g) is used by an employee to value a flight provided by an employer in a calendar year, the rule must be used to value all flights provided to the employee by that employer in the calendar year.

(iii) *Exception for entertainment flights provided to specified individuals after October 22, 2004.* Notwithstanding the provisions of paragraph (g)(14)(i) of this section, an employer may use the general valuation rules of paragraph (b) of this section to value the entertainment use of an aircraft provided after October 22, 2004, to a specified individual. An employer who uses the general valuation rules of paragraph (b) of this section to value any entertainment use of an aircraft by a specified individual in a calendar year must use the general valuation rules of paragraph (b) of this section to value all entertainment use of aircraft provided to all specified individuals during that calendar year.

(A) *Specified individuals defined.* For purposes of paragraph (g)(14)(iii) of this section, *specified individual* is defined in section 274(e)(2)(B) and §1.274–9(b).

(B) *Entertainment defined.* For purposes of paragraph (g)(14)(iii) of this section, *entertainment* is defined in §1.274–2(b)(1).

(h) *Commercial flight valuation rule*—(1) *In general.* Under the commercial flight valuation rule of this paragraph (h), the value of a space-available flight (as defined in paragraph (h) (2) of this section) on a commercial aircraft is 25 percent of the actual carrier's highest unrestricted coach fare in effect for the particular flight taken. The rule of this paragraph (h) is available only to an individual described in §1.132–1(b)(1).

(2) *Space-available flight.* The commercial flight valuation rule of this paragraph (h) is available to value a space-available flight. The term ''space-available flight'' means a flight on a commercial aircraft—

(i) Which is subject to the same types of restrictions customarily associated with flying on an employee ''stand-by'' or ''space-available'' basis, and

(ii) Which meets the definition of a no-additional-cost service under section 132(b), except that the flight is provided to an individual other than the employee or an individual treated as the employee under section 132(f). Thus, a flight is not a space-available flight if the employer guarantees the employee a seat on the flight or if the nondiscrimination requirements of section 132(h)(1) and § 1.132–8 are not satisfied. A flight may be a space-available flight even if the airline that is the actual carrier is not the employer of the employee.

(3) *Commercial aircraft.* If the actual carrier does not offer, in the ordinary course of its business, air transportation to customers on a per-seat basis, the commercial flight valuation rule of this paragraph (h) is not available. Thus, if, in the ordinary course of its line of business, the employer only offers air transportation to customers on a charter basis, the commercial flight valuation rule of this paragraph (h) may not be used to value a space-available flight on the employer's aircraft. If the commercial flight valuation rule is not available, the flight may be valued under the non-commercial flight valuation rule of paragraph (g) of this section.

(4) *Timing of inclusion.* The date that the flight is taken is the relevant date for purposes of applying section 61(a)(1) and this section to a space-available flight on a commercial aircraft. The date of purchase or issuance of a pass or ticket is not relevant. Thus, this section applies to a flight taken on or after January 1, 1989, regardless of the date on which the pass or ticket for the flight was purchased or issued.

(5) *Consistency rules*—(i) *Use by employer.* If the commercial flight valuation rule of this paragraph (h) is used by an employer to value any flight provided in a calendar year, the rule must be used to value all flights eligible for use of the rule provided in the calendar year.

(ii) *Use by employee.* If the commercial flight valuation rule of this paragraph (h) is used by an employee to value a flight provided by an employer in a calendar year, the rule must be used to value all flights provided by that employer eligible for use of the rule taken by such employee in the calendar year.

(i) [Reserved]

(j) *Valuation of meals provided at an employer-operated eating facility for employees*—(1) *In general.* The valuation rule of this paragraph (j) may be used to value a meal provided at an employer-operated eating facility for employees (as defined in § 1.132–7). For rules relating to an exclusion for the value of meals provided at an employer-operated eating facility for employees, see section 132(e)(2) and § 1.132–7.

(2) *Valuation formula*—(i) *In general.* The value of all meals provided at an employer-operated eating facility for employees during a calendar year (''total meal value'') is 150 percent of the direct operating costs of the eating facility determined separately with respect to such eating facility whether or not the direct operating costs test is applied separately to such eating facility under § 1.132–7(b)(2). For purposes of this paragraph (j), the definition of direct operating costs provided in § 1.132–7(b) and the adjustments specified in § 1.132–7(a)(2) apply. The taxable value of meals provided at an eating facility may be determined in two ways. The ''individual meal subsidy'' may be treated as the taxable value of a meal provided at the eating facility (see paragraph (j)(2)(ii) of this section) to a particular employee. Alternatively, the employer may allocate the ''total meal subsidy'' among employees (see paragraph (j)(2)(iii) of this section).

(ii) *''Individual meal subsidy'' defined.* The ''individual meal subsidy'' is determined by multiplying the amount paid by the employee for a particular meal by a fraction, the numerator of which is the total meal value and the denominator of which is the gross receipts of the eating facility for the calendar year and then subtracting the amount paid by the employee for the meal. The taxable value of meals provided to a particular employee during a calendar year, therefore, is the sum of the individual meal subsidies provided to the employee during the calendar year. This rule is available only if there is a charge for each meal selection and if each employee is charged the same price for any given meal selection.

(iii) *Allocation of "total meal subsidy."* Instead of using the individual meal subsidy method provided in paragraph (j)(2)(ii) of this section, the employer may allocate the "total meal subsidy" (total meal value less the gross receipts of the facility) among employees in any manner reasonable under the circumstances. It will be presumed reasonable for an employer to allocate the total meal subsidy on a per-employee basis if the employer has information that would substantiate to the satisfaction of the Commissioner that each employee was provided approximately the same number of meals at the facility.

(k) *Commuting valuation rule for certain employees*—(1) *In general.* Under the rule of this paragraph (k), the value of the commuting use of employer-provided transportation may be determined under paragraph (k)(3) of this section if the following criteria are met by the employer and employee with respect to the transportation:

(i) The transportation is provided, solely because of unsafe conditions, to an employee who would ordinarily walk or use public transportation for commuting to or from work;

(ii) The employer has established a written policy (e.g., in the employer's personnel manual) under which the transportation is not provided for the employee's personal purposes other than for commuting due to unsafe conditions and the employer's practice in fact corresponds with the policy;

(iii) The transportation is not used for personal purposes other than commuting due to unsafe conditions; and

(iv) The employee receiving the employer-provided transportation is a qualified employee of the employer (as defined in paragraph (k)(6) of this section).

(2) *Trip-by-trip basis.* The special valuation rule of this paragraph (k) applies on a trip-by-trip basis. If an employer and employee fail to meet the criteria of paragraph (k)(1) of this section with respect to any trip, the value of the transportation for that trip is not determined under paragraph (k)(3) of this section and the amount includible in the employee's income is determined by reference to the fair market value of the transportation.

(3) *Commuting value*—(i) *$1.50 per one-way commute.* If the requirements of this paragraph (k) are satisfied, the value of the commuting use of the employer-provided transportation is $1.50 per one-way commute (*i.e.*, from home to work or from work to home).

(ii) *Value per employee.* If transportation is provided to more than one qualified employee at the same time, the amount includible in the income of each employee is $1.50 per one-way commute.

(4) *Definition of employer-provided transportation.* For purposes of this paragraph (k), "employer-provided transportation" means transportation by vehicle (as defined in paragraph (f)(4) of this section) that is purchased by the employer (or that is purchased by the employee and reimbursed by the employer) from a party that is not related to the employer for the purpose of transporting a qualified employee to or from work. Reimbursements made by an employer to an employee to cover the cost of purchasing transportation (e.g., hiring cabs) must be made under a bona fide reimbursement arrangement.

(5) *Unsafe conditions.* Unsafe conditions exist if a reasonable person would, under the facts and circumstances, consider it unsafe for the employee to walk to or from home, or to walk to or use public transportation at the time of day the employee must commute. One of the factors indicating whether it is unsafe is the history of crime in the geographic area surrounding the employee's workplace or residence at the time of day the employee must commute.

(6) *Qualified employee defined*—(i) *In general.* For purposes of this paragraph (k), a qualified employee is one who meets the following requirements with respect to the employer:

(A) The employee performs services during the current year, is paid on an hourly basis, is not claimed under section 213(a)(1) of the Fair Labor Standards Act of 1938 (as amended), 29 U.S.C. 201–219 (FLSA), to be exempt from the minimum wage and maximum hour provisions of the FLSA, and is within a classification with respect to which the employer actually pays, or has specified in writing that it will pay, compensation for overtime equal to or exceeding one and one-half times the regular rate as provided by section 207 of the FLSA; and

(B) The employee does not receive compensation from the employer in excess of the amount permitted by section 414(q)(1)(C) of the Code.

(ii) *''Compensation'' and ''paid on an hourly basis'' defined.* For purposes of this paragraph (k), ''compensation'' has the same meaning as in section 414(q)(7). Compensation includes all amounts received from all entities treated as a single employer under section 414 (b), (c), (m), or (o). Levels of compensation shall be adjusted at the same time and in the same manner as provided in section 415(d). If an employee's compensation is stated on an annual basis, the employee is treated as ''paid on an hourly basis'' for purposes of this paragraph (k) as long as the employee is not claimed to be exempt from the minimum wage and maximum hour provisions of the FLSA and is paid overtime wages either equal to or exceeding one and one-half the employee's regular hourly rate of pay.

(iii) *FLSA compliance required.* An employee will not be considered a qualified employee for purposes of this paragraph (k), unless the employer is in compliance with the recordkeeping requirements concerning that employee's wages, hours, and other conditions and practices of employment as provided in section 211(c) of the FLSA and 29 CFR part 516.

(iv) *Issues arising under the FLSA.* If questions arise concerning an employee's classification under the FLSA, the pronouncements and rulings of the Administrator of the Wage and Hour Division, Department of Labor are determinative.

(v) *Non-qualified employees.* If an employee is not a qualified employee within the meaning of this paragraph (k)(6), no portion of the value of the commuting use of employer-provided transportation is excluded under this paragraph (k).

(7) *Examples.* This paragraph (k) is illustrated by the following examples:

Example 1. A and B are word-processing clerks employed by Y, an accounting firm in a large metropolitan area, and both are qualified employees under paragraph (k)(6) of this section. The normal working hours for A and B are from 11:00 p.m. until 7:00 a.m. and public transportation, the only means of transportation available to A or B, would be considered unsafe by a reasonable person at the time they are required to commute from home to work. In response, Y hires a car service to pick up A and B at their homes each evening for purposes of transporting them to work. The amount includible in the income of both A and B is $1.50 for the one-way commute from home to work.

Example 2. Assume the same facts as in *Example 1*, except that Y also hires a car service to return A and B to their homes each morning at the conclusion of their shifts and public transportation would not be considered unsafe by a reasonable person at the time of day A and B commute to their homes. The value of the commute from work to home is includible in the income of both A and B by reference to fair market value since unsafe conditions do not exist for that trip.

Example 3. C is an associate for Z, a law firm in a metropolitan area. The normal working hours for C's law firm are from 9 a.m. until 6 p.m., but C's ordinary office hours are from 10 a.m. until 8 p.m. Public transportation, the only means of transportation available to C at the time C commutes from work to home during the evening, would be considered unsafe by a reasonable person. In response, Z hires a car service to take C home each evening. C does not receive annual compensation from Z in excess of the amount permitted by section 414(q)(1)(C) of the Code. However, C is treated as an employee exempt from the provisions of the FLSA and, accordingly, is not paid overtime wages. Therefore, C is not a qualified employee within the meaning of paragraph (k)(6) of this section. The value of the commute from work to home is includible in C's income by reference to fair market value.

(8) *Effective date.* This paragraph (k) applies to employer-provided transportation provided to a qualified employee on or after July 1, 1991.

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§ 1.61–22 Taxation of split-dollar life insurance arrangements.

(a) *Scope*—(1) *In general.* This section provides rules for the taxation of a split-dollar life insurance arrangement for purposes of the income tax, the gift tax, the Federal Insurance Contributions Act (FICA), the Federal Unemployment Tax Act (FUTA), the Railroad Retirement Tax Act (RRTA), and the Self-Employment Contributions Act of 1954 (SECA). For the Collection of Income Tax at Source on Wages, this section also provides rules for the taxation of a split-dollar life insurance arrangement, other than a payment under a split-dollar life insurance arrangement that is a split-dollar loan under §1.7872–15(b)(1). A split-dollar life insurance arrangement (as defined in paragraph (b) of this section) is subject to the rules of paragraphs (d) through (g) of this section, §1.7872–15, or general tax rules. For rules to determine which rules apply to a split-dollar life insurance arrangement, see paragraph (b)(3) of this section.

(2) *Overview.* Paragraph (b) of this section defines a split-dollar life insurance arrangement and provides rules to determine whether an arrangement is subject to the rules of paragraphs (d) through (g) of this section, §1.7872–15, or general tax rules. Paragraph (c) of this section defines certain other terms. Paragraph (d) of this section sets forth rules for the taxation of economic benefits provided under a split-dollar life insurance arrangement. Paragraph (e) of this section sets forth rules for the taxation of amounts received under a life insurance contract that is part of a split-dollar life insurance arrangement. Paragraph (f) of this section provides rules for additional tax consequences of a split-dollar life insurance arrangement, including the treatment of death benefit proceeds. Paragraph (g) of this section provides rules for the transfer of a life insurance contract (or an undivided interest in the contract) that is part of a split-dollar life insurance arrangement. Paragraph (h) of this section provides examples illustrating the application of this section. Paragraph (j) of this section provides the effective date of this section.

(b) *Split-dollar life insurance arrangement*—(1) *In general.* A split-dollar life insurance arrangement is any arrangement between an owner and a non-owner of a life insurance contract that satisfies the following criteria—

(i) Either party to the arrangement pays, directly or indirectly, all or any portion of the premiums on the life insurance contract, including a payment by means of a loan to the other party that is secured by the life insurance contract;

(ii) At least one of the parties to the arrangement paying premiums under paragraph (b)(1)(i) of this section is entitled to recover (either conditionally or unconditionally) all or any portion of those premiums and such recovery is to be made from, or is secured by, the proceeds of the life insurance contract; and

(iii) The arrangement is not part of a group-term life insurance plan described in section 79 unless the group-term life insurance plan provides permanent benefits to employees (as defined in §1.79–0).

(2) *Special rule*—(i) *In general.* Any arrangement between an owner and a non-owner of a life insurance contract is treated as a split-dollar life insurance arrangement (regardless of whether the criteria of paragraph (b)(1) of this section are satisfied) if the arrangement is described in paragraph (b)(2)(ii) or (iii) of this section.

(ii) *Compensatory arrangements.* An arrangement is described in this paragraph (b)(2)(ii) if the following criteria are satisfied—

(A) The arrangement is entered into in connection with the performance of services and is not part of a group-term life insurance plan described in section 79;

(B) The employer or service recipient pays, directly or indirectly, all or any portion of the premiums; and

(C) Either—

(*1*) The beneficiary of all or any portion of the death benefit is designated by the employee or service provider or is any person whom the employee or service provider would reasonably be expected to designate as the beneficiary; or

(*2*) The employee or service provider has any interest in the policy cash value of the life insurance contract.

(iii) *Shareholder arrangements.* An arrangement is described in this paragraph (b)(2)(iii) if the following criteria are satisfied—

(A) The arrangement is entered into between a corporation and another person in that person's capacity as a shareholder in the corporation;

(B) The corporation pays, directly or indirectly, all or any portion of the premiums; and

(C) Either—

(*1*) The beneficiary of all or any portion of the death benefit is designated by the shareholder or is any person whom the shareholder would reasonably be expected to designate as the beneficiary; or

(*2*) The shareholder has any interest in the policy cash value of the life insurance contract.

(3) *Determination of whether this section or §1.7872–15 applies to a split-dollar life insurance arrangement*—(i) *Split-dollar life insurance arrangements involving split-dollar loans under §1.7872–15.* Except as provided in paragraph (b)(3)(ii) of this section, paragraphs (d) through (g) of this section do not apply to any split-dollar loan as defined in §1.7872–15(b)(1). Section 1.7872–15 applies to any such loan. *See* paragraph (b)(5) of this section for the treatment of a payment made by a non-owner under a split-dollar life insurance arrangement if the payment is not a split-dollar loan.

(ii) *Exceptions.* Paragraphs (d) through (g) of this section apply (and §1.7872–15 does not apply) to any split-dollar life insurance arrangement if—

(A) The arrangement is entered into in connection with the performance of services, and the employer or service recipient is the owner of the life insurance contract (or is treated as the owner of the contract under paragraph (c)(1)(ii)(A)(*1*) of this section); or

(B) The arrangement is entered into between a donor and a donee (for example, a life insurance trust) and the donor is the owner of the life insurance contract (or is treated as the owner of the contract under paragraph (c)(1)(ii)(A)(*2*) of this section).

(4) *Consistency requirement.* A split-dollar life insurance arrangement described in paragraph (b)(1) or (2) of this section must be treated in the same manner by the owner and the non-owner of the life insurance contract under either the rules of this section or §1.7872–15. In addition, the owner and non-owner must fully account for all amounts under the arrangement under paragraph (b)(5) of this section, paragraphs (d) through (g) of this section, or §1.7872–15.

(5) *Non-owner payments that are not split-dollar loans.* If a non-owner of a life insurance contract makes premium payments (directly or indirectly) under a split-dollar life insurance arrangement, and the payments are neither split-dollar loans nor consideration for economic benefits described in paragraph (d) of this section, then neither the rules of paragraphs (d) through (g) of this section nor the rules in §1.7872–15 apply to such payments. Instead, general income tax, employment tax, self-employment tax, and gift tax principles apply to the premium payments. *See*, for example, §1.61–2(d)(2)(ii)(A).

(6) *Waiver, cancellation, or forgiveness.* If a repayment obligation described in §1.7872–15(a)(2) is waived, cancelled, or forgiven at any time, then the parties must take the amount waived, cancelled, or forgiven into account in accordance with the relationships between the parties (for example, as compensation in the case of an employee-employer relationship).

(7) *Change in the owner.* If payments made by a non-owner to an owner were treated as split-dollar loans under §1.7872–15 and the split-dollar life insurance arrangement is modified such that, after the modification, the non-owner is the owner (within the meaning of paragraph (c)(1) of this section) of the life insurance contract under the arrangement, paragraphs (d) through (g) of this section apply to the split-dollar life insurance arrangement from the date of the modification. The payments made (both before and after the modification) are not treated as split-dollar loans under §1.7872–15 on or after the date of the modification. The non-owner of the life insurance contract under the modified split-dollar life insurance arrangement must fully take into account all economic benefits provided under the arrangement under paragraph (d) of this section on or after the date of the modification. For the treatment of a transfer of the contract when the unmodified arrangement is governed by paragraphs (d) through (g) of this section, *see* paragraph (g) of this section.

(c) *Definitions.* The following definitions apply for purposes of this section:

(1) *Owner*—(i) *In general.* With respect to a life insurance contract, the person named as the policy owner of such contract generally is the owner of such contract. If two or more persons are named as policy owners of a life insurance contract and each person has, at all times, all the incidents of ownership with respect to an undivided interest in the contract, each person is treated as the owner of a separate contract to the extent of such person's undivided interest. If two or more persons are named as policy owners of a life insurance contract but each person does not have, at all times, all the incidents of ownership with respect to an undivided interest in the contract, the person who is the first-named policy owner is treated as the owner of the entire contract.

(ii) *Special rule for certain arrangements*—(A) *In general.* Notwithstanding paragraph (c)(1)(i) of this section—

(*1*) An employer or service recipient is treated as the owner of a life insurance contract under a split-dollar life insurance arrangement that is entered into in connection with the performance of services if, at all times, the only economic benefit that will be provided under the arrangement is current life insurance protection as described in paragraph (d)(3) of this section; and

(*2*) A donor is treated as the owner of a life insurance contract under a split-dollar life insurance arrangement that is entered into between a donor and a donee (for example, a life insurance trust) if, at all times, the only economic benefit that will be provided under the arrangement is current life insurance protection as described in paragraph (d)(3) of this section.

(B) *Modifications.* If an arrangement described in paragraph (c)(1)(ii)(A) of this section is modified such that the arrangement is no longer described in paragraph (c)(1)(ii)(A) of this section, the following rules apply:

(*1*) If, immediately after such modification, the employer, service recipient, or donor is the owner of the life insurance contract under the split-dollar life insurance arrangement (determined without regard to paragraph (c)(1)(ii)(A) of this section), the employer, service recipient, or donor continues to be treated as the owner of the life insurance contract.

(*2*) If, immediately after such modification, the employer, service recipient, or donor is not the owner of the life insurance contract under the split-dollar life insurance arrangement (determined without regard to paragraph (c)(1)(ii)(A) of this section), the employer, service recipient, or donor is treated as having made a transfer of the entire life insurance contract to the employee, service provider, or donee under the rules of paragraph (g) of this section as of the date of such modification.

(*3*) For purposes of this paragraph (c)(1)(ii)(B), entering into a successor split-dollar life insurance arrangement that has the effect of providing any economic benefit in addition to that described in paragraph (d)(3) of this section is treated as a modification of the prior split-dollar life insurance arrangement.

(iii) *Attribution rules for compensatory arrangements.* For purposes of this section, if a split-dollar life insurance arrangement is entered into in connection with the performance of services, the employer or service recipient is treated as the owner of the life insurance contract if the owner (within the meaning of paragraph (c)(1)(i) of this section) of the life insurance contract under the split-dollar life insurance arrangement is—

(A) A trust described in section 402(b);

(B) A trust that is treated as owned (within the meaning of sections 671 through 677) by the employer or the service recipient;

(C) A welfare benefit fund within the meaning of section 419(e)(1); or

(D) A member of the employer or service recipient's controlled group (within the meaning of section 414(b)) or a trade or business that is under common control with the employer or service recipient (within the meaning of section 414(c)).

(iv) *Life insurance contracts owned by partnerships.* [Reserved]

(2) *Non-owner*—(i) *Definition.* With respect to a life insurance contract, a non-owner is any person (other than

the owner of such contract under paragraph (c)(1) of this section) that has any direct or indirect interest in such contract (but not including a life insurance company acting only in its capacity as the issuer of a life insurance contract).

(ii) *Example.* The following example illustrates the provisions of this paragraph (c)(2):

Example. (i) On January 1, 2009, Employer R and Trust T, an irrevocable life insurance trust that is not treated under sections 671 through 677 as owned by a grantor or other person, enter into a split-dollar life insurance arrangement in connection with the performance of services under which R will pay all the premiums on the life insurance contract until the termination of the arrangement or the death of E, an employee of R. C, the beneficiary of T, is E's child. R is the owner of the contract under paragraph (c)(1)(i) of this section. E is the insured under the life insurance contract. Upon termination of the arrangement or E's death, R is entitled to receive the lesser of the aggregate premiums or the policy cash value of the contract and T will be entitled to receive any remaining amounts. Under the terms of the arrangement and applicable state law, the policy cash value is fully accessible by R and R's creditors but T has the right to borrow or withdraw at any time the portion of the policy cash value exceeding the amount payable to R.

(ii) Because E and T each have an indirect interest in the life insurance contract that is part of the split-dollar life insurance arrangement, each is a non-owner under paragraph (c)(2)(i) of this section. E and T each are provided economic benefits described in paragraph (d)(2) of this section pursuant to the split-dollar life insurance arrangement. Economic benefits are provided by owner R to E as a payment of compensation, and separately provided by E to T as a gift.

(3) *Transfer of entire contract or undivided interest therein.* A transfer of the ownership of a life insurance contract (or an undivided interest in such contract) that is part of a split-dollar life insurance arrangement occurs on the date that a non-owner becomes the owner (within the meaning of paragraph (c)(1) of this section) of the entire contract or of an undivided interest in the contract.

(4) *Undivided interest.* An undivided interest in a life insurance contract consists of an identical fractional or percentage interest or share in each right, benefit, and obligation with respect to the contract. In the case of any arrangement purporting to create undivided interests where, in substance, the rights, benefits or obligations are shared to any extent among the holders of such interests, the arrangement will be treated as a split-dollar life insurance arrangement.

(5) *Employment tax.* The term employment tax means any tax imposed by, or collected under, the Federal Insurance Contributions Act (FICA), the Federal Unemployment Tax Act (FUTA), the Railroad Retirement Tax Act (RRTA), and the Collection of Income Tax at Source on Wages.

(6) *Self-employment tax.* The term self-employment tax means the tax imposed by the Self-Employment Contributions Act of 1954 (SECA).

(d) *Economic benefits provided under a split-dollar life insurance arrangement*—(1) *In general.* In the case of a split-dollar life insurance arrangement subject to the rules of paragraphs (d) through (g) of this section, economic benefits are treated as being provided to the non-owner of the life insurance contract. The non-owner (and the owner for gift and employment tax purposes) must take into account the full value of all economic benefits described in paragraph (d)(2) of this section, reduced by the consideration paid directly or indirectly by the non-owner to the owner for those economic benefits. Depending on the relationship between the owner and the non-owner, the economic benefits may constitute a payment of compensation, a distribution under section 301, a contribution to capital, a gift, or a transfer having a different tax character. Further, depending on the relationship between or among a non-owner and one or more other persons (including a non-owner or non-owners), the economic benefits may be treated as provided from the owner to the non-owner and as separately provided from the non-owner to such other person or persons (for example, as a payment of compensation from an employer to an employee and as a gift from the employee to the employee's child).

(2) *Value of economic benefits.* The value of the economic benefits provided to a non-owner for a taxable year under the arrangement equals—

(i) The cost of current life insurance protection provided to the non-owner as determined under paragraph (d)(3) of this section;

(ii) The amount of policy cash value to which the non-owner has current access within the meaning of paragraph (d)(4)(ii) of this section (to the extent that such amount was not actually taken into account for a prior taxable year); and

(iii) The value of any economic benefits not described in paragraph (d)(2)(i) or (ii) of this section provided to the non-owner (to the extent not actually taken into account for a prior taxable year).

(3) *Current life insurance protection*—(i) *Amount of current life insurance protection.* In the case of a split-dollar life insurance arrangement described in paragraph (d)(1) of this section, the amount of the current life insurance protection provided to the non-owner for a taxable year (or any portion thereof in the case of the first year or the last year of the arrangement) equals the excess of the death benefit of the life insurance contract (including paid-up additions thereto) over the total amount payable to the owner (including any outstanding policy loans that offset amounts otherwise payable to the owner) under the split-dollar life insurance arrangement, less the portion of the policy cash value actually taken into account under paragraph (d)(1) of this section or paid for by the non-owner under paragraph (d)(1) of this section for the current taxable year or any prior taxable year.

(ii) *Cost of current life insurance protection.* The cost of current life insurance protection provided to the non-owner for any year (or any portion thereof in the case of the first year or the last year of the arrangement) equals the amount of the current life insurance protection provided to the non-owner (determined under paragraph (d)(3)(i) of this section) multiplied by the life insurance premium factor designated or permitted in guidance published in the Internal Revenue Bulletin (*see* § 601.601(d)(2)(ii) of this chapter).

(4) *Policy cash value*—(i) *In general.* For purposes of this paragraph (d), policy cash value is determined disregarding surrender charges or other similar charges or reductions. Policy cash value includes policy cash value attributable to paid-up additions.

(ii) *Current access.* For purposes of this paragraph (d), a non-owner has current access to that portion of the policy cash value—

(A) To which, under the arrangement, the non-owner has a current or future right; and

(B) That currently is directly or indirectly accessible by the non-owner, inaccessible to the owner, or inaccessible to the owner's general creditors.

(5) *Valuation date*—(i) *General rules.* For purposes of this paragraph (d), the amount of the current life insurance protection and the policy cash value shall be determined on the same valuation date. The valuation date is the last day of the non-owner's taxable year, unless the owner and non-owner agree to instead use the policy anniversary date as the valuation date. Notwithstanding the previous sentence, if the split-dollar life insurance arrangement terminates during the taxable year of the non-owner, the value of such economic benefits is determined on the day that the arrangement terminates.

(ii) *Consistency requirement.* The owner and non-owner of the split-dollar life insurance arrangement must use the same valuation date. In addition, the same valuation date must be used for all years prior to termination of the split-dollar life insurance arrangement unless the parties receive consent of the Commissioner to change the valuation date.

(iii) *Artifice or device.* Notwithstanding paragraph (d)(5)(i) of this section, if any artifice or device is used to understate the amount of any economic benefit on the valuation date in paragraph (d)(5)(i) of this section, then, for purposes of this paragraph (d), the date on which the amount of the economic benefit is determined is the date on which the amount of the economic benefit is greatest during that taxable year.

(iv) *Special rule for certain taxes.* For purposes of employment tax (as defined in paragraph (c)(5) of this section), self-employment tax (as defined in paragraph (c)(6) of this section), and sections 6654 and 6655 (relating to the failure to pay estimated income tax), the portions of the current life insurance protection and the policy cash value that are treated as provided by the owner to the non-owner shall be treated as so provided on the last day of the taxable year of the non-owner. Notwithstanding the previous sentence, if the split-dollar life insurance arrangement terminates during the taxable year of the non-owner, such portions of the current life insurance protection and the policy cash value shall be treated as so provided on the day that the arrangement terminates.

(6) *Examples*. The following examples illustrate the rules of this paragraph (d). Except as otherwise provided, both examples assume the following facts: employer (R) is the owner (as defined in paragraph (c)(1)(i) of this section) and employee (E) is the non-owner (as defined in paragraph (c)(2)(i) of this section) of a life insurance contract that is part of a split-dollar life insurance arrangement that is subject to the provisions of paragraphs (d) through (g) of this section; the contract is a life insurance contract as defined in section 7702 and not a modified endowment contract as defined in section 7702A; R does not withdraw or obtain a loan of any portion of the policy cash value and does not surrender any portion of the life insurance contract; the compensation paid to E is reasonable; E is not provided any economic benefits described in paragraph (d)(2)(iii) of this section; E does not make any premium payments; E's taxable year is the calendar year; the value of the economic benefits is determined on the last day of E's taxable year; and E reports on E's Federal income tax return for each year that the split-dollar life insurance arrangement is in effect the amount of income required to be reported under paragraph (d) of this section. The examples are as follows:

Example 1. (i) *Facts*. On January 1 of year 1, R and E enter into the split-dollar life insurance arrangement. Under the arrangement, R pays all of the premiums on the life insurance contract until the termination of the arrangement or E's death. The arrangement provides that upon termination of the arrangement or E's death, R is entitled to receive the lesser of the aggregate premiums paid or the policy cash value of the contract and E is entitled to receive any remaining amounts. Under the terms of the arrangement and applicable state law, the policy cash value is fully accessible by R and R's creditors but E has the right to borrow or withdraw at any time the portion of the policy cash value exceeding the amount payable to R. To fund the arrangement, R purchases a life insurance contract with constant death benefit protection equal to $1,500,000. R makes premium payments on the life insurance contract of $60,000 in each of years 1, 2, and 3. The policy cash value equals $55,000 as of December 31 of year 1, $140,000 as of December 31 of year 2, and $240,000 as of December 31 of year 3.

(ii) *Analysis*. Under the terms of the split-dollar life insurance arrangement, E has the right for year 1 and all subsequent years to borrow or withdraw the portion of the policy cash value exceeding the amount payable to R. Thus, under paragraph (d)(4)(ii) of this section, E has current access to such portion of the policy cash value for each year that the arrangement is in effect. In addition, because R pays all of the premiums on the life insurance contract, R provides to E all of the economic benefits that E receives under the arrangement. Therefore, under paragraph (d)(1) of this section, E includes in gross income the value of all economic benefits described in paragraphs (d)(2)(i) and (ii) of this section provided to E under the arrangement.

(iii) *Results for year 1*. For year 1, E is provided, under paragraph (d)(2)(ii) of this section, $0 of policy cash value (excess of $55,000 policy cash value determined as of December 31 of year 1 over $55,000 payable to R). For year 1, E is also provided, under paragraph (d)(2)(i) of this section, current life insurance protection of $1,445,000 ($1,500,000 minus $55,000 payable to R). Thus, E includes in gross income for year 1 the cost of $1,445,000 of current life insurance protection.

(iv) *Results for year 2*. For year 2, E is provided, under paragraph (d)(2)(ii) of this section, $20,000 of policy cash value ($140,000 policy cash value determined as of December 31 of year 2 minus $120,000 payable to R). For year 2, E is also provided, under paragraph (d)(2)(i) of this section, current life insurance protection of $1,360,000 ($1,500,000 minus the sum of $120,000 payable to R and the aggregate of $20,000 of policy cash value that E actually includes in income on E's year 1 and year 2 federal income tax returns). Thus, E includes in gross income for year 2 the sum of $20,000 of policy cash value and the cost of $1,360,000 of current life insurance protection.

(v) *Results for year 3.* For year 3, E is provided, under paragraph (d)(2)(ii) of this section, $40,000 of policy cash value ($240,000 policy cash value determined as of December 31 of year 3 minus the sum of $180,000 payable to R and $20,000 of aggregate policy cash value that E actually included in gross income on E's year 1 and year 2 federal income tax returns). For year 3, E is also provided, under paragraph (d)(2)(i) of this section, current life insurance protection of $1,260,000 ($1,500,000 minus the sum of $180,000 payable to R and $60,000 of aggregate policy cash value that E actually includes in gross income on E's year 1, year 2, and year 3 federal income tax returns). Thus, E includes in gross income for year 3 the sum of $40,000 of policy cash value and the cost of $1,260,000 of current life insurance protection.

Example 2. (i) *Facts.* The facts are the same as in *Example 1* except that E cannot directly or indirectly access any portion of the policy cash value, but the terms of the split-dollar life insurance arrangement or applicable state law provide that the policy cash value in excess of the amount payable to R is inaccessible to R's general creditors.

(ii) *Analysis.* Under the terms of the split-dollar life insurance arrangement or applicable state law, the portion of the policy cash value exceeding the amount payable to R is inaccessible to R's general creditors and E has a current or future right to that portion of the cash value. Thus, under paragraph (d)(4)(ii) of this section, E has current access to such portion of the policy cash value for each year that the arrangement is in effect. In addition, because R pays all of the premiums on the life insurance contract, R provides to E all of the economic benefits that E receives under the arrangement. Therefore, under paragraph (d)(1) of this section, E includes in gross income the value of all economic benefits described in paragraphs (d)(2)(i) and (ii) of this section provided to E under the arrangement.

(iii) *Results for years 1, 2 and 3.* The results for this example are the same as the results in Example 1.

(e) *Amounts received under the contract*—(1) *In general.* Except as otherwise provided in paragraph (f)(3) of this section, any amount received under a life insurance contract that is part of a split-dollar life insurance arrangement subject to the rules of paragraphs (d) through (g) of this section (including, but not limited to, a policy owner dividend, proceeds of a specified policy loan described in paragraph (e)(2) of this section, or the proceeds of a withdrawal from or partial surrender of the life insurance contract) is treated, to the extent provided directly or indirectly to a non-owner of the life insurance contract, as though such amount had been paid to the owner of the life insurance contract and then paid by the owner to the non-owner. The amount received is taxable to the owner in accordance with the rules of section 72. The non-owner (and the owner for gift tax and employment tax purposes) must take the amount described in paragraph (e)(3) of this section into account as a payment of compensation, a distribution under section 301, a contribution to capital, a gift, or other transfer depending on the relationship between the owner and the non-owner.

(2) *Specified policy loan.* A policy loan is a specified policy loan to the extent—

(i) The proceeds of the loan are distributed directly from the insurance company to the non-owner;

(ii) A reasonable person would not expect that the loan will be repaid by the non-owner; or

(iii) The non-owner's obligation to repay the loan to the owner is satisfied or is capable of being satisfied upon repayment by either party to the insurance company.

(3) *Amount required to be taken into account.* With respect to a non-owner (and the owner for gift tax and employment tax purposes), the amount described in this paragraph (e)(3) is equal to the excess of—

(i) The amount treated as received by the owner under paragraph (e)(1) of this section; over

(ii) The amount of all economic benefits described in paragraphs (d)(2)(ii) and (iii) of this section actually taken into account by the non-owner (and the owner for gift tax and employment tax purposes) plus any consideration described in paragraph (d)(1) of this section paid by the non-owner for such economic benefits described in paragraphs (d)(2)(ii) and (iii) of this section. The amount determined under the preceding sentence applies only to the extent that neither this paragraph (e)(3)(ii) nor paragraph (g)(1)(ii) of this section previously has applied to such economic benefits.

(f) *Other tax consequences*—(1) *Introduction.* In the case of a split-dollar life insurance arrangement subject to the rules of paragraphs (d) through (g) of this section, this paragraph (f) sets forth other tax consequences to the owner and non-owner of a life insurance contract that is part of the arrangement for the period prior to the transfer (as defined in paragraph (c)(3) of this section) of the contract (or an undivided interest therein) from the owner to the non-owner. *See* paragraph (g) of this section and § 1.83–6(a)(5) for tax consequences upon the transfer of the contract (or an undivided interest therein).

(2) *Investment in the contract*—(i) *To the non-owner.* A non-owner does not receive any investment in the contract under section 72(e)(6) with respect to a life insurance contract that is part of a split-dollar life insurance arrangement subject to the rules of paragraphs (d) through (g) of this section.

(ii) *To owner.* Any premium paid by an owner under a split-dollar life insurance arrangement subject to the rules of paragraphs (d) through (g) of this section is included in the owner's investment in the contract under section 72(e)(6). No premium or amount described in paragraph (d) of this section is deductible by the owner (except as otherwise provided in § 1.83–6(a)(5)). Any amount paid by a non-owner, directly or indirectly, to the owner of the life insurance contract for current life insurance protection or for any other economic benefit under the life insurance contract is included in the owner's gross income and is included in the owner's investment in the life insurance contract for purposes of section 72(e)(6) (but only to the extent not otherwise so included by reason of having been paid by the owner as a premium or other consideration for the contract).

(3) *Treatment of death benefit proceeds*—(i) *Death benefit proceeds to beneficiary (other than the owner).* Any amount paid to a beneficiary (other than the owner) by reason of the death of the insured is excluded from gross income by such beneficiary under section 101(a) as an amount received under a life insurance contract to the extent such amount is allocable to current life insurance protection provided to the non-owner pursuant to the split-dollar life insurance arrangement, the cost of which was paid by the non-owner, or the value of which the non-owner actually took into account pursuant to paragraph (d)(1) of this section.

(ii) *Death benefit proceeds to owner as beneficiary.* Any amount paid or payable to an owner in its capacity as a beneficiary by reason of the death of the insured is excluded from gross income of the owner under section 101(a) as an amount received under a life insurance contract to the extent such amount is not allocable to current life insurance protection provided to the non-owner pursuant to the split-dollar life insurance arrangement, the cost of which was paid by the non-owner, or the value of which the non-owner actually took into account pursuant to paragraph (d)(1) of this section.

(iii) *Transfers of death benefit proceeds.* Death benefit proceeds paid to a party to a split-dollar life insurance arrangement (or the estate or beneficiary of that party) that are not excludable from that party's income under section 101(a) to the extent provided in paragraph (f)(3)(i) or (ii) of this section, are treated as transferred to that party in a separate transaction. The death benefit proceeds treated as so transferred will be taxed in a manner similar to other transfers. For example, if death benefit proceeds paid to an employee, the employee's estate, or the employee's beneficiary are not excludable from the employee's gross income under section 101(a) to the extent provided in paragraph (f)(3)(i) of this section, then such payment is treated as a payment of compensation by the employer to the employee.

(g) *Transfer of entire contract or undivided interest therein*—(1) *In general.* Upon a transfer within the meaning of paragraph (c)(3) of this section of a life insurance contract (or an undivided interest therein) to a non-owner (transferee), the transferee (and the owner (transferor) for gift tax and employment tax purposes) takes into account the excess of the fair market value of the life insurance contract (or the undivided interest therein) transferred to the transferee at that time over the sum of—

(i) The amount the transferee pays to the transferor to obtain the contract (or the undivided interest therein); and

(ii) The amount of all economic benefits described in paragraph (d)(2)(ii) and (iii) of this section actually taken into account by the transferee (and the transferor for gift tax and employment tax purposes), plus any consideration described in paragraph (d)(1) of this section paid by the transferee for such economic benefits described in paragraphs (d)(2)(ii) and (iii) of this section. The amount determined under the preceding sentence applies only to the extent that neither this paragraph (g)(1)(ii) nor paragraph (e)(3)(ii) of this section previously has applied to such economic benefits.

(2) *Determination of fair market value.* For purposes of paragraph (g)(1) of this section, the fair market value of a life insurance contract is the policy cash value and the value of all other rights under such contract (including any supplemental agreements thereto and whether or not guaranteed), other than the value of current life insurance protection. Notwithstanding the preceding sentence, the fair market value of a life insurance contract for gift tax purposes is determined under §25.2512–6(a) of this chapter.

(3) *Exception for certain transfers in connection with the performance of services.* To the extent the ownership of a life insurance contract (or undivided interest in such contract) is transferred in connection with the performance of services, paragraph (g)(1) of this section does not apply until such contract (or undivided interest in such contract) is taxable under section 83. For purposes of paragraph (g)(1) of this section, fair market value is determined disregarding any lapse restrictions and at the time the transfer of such contract (or undivided interest in such contract) is taxable under section 83.

(4) *Treatment of non-owner after transfer*—(i) *In general.* After a transfer of an entire life insurance contract (except when such transfer is in connection with the performance of services and the transfer is not yet taxable under section 83), the person who previously had been the non-owner is treated as the owner of such contract for all purposes, including for purposes of paragraph (b) of this section and for purposes of §1.61–2(d)(2)(ii)(A). After the transfer of an undivided interest in a life insurance contract (or, if later, at the time such transfer is taxable under section 83), the person who previously had been the non-owner is treated as the owner of a separate contract consisting of that interest for all purposes, including for purposes of paragraph (b) of this section and for purposes of §1.61–2(d)(2)(ii)(A).

(ii) *Investment in the contract after transfer*—(A) *In general.* The amount treated as consideration paid to acquire the contract under section 72(g)(1), in order to determine the aggregate premiums paid by the transferee for purposes of section 72(e)(6)(A) after the transfer (or, if later, at the time such transfer is taxable under section 83), equals the greater of the fair market value of the contract or the sum of the amounts determined under paragraphs (g)(1)(i) and (ii) of this section.

(B) *Transfers between a donor and a donee.* In the case of a transfer of a contract between a donor and a donee, the amount treated as consideration paid by the transferee to acquire the contract under section 72(g)(1), in order to determine the aggregate premiums paid by the transferee for purposes of section 72(e)(6)(A) after the transfer, equals the sum of the amounts determined under paragraphs (g)(1)(i) and (ii) of this section except that—

(*1*) The amount determined under paragraph (g)(1)(i) of this section includes the aggregate of premiums or other consideration paid or deemed to have been paid by the transferor; and

(*2*) The amount of all economic benefits determined under paragraph (g)(1)(ii) of this section actually taken into account by the transferee does not include such benefits to the extent such benefits were excludable from the transferee's gross income at the time of receipt.

(C) *Transfers of an undivided interest in a contract.* If a portion of a contract is transferred to the transferee, then the amount to be included as consideration paid to acquire the contract is determined by multiplying the amount determined under paragraph (g)(4)(ii)(A) of this section (as modified by paragraph (g)(4)(ii)(B) of this section, if the transfer is between a donor and a donee) by a fraction, the numerator of which is the fair market value of the portion transferred and the denominator of which is the fair market value of the entire contract.

(D) *Example*. The following example illustrates the rules of this paragraph (g)(4)(ii):

Example. (i) In year 1, donor D and donee E enter into a split-dollar life insurance arrangement as defined in paragraph (b)(1) of this section. D is the owner of the life insurance contract under paragraph (c)(1) of this section. The life insurance contract is not a modified endowment contract as defined in section 7702A. In year 5, D gratuitously transfers the contract, within the meaning of paragraph (c)(3) of this section, to E. At the time of the transfer, the fair market value of the contract is $200,000 and D had paid $50,000 in premiums under the arrangement. In addition, by the time of the transfer, E had current access to $80,000 of policy cash value which was excludable from E's gross income under section 102.

(ii) E's investment in the contract is $50,000, consisting of the $50,000 of premiums paid by D. The $80,000 of policy cash value to which E had current access is not included in E's investment in the contract because such amount was excludable from E's gross income when E had current access to that policy cash value.

(iii) *No investment in the contract for current life insurance protection*. Except as provided in paragraph (g)(4)(ii)(B) of this section, no amount allocable to current life insurance protection provided to the transferee (the cost of which was paid by the transferee or the value of which was provided to the transferee) is treated as consideration paid to acquire the contract under section 72(g)(1) to determine the aggregate premiums paid by the transferee for purposes of determining the transferee's investment in the contract under section 72(e) after the transfer.

(h) *Examples*. The following examples illustrate the rules of this section. Except as otherwise provided, each of the examples assumes that the employer (R) is the owner (as defined in paragraph (c)(1) of this section) of a life insurance contract that is part of a split-dollar life insurance arrangement subject to the rules of paragraphs (d) through (g) of this section, that the employee (E) is not provided any economic benefits described in paragraph (d)(2)(iii) of this section, that the life insurance contract is not a modified endowment contract under section 7702A, that the compensation paid to E is reasonable, and that E makes no premium payments. The examples are as follows:

Example 1. (i) In year 1, R purchases a life insurance contract on the life of E. R is named as the policy owner of the contract. R and E enter into an arrangement under which R will pay all the premiums on the life insurance contract until the termination of the arrangement or E's death. Upon termination of the arrangement or E's death, R is entitled to receive the greater of the aggregate premiums or the policy cash value of the contract. The balance of the death benefit will be paid to a beneficiary designated by E.

(ii) Because R is designated as the policy owner of the contract, R is the owner of the contract under paragraph (c)(1)(i) of this section. In addition, R would be treated as the owner of the contract regardless of whether R were designated as the policy owner under paragraph (c)(1)(i) of this section because the split-dollar life insurance arrangement is described in paragraph (c)(1)(ii)(A)(*1*) of this section. E is a non-owner of the contract. Under the arrangement between R and E, a portion of the death benefit is payable to a beneficiary designated by E. The arrangement is a split-dollar life insurance arrangement under paragraph (b)(1) or (2) of this section. Because R pays all the premiums on the life insurance contract, R provides to E the entire amount of the current life insurance protection E receives under the arrangement. Therefore, for each year that the split-dollar life insurance arrangement is in effect, E must include in gross income under paragraph (d)(1) of this section the value of current life insurance protection described in paragraph (d)(2)(i) of this section provided to E in each year.

Example 2. (i) The facts are the same as in *Example 1* except that, upon termination of the arrangement or E's death, R is entitled to receive the lesser of the aggregate premiums or the policy cash value of the contract. Under the terms of the arrangement and applicable state law, the policy cash value is fully accessible by R and R's creditors but E has the right to borrow or withdraw at any time the portion of the policy cash value exceeding the amount payable to R.

(ii) Because R is designated as the policy owner, R is the owner of the contract under paragraph (c)(1)(i) of this section. E is a non-owner of the contract. For each year that the split-dollar life insurance arrangement is in effect, E has the right to borrow or withdraw at any time the portion of the policy cash value exceeding the amount payable to

R. Thus, under paragraph (d)(4)(ii) of this section, E has current access to such portion of the policy cash value for each year that the arrangement is in effect. In addition, because R pays all the premiums on the life insurance contract, R provides to E all the economic benefits that E receives under the arrangement. Therefore, for each year that the split-dollar life insurance arrangement is in effect, E must include in gross income under paragraph (d)(1) of this section, the value of all economic benefits described in paragraph (d)(2)(i) and (ii) of this section provided to E in each year.

Example 3. (i) The facts are the same as in *Example 1* except that in year 5, R and E modify the split-dollar life insurance arrangement to provide that, upon termination of the arrangement or E's death, R is entitled to receive the greater of the aggregate premiums or one-half the policy cash value of the contract. Under the terms of the modified arrangement and applicable state law, the policy cash value is fully accessible by R and R's creditors but E has the right to borrow or withdraw at any time the portion of the policy cash value exceeding the amount payable to R.

(ii) For each year that the split-dollar life insurance arrangement is in effect, E must include in gross income under paragraph (d)(1) of this section the value of the economic benefits described in paragraph (d)(2)(i) of this section provided to E under the arrangement during that year. In year 5 (and subsequent years), E has the right to borrow or withdraw at any time the portion of the policy cash value exceeding the amount payable to R. Thus, under paragraph (d)(4)(ii) of this section, E has current access to such portion of the policy cash value. Thus, in year 5 (and each subsequent year), E must also include in gross income under paragraph (d)(1) of this section the value of the economic benefits described in paragraph (d)(2)(ii) of this section provided to E in each year.

(iii) The arrangement is not described in paragraph (c)(1)(ii)(A)(*1*) of this section after it is modified in year 5. Because R is the designated owner of the life insurance contract, R continues to be treated as the owner of the contract under paragraph (c)(1)(ii)(B)(*1*) of this section after the arrangement is modified. In addition, because the modification made by R and E in year 5 does not involve the transfer (within the meaning of paragraph (c)(3) of this section) of an undivided interest in the life insurance contract from R to E, the modification is not a transfer for purposes of paragraph (g) of this section.

Example 4. (i) The facts are the same as in *Example 2* except that in year 7, R and E modify the split-dollar life insurance arrangement to provide that, upon termination of the arrangement or E's death, R will be paid the lesser of 80 percent of the aggregate premiums or the policy cash value of the contract. Under the terms of the modified arrangement and applicable state law, the policy cash value is fully accessible by R and R's creditors but E has the right to borrow or withdraw at any time the portion of the policy cash value exceeding the lesser of 80 percent of the aggregate premiums paid by R or the policy cash value of the contract.

(ii) Commencing in year 7 (and in each subsequent year), E must include in gross income the economic benefits described in paragraph (d)(2)(ii) of this section as provided in this *Example 4(ii)* rather than as provided in *Example 2(ii)*. Thus, in year 7 (and in each subsequent year) E must include in gross income under paragraph (d) of this section, the excess of the policy cash value over the lesser of 80 percent of the aggregate premiums paid by R or the policy cash value of the contract (to the extent E did not actually include such amounts in gross income for a prior taxable year). In addition, in year 7 (and each subsequent year) E must also include in gross income the value of the economic benefits described in paragraph (d)(2)(i) of this section provided to E under the arrangement in each such year.

Example 5. (i) The facts are the same as in *Example 3* except that in year 7, E is designated as the policy owner. At that time, E's rights to the contract are substantially vested as defined in §1.83–3(b).

(ii) In year 7, R is treated as having made a transfer (within the meaning of paragraph (c)(3) of this section) of the life insurance contract to E. E must include in gross income the amount determined under paragraph (g)(1) of this section.

(iii) After the transfer of the contract to E, E is the owner of the contract and any premium payments by R will be included in E's income under paragraph (b)(5) of this section and §1.61–2(d)(2)(ii)(A) (unless R's payments are split-dollar loans as defined in §1.7872–15(b)(1)).

Example 6. (i) In year 1, E and R enter into a split-dollar life insurance arrangement as defined in paragraph (b)(2) of this section. Under the arrangement, R is required to make annual premium payments of $10,000 and E is required to make annual premium payments of $500. In year 5, a $500 policy owner dividend payable to E is declared by the insurance company. E directs the insurance company to use the $500 as E's premium payment for year 5.

(ii) For each year the arrangement is in effect, E must include in gross income the value of the economic benefits provided during the year, as required by paragraph (d)(2) of this section, over the $500 premium payments paid by E. In year 5, E must also include in gross income as compensation the excess, if any, of the $500 distributed to E from the proceeds of the policy owner dividend over the amount determined under paragraph (e)(3)(ii) of this section.

(iii) R must include in income the premiums paid by E during the years the split-dollar life insurance arrangement is in effect, including the $500 of the premium E paid in year 5 with proceeds of the policy owner dividend. R's investment in the contract is increased in an amount equal to the premiums paid by E, including the $500 of the premium paid by E in year 5 from the proceeds of the policy owner dividend. In year 5, R is treated as receiving a $500 distribution under the contract, which is taxed pursuant to section 72.

Example 7. (i) The facts are the same as in *Example 2* except that in year 10, E withdraws $100,000 from the cash value of the contract.

(ii) In year 10, R is treated as receiving a $100,000 distribution from the insurance company. This amount is treated as an amount received by R under the contract and taxed pursuant to section 72. This amount reduces R's investment in the contract under section 72(e). R is treated as paying the $100,000 to E as cash compensation, and E must include that amount in gross income less any amounts determined under paragraph (e)(3)(ii) of this section.

Example 8. (i) The facts are the same as in *Example 7* except E receives the proceeds of a $100,000 specified policy loan directly from the insurance company.

(ii) The transfer of the proceeds of the specified policy loan to E is treated as a loan by the insurance company to R. Under the rules of section 72(e), the $100,000 loan is not included in R's income and does not reduce R's investment in the contract. R is treated as paying the $100,000 of loan proceeds to E as cash compensation. E must include that amount in gross income less any amounts determined under paragraph (e)(3)(ii) of this section.

(i) [Reserved]

(j) *Effective date*—(1) *General rule*—(i) *In general.* This section applies to any split-dollar life insurance arrangement (as defined in paragraph (b)(1) or (2) of this section) entered into after September 17, 2003.

(ii) *Determination of when an arrangement is entered into.* For purposes of paragraph (j) of this section, a split-dollar life insurance arrangement is entered into on the latest of the following dates:

(A) The date on which the life insurance contract under the arrangement is issued;

(B) The effective date of the life insurance contract under the arrangement;

(C) The date on which the first premium on the life insurance contract under the arrangement is paid;

(D) The date on which the parties to the arrangement enter into an agreement with regard to the policy; or

(E) The date on which the arrangement satisfies the definition of a split-dollar life insurance arrangement (as defined in paragraph (b)(1) or (2) of this section).

(2) *Modified arrangements treated as new arrangements*—(i) *In general.* For purposes of paragraph (j)(1) of this section, if an arrangement entered into on or before September 17, 2003 is materially modified after September 17, 2003, the arrangement is treated as a new arrangement entered into on the date of the modification.

(ii) *Non-material modifications.* The following is a non-exclusive list of changes that are not material modifications under paragraph (j)(2)(i) of this section (either alone or in conjunction with other changes listed in paragraphs (j)(2)(ii)(A) through (I) of this section)—

(A) A change solely in the mode of premium payment (for example, a change from monthly to quarterly premiums);

(B) A change solely in the beneficiary of the life insurance contract, unless the beneficiary is a party to the arrangement;

(C) A change solely in the interest rate payable under the life insurance contract on a policy loan;

(D) A change solely necessary to preserve the status of the life insurance contract under section 7702;

(E) A change solely to the ministerial provisions of the life insurance contract (for example, a change in the address to send payment);

(F) A change made solely under the terms of any agreement (other than the life insurance contract) that is a part of the split-dollar life insurance arrangement if the change is non-discretionary by the parties and is made pursuant to a binding commitment (whether set forth in the agreement or otherwise) in effect on or before September 17, 2003;

(G) A change solely in the owner of the life insurance contract as a result of a transaction to which section 381(a) applies and in which substantially all of the former owner's assets are transferred to the new owner of the policy;

(H) A change to the policy solely if such change is required by a court or a state insurance commissioner as a result of the insolvency of the insurance company that issued the policy; or

(I) A change solely in the insurance company that administers the policy as a result of an assumption reinsurance transaction between the issuing insurance company and the new insurance company to which the owner and the non-owner were not a party.

(iii) *Delegation to Commissioner.* The Commissioner, in revenue rulings, notices, and other guidance published in the Internal Revenue Bulletin, may provide additional guidance with respect to other modifications that are not material for purposes of paragraph (j)(2)(i) of this section. See §601.601(d)(2)(ii) of this chapter.

[T.D. 9092, 68 FR 54344, Sept. 17, 2003; 68 FR 63735, Nov. 10, 2003]

§ 1.62–1 Adjusted gross income.

(a)–(b) [Reserved]

(c) *Deductions allowable in computing adjusted gross income.* The deductions specified in section 62(a) for purposes of computing adjusted gross income are—

(1) Deductions set forth in §1.62–1T(c); and

(2) Deductions allowable under part VI, subchapter B, chapter 1 of the Internal Revenue Code, (section 161 and following) that consist of expenses paid or incurred by the taxpayer in connection with the performance of services as an employee under a reimbursement or other expense allowance arrangement (as defined in §1.62–2) with his or her employer. For the rules pertaining to expenses paid or incurred in taxable years beginning before January 1, 1989, see §1.62–1T (c)(2) and (f) (as contained in 26 CFR part 1 (§§1.61 to 1.169) revised April 1, 1992).

(d)–(h) [Reserved]

(i) *Effective date.* Paragraph (c) of this section is effective for taxable years beginning on or after January 1, 1989.

[T.D. 8451, 57 FR 57668, Dec. 7, 1992; 57 FR 60568, Dec. 21, 1992]

§ 1.62–1T Adjusted gross income (temporary).

(a) *Basis for determining the amount of certain deductions.* The term ''adjusted gross income'' means the gross income computed under section 61 minus such of the deductions allowed by chapter 1 of the Code as are specified in section 62(a). Adjusted gross income is used as the basis for determining the following:

(1) The limitation on the amount of miscellaneous itemized deductions (under section 67).

(2) The limitation on the amount of the deduction for casualty losses (under section 165(h)(2)),

(3) The limitation on the amount of the deduction for charitable contributions (under section 170(b)(1)),

(4) The limitation on the amount of the deduction for medical and dental expenses (under section 213),

(5) The limitation on the amount of the deduction for qualified retirement contributions for active participants in certain pension plans (under section 219(g)), and

(6) The phase-out of the exemption from the disallowance of passive activity losses and credits (under section 469(i)(3)).

(b) *Double deduction not permitted.* Section 62 (a) merely specifies which of the deductions provided in chapter 1 of the Code shall be allowed in computing adjusted gross income. It does not create any new deductions. The fact that a particular item may be described in more than one of the paragraphs under section 62(a) does not permit the item to be deducted twice in computing adjusted gross income or taxable income.

(c) *Deductions allowable in computing adjusted gross income.* The deductions specified in section 62(a) for purposes of computing adjusted gross income are:

(1) Deductions allowable under chapter 1 of the Code (other than by part VII (section 211 and following), subchapter B of such chapter) that are attributable to a trade or business carried on by the taxpayer not consisting of services performed as an employee;

(2) [Reserved]

(3) For taxable years beginning after December 31, 1986, deductions allowable under section 162 that consist of expenses paid or incurred by a qualified performing artist (as defined in section

62(b)) in connection with the performance by him or her of services in the performing arts as an employee;

(4) Deductions allowable under part VI as losses from the sale or exchange of property;

(5) Deductions allowable under part VI, section 212, or section 611 that are attributable to property held for the production of rents or royalties;

(6) Deductions for depreciation or depletion allowable under sections 167 or 611 to a life tenant of property or to an income beneficiary of property held in trust or to an heir, legatee, or devisee of an estate;

(7) Deductions allowed by section 404 for contributions on behalf of a self-employed individual;

(8) Deductions allowed by section 219 for contributions to an individual retirement account described in section 408(a), or for an individual retirement annuity described in section 408(b);

(9) Deductions allowed by section 402(e)(3) with respect to a lump-sum distribution;

(10) For taxable years beginning after December 31, 1972, deductions allowed by section 165 for losses incurred in any transaction entered into for profit though not connected with a trade or business, to the extent that such losses include amounts forfeited to a bank, mutual savings bank, savings and loan association, building and loan association, cooperative bank or homestead association as a penalty for premature withdrawal of funds from a time savings account, certificate of deposit, or similar class of deposit;

(11) For taxable years beginning after December 31, 1976, deductions for alimony and separate maintenance payments allowed by section 215;

(12) Deductions allowed by section 194 for the amortization of reforestation expenditures; and

(13) Deductions allowed by section 165 for the repayment (made in a taxable year beginning after December 28, 1980) to a trust described in paragraph (9) or (17) of section 501(c) of supplemental unemployment compensation benefits received from such trust if such repayment is required because of the receipt of trade readjustment allowances under section 231 or 232 of the Trade Act of 1974 (19 U.S.C. 2291 and 2292).

(d) *Expenses directly related to a trade or business.* For the purpose of the deductions specified in section 62, the performance of personal services as an employee does not constitute the carrying on of a trade or business, except as otherwise expressly provided. The practice of a profession, not as an employee, is considered the conduct of a trade or business within the meaning of such section. To be deductible for the purposes of determining adjusted gross income, expenses must be those directly, and not those merely remotely, connected with the conduct of a trade or business. For example, taxes are deductible in arriving at adjusted gross income only if they constitute expenditures directly attributable to a trade or business or to property from which rents or royalties are derived. Thus, property taxes paid or incurred on real property used in a trade or business are deductible, but state taxes on net income are not deductible even though the taxpayer's income is derived from the conduct of a trade or business.

(e) *Reimbursed and unreimbursed employee expenses*—(1) *In general.* Expenses paid or incurred by an employee that are deductible from gross income under part VI in computing taxable income (determined without regard to section 67) and for which the employee is reimbursed by the employer, its agent, or third party (for whom the employee performs a benefit as an employee of the employer) under an express agreement for reimbursement or pursuant to an *express* expense allowance arrangement may be deducted from gross income in computing adjusted gross income. Except as provided in paragraphs (e)(2) and (e)(4) of this section, for taxable years beginning after December 31, 1986, if the amount of a reimbursement made by an employer, its agent, or third party to an employee is less than the total amount of the business expenses paid or incurred by the employee, the determination of to which of the employee's business expenses the reimbursement applies and the amount of each expense that is covered by the reimbursement is made on the basis of all of the facts and circumstances of the particular case.

(2) *Facts and circumstances unclear on business expenses for meals and entertainment.* If—

(i) The facts and circumstances do not make clear—

(A) That a reimbursement does not apply to business expenses for meals or entertainment, or

(B) The amount of business expenses for meals or entertainment that is covered by the reimbursement, and

(ii) The employee pays or incurs business expenses for meals or entertainment,

the amount of the reimbursement that applies to such expenses (or portion thereof with respect to which the facts and circumstances are unclear) shall be determined by multiplying the amount of the employee's business expenses for meals and entertainment (or portion thereof with respect to which the facts and circumstances are unclear) by a fraction, the numerator of which is the total amount of the reimbursement (or portion thereof with respect to which the facts and circumstances are unclear) and the denominator of which is the aggregate amount of all the business expenses of the employee (or portion thereof with respect to which the facts and circumstances are unclear).

(3) *Deductibility of unreimbursed expenses.* The amount of expenses that is determined not to be reimbursed pursuant to paragraph (e) (1) or (2) of this section is deductible from adjusted gross income in determining the employee's taxable income subject to the limitations applicable to such expenses (e.g., the 2-percent floor of section 67 and the 80-percent limitation on meal and entertainment expenses provided for in section 274(n)).

(4) *Unreimbursed expenses of State legislators.* For taxable years beginning after December 31, 1986, any portion of the amount allowed as a deduction to State legislators pursuant to section 162(h)1)(B) that is not reimbursed by the State or a third party shall be allocated between lodging and meals in the same ratio as the amounts allowable for lodging and meals under the Federal per diem applicable to the legislator's State capital at the end of the legislator's taxable year (see Appendix 1–A of the Federal Travel Regulations (FTR), which as of March 28, 1988, are contained in GSA Bulletin FPMR A–40, Supplement 20). For purposes of this paragraph (e)(4), the amount allowable for meals under the Federal per diem shall be the amount of the Federal per diem allowable for meals and incidental expenses reduced by $2 per legislative day (or other amount allocated to incidental expenses in 1–7.5(a)(2) of the FTR). The unreimbursed portion of each type of expense is deductible from adjusted gross income in determining the State legislator's taxable income subject to the limitations applicable to such expenses. For example, the unreimbursed portion allocable to meals shall be reduced by 20 percent pursuant to section 274(n) before being subjected to the 2-percent floor of section 67 for purposes of computing the taxable income of a State legislator. See §1.67–1T(a)(2).

(5) *Expenses paid directly by an employer, its agent, or third party.* In the case of an employer, its agent, or a third party who provides property or services to an employee or who pays an employee's expenses directly instead of reimbursing the employee, see section 132 and the regulations thereunder for the income tax treatment of such expenses.

(6) *Examples.* The provisions of this paragraph (e) may be illustrated by the following examples:

Example 1. During 1987, A, an employee, while on business trips away from home pays $300 for travel fares, $200 for lodging and $100 for meals. In addition, A pays $50 for business meals in the area of his place of employment (''local meals''), $250 for continuing education courses, and $100 for business-related entertainment (other than meals). The total amount of the reimbursements received by A for his employee expenses from his employer is $750, and it is assumed that A's expenses meet the deductibility requirements of sections 162 and 274. A includes the amount of the reimbursement in his gross income. A's employer designates the reimbursement to cover in full A's expenses for travel fares, lodging, and meals while away from home, local meals, and entertainment, and no facts or circumstances indicate a contrary intention of the employer. Because the facts and circumstances make clear the amount of A's business expenses for meals and entertainment that is covered by the reimbursement, the reimbursement will be allocated to these expenses. In determining his adjusted gross income under section 62, A may deduct the full amount of the reimbursement for travel fares, lodging, and meals while away from home, local meals, and entertainment. In determining his taxable income under section 63, A may deduct his expenses for continuing education courses to the extent allowable by sections 67 and 162.

Example 2. Assume the facts are the same as in example (1) except that the facts and circumstances make clear that the reimbursement covers all types of deductible expenses but they do not make clear the amount of each type of expense that is covered by the reimbursement. The amount of the reimbursement that is allocated to A's business expenses for meals and entertainment is $187.50. This amount is determined by multiplying the total amount of A's business expenses for meals and entertainment ($250) by the ratio of A's total reimbursement to A's total business expenses ($750/$1,000). The remaining amount of the reimbursement, $562.50 ($750 − $187.50), is allocated to A's business expenses other than meal and entertainment expenses. Therefore, in determining his adjusted gross income under section 62, A may deduct $750 for reimbursed business expenses (including meals and entertainment). In determining his taxable income under section 63, A may deduct (subject to the limitations and conditions of sections 67, 162, and 274) the unreimbursed portion of his expenses for meals and entertainment ($62.50 ($250 − $187.50), and other employee business expenses ($187.50 ($750 − $562.50)).

Example 3. Assume the facts are the same as in example (1) except that the amount of the reimbursement is $500. Assume further that the facts and circumstances make clear that the reimbursement covers $100 of expenses for meals and that the remaining $400 of the reimbursement covers all types of deductible expenses (including any expenses for meals in excess of the $100 already designated) other than expenses for entertainment. The amount of the reimbursement that is allocated to A's business expenses for meals and entertainment is $125. This amount is equal to the sum of the amount of the reimbursement that clearly applies to meals ($100) and the amount of the reimbursement with respect to which the facts are unclear that is allocated to meals ($25). The latter amount is determined by multiplying the total amount of A's business expenses for meals and entertainment with respect to which the facts are unclear ($50) by the ratio of A's total reimbursement with respect to which the facts are unclear to A's total business expenses with respect to which the facts are unclear ($400/$800). The remaining amount of the reimbursement, $375 ($500 − $125) is allocated to A's business expenses other than meals and entertainment. Therefore, in determining his adjusted gross income under section 62, A may deduct $500 for reimbursed business expenses (including meals). In determining his taxable income under section 63, A may deduct (subject to the limitations and conditions of sections 67, 162, and 274) the unreimbursed portion of his expenses for meals ($25 ($150 − $125)), entertainment ($100), and other employee business expenses ($375 ($750 − $375)).

Example 4. During 1987 B, a research scientist, is employed by Corporation X. B gives a speech before members of Association Y, a professional organization of scientists, describing her most recent research findings. Pursuant to a reimbursement arrangement, Y reimburses B for the full amount of her travel fares to the site of the speech and for the full amount of her expenses for lodging and meals while there. B includes the amount of the reimbursement in her gross income. B may deduct the full amount of her travel expenses pursuant to section 62(a)(2)(A) in computing her adjusted gross income.

(f) [Reserved]

(g) *Moving expenses.* For taxable years beginning after December 31, 1986, a taxpayer described in section 217(a) shall not take into account the deduction described in section 217 relating to moving expenses in computing adjusted gross income under section 62 even if the taxpayer is reimbursed for his or her moving expenses. Such a taxpayer shall include the amount of any reimbursement for moving expenses in income pursuant to section 82. The deduction described in section 217 shall be taken into account in computing the taxable income of the taxpayer under section 63. Pursuant to section 67(b)(6), the 2-percent floor described in section 67(a) does not apply to moving expenses.

(h) *Cross-reference.* See 26 CFR 1.62–1 (Rev. as of April 1, 1986) with respect to pre-1987 deductions for travel, meal, lodging, transportation, and other trade or business expenses of an employee, reimbursed expenses of an employee, expenses of an outside salesperson, long-term capital gains, contributions described in section 405(c) to a bond purchase plan on behalf of a self-employed individual, moving expenses, amounts not received as benefits pursuant to section 1379(b)(3), and retirement bonds described in section 409 (allowed by section 219).

[T.D. 8189, 53 FR 9873, Mar. 28, 1988, as amended by T.D. 8276, 54 FR 51024, Dec. 12, 1989; T.D. 8324, 55 FR 51691, Dec. 17, 1990; T.D. 8451, 57 FR 57668, Dec. 7, 1992]

§ 1.62–2 Reimbursements and other expense allowance arrangements.

(a) *Table of contents.* The contents of this section are as follows:

(b) *Scope.* For purposes of determining ''adjusted gross income,'' section 62(a)(2)(A) allows an employee a deduction for expenses allowed by part VI (section 161 and following), subchapter B, chapter 1 of the Code, paid by the employee, in connection with the performance of services as an employee of the employer, under a reimbursement or other expense allowance arrangement with a payor (the employer, its agent, or a third party). Section 62(c) provides that an arrangement will not be treated as a reimbursement or other expense allowance arrangement for purposes of section 62(a)(2)(A) if—

(1) Such arrangement does not require the employee to substantiate the expenses covered by the arrangement to the payor, or

(2) Such arrangement provides the employee the right to retain any amount in excess of the substantiated expenses covered under the arrangement.

This section prescribes rules relating to the requirements of section 62(c).

(c) *Reimbursement or other expense allowance arrangement*—(1) *Defined.* For purposes of §§ 1.62–1, 1.62–1T, and 1.62–2, the phrase ''reimbursement or other expense allowance arrangement'' means an arrangement that meets the requirements of paragraphs (d) (business connection, (e) (substantiation), and (f) (returning amounts in excess of expenses) of this section. A payor may have more than one arrangement with respect to a particular employee, depending on the facts and circumstances. See paragraph (d)(2) of this section (payor treated as having two arrangements under certain circumstances).

(2) *Accountable plans*—(i) *In general.* Except as provided in paragraph (c)(2)(ii) of this section, if an arrangement meets the requirements of paragraphs (d), (e), and (f) of this section, all amounts paid under the arrangement are treated as paid under an ''accountable plan.''

(ii) *Special rule for failure to return excess.* If an arrangement meets the requirements of paragraphs (d), (e), and (f) of this section, but the employee fails to return, within a reasonable period of time, any amount in excess of the amount of the expenses substantiated in accordance with paragraph (e) of this section, only the amounts paid under the arrangement that are not in excess of the substantiated expenses are treated as paid under an accountable plan.

(3) *Nonaccountable plans*—(i) *In general*. If an arrangement does not satisfy one or more of the requirements of paragraphs (d), (e), or (f) of this section, all amounts paid under the arrangement are treated as paid under a ''nonaccountable plan.'' If a payor provides a nonaccountable plan, an employee who receives payments under the plan cannot compel the payor to treat the payments as paid under an accountable plan by voluntarily substantiating the expenses and returning any excess to the payor.

(ii) *Special rule for failure to return excess*. If an arrangement meets the requirements of paragraphs (d), (e), and (f) of this section, but the employee fails to return, within a reasonable period of time, any amount in excess of the amount of the expenses substantiated in accordance with paragraph (e) of this section, the amounts paid under the arrangement that are in excess of the substantiated expenses are treated as paid under a nonaccountable plan.

(4) *Treatment of payments under accountable plans*. Amounts treated as paid under an accountable plan are excluded from the employee's gross income, are not reported as wages or other compensation on the employee's Form W-2, and are exempt from the withholding and payment of employment taxes (Federal Insurance Contributions Act (FICA), Federal Unemployment Tax Act (FUTA), Railroad Retirement Tax Act (RRTA), Railroad Unemployment Repayment Tax (RURT), and income tax.) See paragraph (l) of this section for cross references.

(5) *Treatment of payments under nonaccountable plans*. Amounts treated as paid under a nonaccountable plan are included in the employee's gross income, must be reported as wages or other compensation on the employee's Form W-2, and are subject to withholding and payment of employment taxes (FICA, FUTA, RRTA, RURT, and income tax). See paragraph (h) of this section. Expenses attributable to amounts included in the employee's gross income may be deducted, provided the employee can substantiate the full amount of his or her expenses (*i.e.*, the amount of the expenses, if any, the reimbursement for which is treated as paid under an accountable plan as well as those for which the employee is claiming the deduction) in accordance with §§ 1.274–5T and 1.274(d)–1 or § 1.162–17, but only as a miscellaneous itemized deduction subject to the limitations applicable to such expenses (e.g., the 80-percent limitation on meal and entertainment expenses provided in section 274(n) and the 2-percent floor provided in section 67).

(d) *Business connection*—(1) *In general*. Except as provided in paragraphs (d)(2) and (d)(3) of this section, an arrangement meets the requirements of this paragraph (d) if it provides advances, allowances (including per diem allowances, allowances only for meals and incidental expenses, and mileage allowances), or reimbursements only for business expenses that are allowable as deductions by part VI (section 161 and the following), subchapter B, chapter 1 of the Code, and that are paid or incurred by the employee in connection with the performance of services as an employee of the employer. The payment may be actually received from the employer, its agent, or a third party for whom the employee performs a service as an employee of the employer, and may include amounts charged directly or indirectly to the payor through credit card systems or otherwise. In addition, if both wages and the reimbursement or other expense allowance are combined in a single payment, the reimbursement or other expense allowance must be identified either by making a separate payment or by specifically identifying the amount of the reimbursement or other expense allowance.

(2) *Other bona fide expenses*. If an arrangement provides advances, allowances, or reimbursements for business expenses described in paragraph (d)(1) of this section (*i.e.*, deductible employee business expenses) and for other bona fide expenses related to the employer's business (e.g., travel that is not away from home) that are not deductible under part VI (section 161 and the following), subchapter B, chapter 1

of the Code, the payor is treated as maintaining two arrangements. The portion of the arrangement that provides payments for the deductible employee business expenses is treated as one arrangement that satisfies this paragraph (d). The portion of the arrangement that provides payments for the nondeductible employee expenses is treated as a second arrangement that does not satisfy this paragraph (d) and all amounts paid under this second arrangement will be treated as paid under a nonaccountable plan. See paragraphs (c)(5) and (h) of this section.

(3) *Reimbursement requirement*—(i) *In general*. If a payor arranges to pay an amount to an employee regardless of whether the employee incurs (or is reasonably expected to incur) business expenses of a type described in paragraph (d)(1) or (d)(2) of this section, the arrangement does not satisfy this paragraph (d) and all amounts paid under the arrangement are treated as paid under a nonaccountable plan. See paragraphs (c)(5) and (h) of this section.

(ii) *Per diem allowances*. An arrangement providing a per diem allowance for travel expenses of a type described in paragraph (d)(1) or (d)(2) of this section that is computed on a basis similar to that used in computing the employee's wages or other compensation (e.g., the number of hours worked, miles traveled, or pieces produced) meets the requirements of this paragraph (d) only if, on December 12, 1989, the per diem allowance was identified by the payor either by making a separate payment or by specifically identifying the amount of the per diem allowance, or a per diem allowance computed on that basis was commonly used in the industry in which the employee is employed. See section 274(d) and §1.274(d)–1. A per diem allowance described in this paragraph (d)(3)(ii) may be adjusted in a manner that reasonably reflects actual increases in employee business expenses occurring after December 12, 1989.

(e) *Substantiation*—(1) *In general*. An arrangement meets the requirements of this paragraph (e) if it requires each business expense to be substantiated to the payor in accordance with paragraph (e)(2) or (e)(3) of this section, whichever is applicable, within a reasonable period of time. See §1.274–5T or §1.162–17.

(2) *Expenses governed by section 274(d)*. An arrangement that reimburses travel, entertainment, use of a passenger automobile or other listed property, or other business expenses governed by section 274(d) meets the requirements of this paragraph (e)(2) if information sufficient to satisfy the substantiation requirements of section 274(d) and the regulations thereunder is submitted to the payor. See §1.274–5. Under section 274(d), information sufficient to substantiate the requisite elements of each expenditure or use must be submitted to the payor. For example, with respect to travel away from home, §1.274–5(b)(2) requires that information sufficient to substantiate the amount, time, place, and business purpose of the expense must be submitted to the payor. Similarly, with respect to use of a passenger automobile or other listed property, §1.274–5(b)(6) requires that information sufficient to substantiate the amount, time, use, and business purpose of the expense must be submitted to the payor. *See* §1.274–5(g) and (j), which grant the Commissioner the authority to establish optional methods of substantiating certain expenses. Substantiation of the amount of a business expense in accordance with rules prescribed pursuant to the authority granted by §1.274–5(g) or (j) will be treated as substantiation of the amount of such expense for purposes of this section.

(3) *Expenses not governed by section 274(d)*. An arrangement that reimburses business expenses not governed by section 274(d) meets the requirements of this paragraph (e)(3) if information is submitted to the payor sufficient to enable the payor to identify the specific nature of each expense and to conclude that the expense is attributable to the payor's business activities. Therefore, each of the elements of an expenditure or use must be substantiated to the payor. It is not sufficient if an employee merely aggregates expenses into broad categories (such as ''travel'') or reports individual expenses through the use of vague, nondescriptive terms (such as ''miscellaneous business expenses''). See §1.162–17(b).

(f) *Returning amounts in excess of expenses—(1) In general.* Except as provided in paragraph (f)(2) of this section, an arrangement meets the requirements of this paragraph (f) if it requires the employee to return to the payor within a reasonable period of time may amount paid under the arrangement in excess of the expenses substantiated in accordance with paragraph (e) of this section. The determination of whether an arrangement requires an employee to return amounts in excess of substantiated expenses will depend on the facts and circumstances. An arrangement whereby money is advanced to an employee to defray expenses will be treated as satisfying the requirements of this paragraph (f) only if the amount of money advanced is reasonably calculated not to exceed the amount of anticipated expenditures, the advance of money is made on a day within a reasonable period of the day that the anticipated expenditures are paid or incurred, and any amounts in excess of the expenses substantiated in accordance with paragraph (e) of this section are required to be returned to the payor within a reasonable period of time after the advance is received.

(2) *Per diem or mileage allowances.* The Commissioner may, in his discretion, prescribe rules in pronouncements of general applicability under which a reimbursement or other expense allowance arrangement that provides per diem allowances providing for ordinary and necessary expenses of traveling away from home (exclusive of transportation costs to and from destination) or mileage allowances providing for ordinary and necessary expenses of local travel and tranportation while traveling away from home will be treated as satisfying the requirements of this paragraph (f), even though the arrangement does not require the employee to return the portion of such an allowance that relates to the days or miles of travel substantiated and that exceeds the amount of the employee's expenses deemed substantiated pursuant to rules prescribed under section 274(d), provided the allowance is paid at a rate for each day or mile of travel that is reasonably calculated not to exceed the amount of the employee's expenses or anticipated expenses and the employee is required to return to the payor within a reasonable period of time any portion of such allowance which relates to days or miles of travel not substantiated in accordance with paragraph (e) of this section.

(g) *Reasonable period*—(1) *In general.* The determination of a reasonable period of time will depend on the facts and circumstances.

(2) *Safe harbors*—(i) *Fixed date method.* An advance made within 30 days of when an expense is paid or incurred, an expense substantiated to the payor within 60 days after it is paid or incurred, or an amount returned to the payor within 120 days after an expense is paid or incurred will be treated as having occurred within a reasonable period of time.

(ii) *Periodic statement method.* If a payor provides employees with periodic statements (no less frequently than quarterly) stating the amount, if any, paid under the arrangement in excess of the expenses the employee has substantiated in accordance with paragraph (e) of this section, and requesting the employee to substantiate any additional business expenses that have not yet been substantiated (whether or not such expenses relate to the expenses with respect to which the original advance was paid) and/or to return any amounts remaining unsubstantiated within 120 days of the statement, an expense substantiated or an amount returned within that period will be treated as being substantiated or returned within a reasonable period of time.

(3) *Pattern of overreimbursements.* If, under a reimbursement or other expense allowance arrangement, a payor has a plan or practice to provide amounts to employees in excess of expenses substantiated in accordance with paragraph (e) of this section and to avoid reporting and withholding on such amounts, the payor may not use either of the safe harbors provided in paragraph (g)(2) of this section for any years during which such plan or practice exists.

(h) *Withholding and payment of employment taxes*—(1) *When excluded from wages.* If an arrangement meets the requirements of paragraphs (d), (e), and

(f) of this section, the amounts paid under the arrangement that are not in excess of the expenses substantiated in accordance with paragraph (e) of this section (*i.e.*, the amounts treated as paid under an accountable plan) are not wages and are not subject to withholding and payment of employment taxes. If an arrangement provides advances, allowances, or reimbursements for meal and entertainment expenses and a portion of the payment is treated as paid under a nonaccountable plan under paragraph (d)(2) of this section due solely to section 274(n), then notwithstanding paragraph (h)(2)(ii) of this section, these nondeductible amounts are neither treated as gross income nor subject to withholding and payment of employment taxes.

(2) *When included in wages*—(i) *Accountable plans*—(A) *General rule.* Except as provided in paragraph (h)(2)(i)(B) of this section, if the expenses covered under an arrangement that meets the requirements of paragraphs (d), (e), and (f) of this section are not substantiated to the payor in accordance with paragraph (e) of this section within a reasonable period of time or if any amounts in excess of the substantiated expenses are not returned to the payor in accordance with paragraph (f) of this section within a reasonable period of time, the amount which is treated as paid under a nonaccountable plan under paragraph (c)(3)(ii) of this section is subject to withholding and payment of employment taxes no later than the first payroll period following the end of the reasonable period. A payor may treat any amount not substantiated or returned within the periods specified in paragraph (g)(2) of this section as not substantiated or returned within a reasonable period of time.

(B) *Per diem or mileage allowances*—(*1*) *In general.* If a payor pays a per diem or mileage allowance under an arrangement that meets the requirements of the paragraphs (d), (e), and (f) of this section, the portion, if any, of the allowance paid that relates to days or miles of travel substantiated in accordance with paragraph (e) of this section and that exceeds the amount of the employee's expenses deemed substantiated for such travel pursuant to rules prescribed under section 274(d) and §1.274(d)–1 or §1.274–5T(j) is treated as paid under a nonaccountable plan. See paragraph (c)(3)(ii) of this section. Because the employee is not required to return this excess portion, the reasonable period of time provisions of paragraph (g) of this section (relating to the return of excess amounts) do not apply to this excess portion.

(*2*) *Reimbursements.* Except as provided in paragraph (h)(2)(i)(B)(*4*) of this section, in the case of a per diem or mileage allowance paid as a reimbursement at a rate for each day or mile of travel that exceeds the amounts of the employee's expenses deemed substantiated for a day or mile of travel, the excess portion described in paragraph (h)(2)(i) of this section is subject to withholding and payment of employment taxes in the payroll period in which the payor reimburses the expenses for the days or miles of travel substantiated in accordance with paragraph (e) of this section.

(*3*) *Advances.* Except as provided in paragraph (h)(2)(i)(B)(*4*) of this section, in the case of a per diem or mileage allowance paid as an advance at a rate for each day or mile of travel that exceeds the amount of the employee's expenses deemed substantiated for a day or mile of travel, the excess portion described in paragraph (h)(2)(i) of this section is subject to withholding and payment of employment taxes no later than the first payroll period following the payroll period in which the expenses with respect to which the advance was paid (*i.e.*, the days or miles of travel) are substantiated in accordance with paragraph (e) of this section. The expenses with respect to which the advance was paid must be substantiated within a reasonable period of time. See paragraph (g) of this section.

(*4*) *Special rules.* The Commissioner may, in his discretion, prescribe special rules in pronouncements of general applicability regarding the timing of withholding and payment of employment taxes on per diem and mileage allowances.

(ii) *Nonaccountable plans.* If an arrangement does not satisfy one or more of the requirements of paragraphs (d), (e), or (f) of this section, all amounts paid under the arrangement are wages and are subject to withholding and payment of employment taxes when paid.

(i) *Application*. The requirements of paragraphs (d) (business connection), (e) (substantiation), and (f) (returning amounts in excess of expenses) of this section will be applied on an employee-by-employee basis. Thus, for example, the failure by one employee to substantiate expenses under an arrangement in accordance with paragraph (e) of this section will not cause amounts paid to other employees to be treated as paid under a nonaccountable plan.

(j) *Examples*. The rules contained in this section may be illustrated by the following examples:

Example 1. Reimbursement requirement. Employer S pays its engineers $200 a day. On those days that an engineer travels away from home on business for Employer S, Employer S designates $50 of the $200 as paid to reimburse the engineer's travel expenses. Because Employer S would pay an engineer $200 a day regardless of whether the engineer was traveling away from home, the arrangement does not satisfy the reimbursement requirement of paragraph (d)(3)(i) of this section. Thus, no part of the $50 Employer S designated as a reimbursement is treated as paid under an accountable plan. Rather, all payments under the arrangement are treated as paid under a nonaccountable plan. Employer S must report the entire $200 as wages or other compensation on the employees' Forms W-2 and must withhold and pay employment taxes on the entire $200 when paid.

Example 2. Reimbursement requirement, multiple arrangements. Airline T pays all its employees a salary. Airline T also pays an allowance under an arrangement that otherwise meets the requirements of paragraphs (d), (e), and (f) of this section to its pilots and flight attendants who travel away from their home base airports, whether or not they are ''away from home.'' Because the allowance is paid only to those employees who incur (or are reasonably expected to incur) expenses of a type described in paragraph (d)(1) or (d)(2) of this section, the arrangement satisfies the reimbursement requirement of paragraph (d)(3)(i) of this section. Under paragraph (d)(2) of this section, Airline T is treated as maintaining two arrangements. The portion of the arrangement providing the allowances for away from home travel is treated as an accountable plan. The portion of the arrangement providing the allowances for non-away from home travel is treated as a nonaccountable plan. Airline T must report the non-away from home allowances as wages or other compensation on the employees' Forms W-2 and must withhold and pay employment taxes on these payments when paid.

Example 3. Reimbursement requirement. Corporation R pays all its salespersons a salary. Corporation R also pays a travel allowance under an arrangement that otherwise meets the requirements of paragraphs (d), (e), and (f) of this section. This allowance is paid to all salespersons, including salespersons that Corporation R knows, or has reason to know, do not travel away from their offices on Corporation R business and would not be reasonably expected to incur travel expenses. Because the allowance is not paid only to those employees who incur (or are reasonably expected to incur) expenses of a type described in paragraph (d)(1) or (d)(2) of this section, the arrangement does not satisfy the reimbursement requirement of paragraph (d)(3)(i) of this section. Thus, no part of the allowance Corporation R designated as a reimbursement is treated as paid under an accountable plan. Rather, all payments under the arrangement are treated as paid under a nonaccountable plan. Corporation R must report all payments under the arrangement as wages or other compensation on the employees' Forms W-2 and must withhold and pay employment taxes on the payments when paid.

Example 4. Separate arrangement, miscellaneous expenses. Under an arrangement that meets the requirements of paragraphs (d), (e), and (f) of this section, County U reimburses its employees for lodging and meal expenses incurred when they travel away from home on County U business. For its own convenience, County U also separately pays certain of its employees a $25 monthly allowance to cover the cost of small miscellaneous office expenses. County U does not require its employees to substantiate these miscellaneous expenses and does not require them to return the amounts by which the monthly allowance exceeds the miscellaneous expenses. The monthly allowance arrangement is a nonaccountable plan. County U must report the monthly allowances as wages or other compensation on the employees' Forms W-2 and must withhold and pay employment taxes on the monthly allowances when paid. The nonaccountable plan providing the monthly allowances is treated as separate from the accountable plan providing reimbursements for lodging and meal expenses incurred for travel away from home on County U business.

Example 5. Excessive advances. In anticipation of employee business expenses that Corporation V does not reasonably expect to exceed $400 in any quarter, Corporation V nonetheless advances $1,000 to Employee A for such expenses. Whenever Employee A substantiates an expense in accordance with paragraph (e) of this section, Corporation V provides an additional advance in an amount equal to the amount substantiated, thereby providing a continuing advance of $1,000. Because the amounts advanced under this arrangement are not reasonably calculated so as not to exceed the amount of anticipated expenditures and because the advance of money is not made on a day within a reasonable period of the day that the anticipated expenditures are paid or incurred, the arrangement is a nonaccountable plan. The arrangement fails to satisfy the requirements of paragraphs (d) (business connection) and (f) (reasonable calculation of advances) of this section. Thus, Corporation V must report the entire amount of each advance as wages or other compensation and must withhold and pay employment taxes on the entire amount of each advance when paid.

Example 6. Excess mileage advance. Under an arrangement that meets the requirements of paragraphs (d), (e), and (f) of this section, Employer W pays its employees a mileage allowance at a rate of 30 cents per mile (when the amount deemed substantiated for each mile of travel substantiated is 26 cents per mile) to cover automobile business expenses. The allowance is paid at a rate for each mile of travel that is reasonably calculated not to exceed the amount of the employee's expenses or anticipated expenses. Employer W does not require the return of the portion of the mileage allowance (4 cents) that exceeds the amount deemed substantiated for each mile of travel substantiated in accordance with paragraph (e) of this section. In June, Employer W advances Employee B $150 for 500 miles to be traveled by Employee B during the month. In July, Employee B substantiates 500 miles of business travel. The amount deemed substantiated by Employee B is $130. However, Employer W does not require Employee B to return the remaining $20 of the advance. No later than the first payroll period following the payroll period in which the business miles of travel are substantiated, Employer W must withhold and pay employment taxes on $20 (500 miles × 4 cents per mile).

Example 7. Excess per diem reimbursement. Under an arrangement that meets the requirements of paragraphs (d), (e), and (f) of this section, Employer X pays its employees a per diem allowance to cover lodging, meal, and incidental expenses incurred for travel away from home on Employer X business at a rate equal to 120 percent of the amount deemed substantiated for each day of travel to the localities to which the employees travel. Employer X does not require the employees to return the 20 percent by which the reimbursement for those expenses exceeds the amount deemed substantiated for each day of travel substantiated in accordance with paragraph (e) of this section. Employee C substantiates six days of business travel away from home: Two days in a locality for which the amount deemed substantiated is $100 a day and four days in a locality for which the amount deemed substantiated is $125 a day. Employer X reimburses Employee C $840 for the six days of travel away from home (2×(120%×$100)+4×(120%×$125)), and does not require Employee C to return the excess portion ($140 excess portion = (2 days×$20 ($120−$100)+4 days×$25 ($150-$125)). For the payroll period in which Employer X reimburses the expenses, Employer X must withhold and pay employment taxes on $140.

Example 8. Return Requirement. Employer Y provides expense allowances to certain of its employees to cover business expenses of a type described in paragraph (d)(1) of this section under an arrangement that requires the employees to substantiate their expenses within a reasonable period of time and to return any excess amounts within a reasonable period of time. Each time an employee returns an excess amount to Employer Y, however, Employer Y pays the employee a "bonus" equal to the amount returned by the employee. The arrangement fails to satisfy the requirements of paragraph (f) (returning amounts in excess of expenses) of this section. Thus, Employer Y must report the entire amount of the expense allowance payments as wages or other compensation and must withhold and pay employment taxes on the payments when paid. Compare example (6) (where the employee is not required to return the portion of the mileage allowance that exceeds the amount deemed substantiated for each mile of travel substantiated).

Example 9. Timely substantiation. Employer Z provides a $500 advance to Employee D for a trip away from home on Employer Z business. Employee D incurs $500 in business expenses on the trip. Employer Z uses the periodic statement method safe harbor. At the end of the quarter during which the trip occurred, Employer Z sends a quarterly statement to Employee D stating that $500 was advanced to Employee D during the quarter and that no expenses were substantiated and no excess amounts returned. The statement advises Employee D that Employee D must substantiate any additional business expenses within 120 days of the date of the statement, and must return any unsubstantiated excess within the 120-day period. Employee D fails to substantiate any expenses or to return the excess within the 120-day period. Employer Z treats the $500 as wages and withholds and pays employment taxes on the $500. After the 120-day period has expired, Employee D substantiates the $500 in travel expenses in accordance with paragraph (e) of this section. Employer Z properly reported and withheld and paid employment taxes on the $500 and no adjustments may be made. Employee D must include the $500 in gross income and may deduct the $500 of expenses as a miscellaneous itemized deduction subject to the 2-percent floor provided in section 67.

(k) *Anti-abuse provision.* If a payor's reimbursement or other expense allowance arrangement evidences a pattern of abuse of the rules of section 62(c) and this section, all payments made under the arrangement will be treated as made under a nonaccountable plan.

(l) *Cross references.* For employment tax regulations relating to reimbursement and expense allowance arrangements, see §§31.3121 (a)–3, 31.3231(e)–(3), 31.3306(b)–2, and 31.3401(a)–4, which generally apply to payments made under reimbursement or other expense allowance arrangements received by an employee on or after July 1, 1990 with respect to expenses paid or incurred on or after July 1, 1990. For reporting requirements, see §1.6041–3(i), which generally applies to payments made under reimbursement or other expense allowance arrangements received by an employee on or after January 1, 1989 with respect to expenses paid or incurred on or after January 1, 1989.

(m) *Effective dates.* This section generally applies to payments made under reimbursement or other expense allowance arrangements received by an employee in taxable years of the employee beginning on or after January 1, 1989, with respect to expenses paid or incurred in taxable years beginning on or after January 1, 1989. Paragraph (h) of this section generally applies to payments made under reimbursement or other expense allowance arrangements received by an employee on or after July 1, 1990 with respect to expenses paid or incurred on or after July 1, 1990. Paragraphs (d)(3)(ii) and (h)(2)(i)(B) of this section apply to payments made under reimbursement or other expense allowance arrangements received by an employee on or after January 1, 1991 with respect to expenses paid or incurred on or after January 1, 1991. Paragraph (e)(2) of this section applies to payments made under reimbursement or other expense allowance arrangements received by an employee with respect to expenses paid or incurred after December 31, 1997.

[T.D. 8324, 55 FR 51691, Dec. 17, 1990; 56 FR 8911, Mar. 4, 1991, as amended by T.D. 8451, 57 FR 57668, Dec. 7, 1992; T.D. 8666, 61 FR 27005, May 30, 1996; T.D. 8784, 63 FR 52600, Oct. 1, 1998; T.D. 8864, 65 FR 4122, Jan. 26, 2000; T.D. 9064, 68 FR 39011, July 1, 2003]

§ 1.63–1 Change of treatment with respect to the zero bracket amount and itemized deductions.

(a) *In general.* An individual who files a return on which the individual itemizes deductions in accordance with section 63(g) may later make a change of treatment by recomputing taxable income for the taxable year to which that return relates without itemizing deductions. Similarly, an individual who files a return on which the individual computes taxable income without itemizing deductions may later make a change of treatment by itemizing deductions in accordance with section 63(g) in recomputing taxable income for the taxable year to which that return relates.

(b) *No extension of time for claiming credit or refund.* A change of treatment described in paragraph (a) of this section does not extend the period of time prescribed in section 6511 within which the taxpayer may make a claim for credit or refund of tax.

(c) *Special requirements if spouse filed separate return*—(1) *Requirements.* If the spouse of the taxpayer filed a separate return for a taxable year corresponding to the taxable year of the taxpayer, the taxpayer may not make a change of treatment described in paragraph (a) of this section for that year unless—

(i) The spouse makes a change of treatment on the separate return consistent with the change of treatment sought by the taxpayer; and

(ii) The taxpayer and the taxpayer's spouse file a consent in writing to the assessment of any deficiency of either spouse to the extent attributable to the change of treatment, even though the assessment of the deficiency would otherwise be prevented by the operation of any law or rule of law. The consent must be filed with the district director for the district in which the taxpayer applies for the change of treatment, and the period during which a deficiency may be assessed shall be established by agreement of the spouses and the district director.

(2) *Corresponding taxable year.* A taxable year of one spouse corresponds to a taxable year of the other spouse if both taxable years end in the same calendar year. If the taxable year of one spouse ends with death, however, the

corresponding taxable year of the surviving spouse is that in which the death occurs.

(d) *Inapplicable if tax liability has been compromised.* The taxpayer may not make a change of treatment described in paragraph (a) of this section for any taxable year if—

(1) The tax liability of the taxpayer for the taxable year has been compromised under section 7122; or

(2) The tax liability of the taxpayer's spouse for a taxable year corresponding to the taxable year of the taxpayer has been compromised under section 7122. See paragraph (c)(2) of this section for the determination of a corresponding taxable year.

(e) *Effective date.* This section applies to taxable years beginning after 1976.

[T.D. 7585, 44 FR 1105, Jan. 4, 1979]

§ 1.63–2 Cross reference.

For rules with respect to charitable contribution deductions for nonitemizing taxpayers, see section 63 (b)(1)(C) and (i) and section 170(i) of the Internal Revenue Code of 1954.

(Secs. 170(a)(1) and 7805 of the Internal Revenue Code of 1954 (68A Stat. 58, 26 U.S.C. 170(a)(1); 68A Stat. 917, 26 U.S.C. 7805)

[T.D. 8002, 49 FR 50666, Dec. 31, 1984]

§ 1.66–1 Treatment of community income.

(a) *In general.* Married individuals domiciled in a community property state who do not elect to file a joint individual Federal income tax return under section 6013 generally must report half of the total community income earned by the spouses during the taxable year except at times when one of the following exceptions applies:

(1) The spouses live apart and meet the qualifications of § 1.66–2.

(2) The Secretary denies a spouse the Federal income tax benefits resulting from community property law under § 1.66–3, because that spouse acted as if solely entitled to the income and failed to notify his or her spouse of the nature and amount of the income prior to the due date for the filing of his or her spouse's return.

(3) A requesting spouse qualifies for traditional relief from the Federal income tax liability resulting from the operation of community property law under § 1.66–4(a).

(4) A requesting spouse qualifies for equitable relief from the Federal income tax liability resulting from the operation of community property law under § 1.66–4(b).

(b) *Applicability.* (1) The rules of this section apply only to community income, as defined by state law. The rules of this section do not apply to income that is not community income. Thus, the rules of this section do not apply to income from property that was formerly community property, but in accordance with state law, has ceased to be community property, becoming, e.g., separate property or property held by joint tenancy or tenancy in common.

(2) When taxpayers report income under paragraph (a) of this section, *all* community income for the calendar year is treated in accordance with the rules provided by section 879(a). Unlike the other provisions under section 66, section 66(a) does not permit inclusion on an item-by-item basis.

(c) *Transferee liability.* The provisions of section 66 do not negate liability that arises under the operation of other laws. Therefore, a spouse who is not subject to Federal income tax on community income may nevertheless remain liable for the unpaid tax (including additions to tax, penalties, and interest) to the extent provided by Federal or state transferee liability or property laws (other than community property laws). For the rules regarding the liability of transferees, see sections 6901 through 6904 and the regulations thereunder.

[T.D. 9074, 68 FR 41070, July 10, 2003]

§ 1.66–2 Treatment of community income where spouses live apart.

(a) Community income of spouses domiciled in a community property state will be treated in accordance with the rules provided by section 879(a) if all of the following requirements are satisfied—

(1) The spouses are married to each other at any time during the calendar year;

(2) The spouses live apart at all times during the calendar year;

(3) The spouses do not file a joint return with each other for a taxable year beginning or ending in the calendar year;

(4) One or both spouses have earned income that is community income for the calendar year; and

(5) No portion of such earned income is transferred (directly or indirectly) between such spouses before the close of the calendar year.

(b) *Living apart.* For purposes of this section, living apart requires that spouses maintain separate residences. Spouses who maintain separate residences due to temporary absences are not considered to be living apart. Spouses who are not members of the same household under § 1.6015–3(b) are considered to be living apart for purposes of this section.

(c) *Transferred income.* For purposes of this section, transferred income does not include a *de minimis* amount of earned income that is transferred between the spouses. In addition, any amount of earned income transferred for the benefit of the spouses' child will not be treated as an indirect transfer to one spouse. Additionally, income transferred between spouses is presumed to be a transfer of earned income. This presumption is rebuttable.

(d) *Examples.* The following examples illustrate the rules of this section:

Example 1. Living apart. H and W are married, domiciled in State A, a community property state, and have lived apart the entire year of 2002. W, who is in the Army, was stationed in Korea for the entire calendar year. During their separation, W intended to return home to H, and H intended to live with W upon W's return. H and W do not file a joint return for taxable year 2002. H and W may not report their income under this section because a temporary absence due to military service is not living apart as contemplated under this section.

Example 2. Transfer of earned income—de minimis exception. H and W are married, domiciled in State B, a community property state, and have lived apart the entire year of 2002. H and W are estranged and intend to live apart indefinitely. H and W do not file a joint return for taxable year 2002. H occasionally visits W and their two children, who live with W. When H visits, he often buys gifts for the children, takes the children out to dinner, and occasionally buys groceries or gives W money to buy the children new clothes for school. Both W and H have earned income in the year 2002 that is community income under the laws of State B. H and W may report their income on separate returns under this section.

Example 3. Transfer of earned income—source of transfer. H and W are married, domiciled in State C, a community property state, and have lived apart the entire year of 2002. H and W are estranged and intend to live apart indefinitely. H and W do not file a joint return for taxable year 2002. W provides H $1,000 a month from March 2002 through August 2002 while H is working part-time and seeking full-time employment. W is not legally obligated to make the $1,000 payments. W earns $75,000 in 2002 in wage income. W also receives $10,000 in capital gains income in December 2002. H wants to report his income in accordance with this section, alleging that the $6,000 that he received from W was not from W's earned income, but from the capital gains income W received in 2002. The facts and circumstances surrounding the periodic payments to H from W do not indicate that W made the payments out of her capital gains. H and W may not report their income in accordance with this section, as the $6,000 W transferred to H is presumed to be from W's earned income, and H has not presented any facts to rebut the presumption.

[T.D. 9074, 68 FR 41070, July 10, 2003]

§ 1.66–3 Denial of the Federal income tax benefits resulting from the operation of community property law where spouse not notified.

(a) *In general.* The Secretary may deny the Federal income tax benefits of community property law to any spouse with respect to any item of community income if that spouse acted as if solely entitled to the income and failed to notify his or her spouse of the nature and amount of the income before the due date (including extensions) for the filing of the return of his or her spouse for the taxable year in which the item of income was derived. Whether a spouse has acted as if solely entitled to the item of income is a facts and circumstances determination. This determination focuses on whether the spouse used, or made available, the item of income for the benefit of the marital community.

(b) *Effect.* The item of community income will be included, in its entirety, in the gross income of the spouse to whom the Secretary denied the Federal income tax benefits resulting from community property law. The tax liability arising from the inclusion of the item of community income must be assessed in accordance with section 6212 against this spouse.

(c) *Examples.* The following examples illustrate the rules of this section:

Example 1. Acting as if solely entitled to income. (i) H and W are married and are domiciled in State A, a community property state. W's Form W-2 for taxable year 2000 showed wage income of $35,000. W also received a Form 1099–INT, ''Interest Income,'' showing $1,000 W received in taxable year 2000. W's wage income was directly deposited into H and W's joint account, from which H and W paid bills and household expenses. W did not inform H of her interest income or the Form 1099–INT, but W gave H a copy of the W-2 when she received it in January 2001. W did not use her interest income for bills or household expenses. Instead W gave her interest income to her brother, who was unemployed. Neither the separate return filed by H nor the separate return filed by W included the interest income. In 2002, the IRS audits both H and W. The Internal Revenue Service (IRS) may raise section 66(b) as to W's interest income, denying W the Federal income tax benefit resulting from community property law as to this item of income.

(ii) H and W are married and are domiciled in State B, a community property state. For taxable year 2000, H receives $45,000 in wage income that H places in a separate account. H and W maintain separate residences. H's wage income is community income under the laws of State B. That same year, W loses her job, and H pays W's mortgage and household expenses for several months while W seeks employment. Neither H nor W files a return for 2000, the taxable year for which the IRS subsequently audits them. The IRS may not raise section 66(b) and deny H the Federal income tax benefits resulting from the operation of community property law as to H's wage income of $45,000, as H has not treated this income as if H were solely entitled to it.

Example 2. Notification of nature and amount of the income. H and W are married and domiciled in State C, a community property state. H and W do not file a joint return for taxable year 2001. H's and W's earned income for 2001 is community income under the laws of State C. H receives $50,000 in wage income in 2001. In January 2002, H receives a Form W-2 that erroneously states that H earned $45,000 in taxable year 2001. H provides W a copy of H's Form W-2 in February 2002. W files for an extension prior to April 15, 2002. H receives a corrected Form W-2 reflecting wages of $50,000 in May 2002. H provides a copy of the corrected Form W-2 to W in May 2002. W files a separate return in June 2002, but reports one half of $45,000 ($22,500) of wage income that H earned. H files a separate return reporting half of $50,000 ($25,000) in wage income. The IRS audits both H and W. Even if H had acted as if solely entitled to the wage income, the IRS may not raise section 66(b) as to this income because H notified W of the nature and amount of the income prior to the due date of W's return (including extensions).

[T.D. 9074, 68 FR 41070, July 10, 2003]

§ 1.66–4 Request for relief from the Federal income tax liability resulting from the operation of community property law.

(a) *Traditional relief*—(1) *In general.* A requesting spouse will receive relief from the Federal income tax liability resulting from the operation of community property law for an item of community income if—

(i) The requesting spouse did not file a joint Federal income tax return for the taxable year for which he or she seeks relief;

(ii) The requesting spouse did not include in gross income for the taxable year an item of community income properly includible therein, which, under the rules contained in section 879(a), would be treated as the income of the nonrequesting spouse;

(iii) The requesting spouse establishes that he or she did not know of, and had no reason to know of, the item of community income; and

(iv) Taking into account all of the facts and circumstances, it is inequitable to include the item of community income in the requesting spouse's individual gross income.

(2) *Knowledge or reason to know.* (i) A requesting spouse had knowledge or reason to know of an item of community income if he or she either actually knew of the item of community income, or if a reasonable person in similar circumstances would have known of the item of community income. All of the facts and circumstances are considered in determining whether a requesting spouse had reason to know of an item of community income. The relevant facts and circumstances include, but are not limited to, the nature of the item of community income, the amount of the item of community income relative to other income items, the couple's financial situation, the requesting spouse's educational background and business experience, and

whether the item of community income was reflected on prior years' returns (e.g., investment income omitted that was regularly reported on prior years' returns).

(ii) If the requesting spouse is aware of the source of community income or the income-producing activity, but is unaware of the specific amount of the nonrequesting spouse's community income, the requesting spouse is considered to have knowledge or reason to know of the item of community income. The requesting spouse's lack of knowledge of the specific amount of community income does not provide a basis for relief under this section.

(3) *Inequitable.* All of the facts and circumstances are considered in determining whether it is inequitable to hold a requesting spouse liable for a deficiency attributable to an item of community income. One relevant factor for this purpose is whether the requesting spouse benefitted, directly or indirectly, from the omitted item of community income. A benefit includes normal support, but does not include *de minimis* amounts. Evidence of direct or indirect benefit may consist of transfers of property or rights to property, including transfers received several years after the filing of the return. Thus, for example, if a requesting spouse receives from the nonrequesting spouse property (including life insurance proceeds) that is traceable to items of community income attributable to the nonrequesting spouse, the requesting spouse will have benefitted from those items of community income. Other factors may include, if the situation warrants, desertion, divorce or separation. Factors relevant to whether it would be inequitable to hold a requesting spouse liable, more specifically described under the applicable administrative procedure issued under section 66(c) (Revenue Procedure 2000–15 (2000–1 C.B. 447) (See §601.601(d)(2) of this chapter), or other applicable guidance published by the Secretary), are to be considered in making a determination under this paragraph.

(b) *Equitable relief.* Equitable relief may be available when the four requirements of paragraph (a)(1) of this section are not satisfied, but it would be inequitable to hold the requesting spouse liable for the unpaid tax or deficiency. Factors relevant to whether it would be inequitable to hold a requesting spouse liable, more specifically described under the applicable administrative procedure issued under section 66(c) (Revenue Procedure 2000–15 (2000–1 C.B. 447), or other applicable guidance published by the Secretary), are to be considered in making a determination under this paragraph.

(c) *Applicability.* Traditional relief under paragraph (a) of this section applies only to deficiencies arising out of items of omitted income. Equitable relief under paragraph (b) of this section applies to any deficiency or any unpaid tax (or any portion of either). Equitable relief is available only for the portion of liabilities that were unpaid as of July 22, 1998, and for liabilities that arise after July 22, 1998.

(d) *Effect of relief.* When the requesting spouse qualifies for relief under paragraph (a) or (b) of this section, the IRS must assess any deficiency of the nonrequesting spouse arising from the granting of relief to the requesting spouse in accordance with section 6212.

(e) *Examples.* The following examples illustrate the rules of this section:

Example 1. Item-by-item approach. H and W are married, living together, and domiciled in State A (a community property state). H and W file separate returns for taxable year 2002 on April 15, 2003. H earns $56,000 in wages, and W earns $46,000 in wages, in 2002. H reports half of his wage income as shown on his Form W-2, in the amount of $28,000, and half of W's wage income as shown on her Form W-2, in the amount of $23,000. W reports half of her wage income as shown on her W-2, in the amount of $23,000, and half of H's wage income as shown on his Form W-2, in the amount of $28,000. Neither H nor W reports W's income from her sole proprietorship of $34,000 or W's investment income of $5,000 for taxable year 2002. The Internal Revenue Service (IRS) proposes deficiencies with respect to H's and W's taxable year 2002 returns due to the omission of W's income from her sole proprietorship and investments. H timely requests relief under section 66(c). Because the IRS determines that H satisfies the four requirements of the traditional relief provision of section 66(c) with respect to W's omitted investment income, the IRS grants H's request for relief as to the omitted investment income. The IRS determines that H does not satisfy the four requirements of the traditional relief provision of section 66(c) as to W's sole proprietorship income. The IRS further determines that, under the equitable relief provision of section 66(c), it is not inequitable to hold H liable for the sole proprietorship income. Relief is applicable on an item-by-item basis. Thus, H is liable for the tax on half of his wage income in the amount of $28,000, half of W's wage income in the amount of $23,000, half of W's sole proprietorship income in the amount of $17,000, but none of W's investment income, for which H obtained relief under section 66(c). W is liable for the tax on half of H's wage income in the amount of $28,000, half of W's wage income in the amount of $23,000, half of W's sole proprietorship income in the amount of $17,000, and all of W's investment income in the amount of $5,000, because H obtained relief under section 66(c).

Example 2. Benefit. H and W are married, living together, and domiciled in State B (a community property state). Neither H nor W files a return for taxable year 2000. H earns $60,000 in 2000, which he deposits in a joint account. H and W pay the mortgage payment, household bills, and other family expenses out of the joint account. W earns $20,000 in 2000. W uses a portion of the $20,000 to make monthly loan payments on the family cars, but loses the remainder at the local racetrack. In 2002, the IRS audits H and W. H requests relief under section 66(c), stating that he did not know or have reason to know of W's additional income, as H travels extensively while W handles the family finances. Regardless of whether H had knowledge or reason to know of the source of W's income, H is not eligible for traditional relief under section 66(c) because H benefitted from W's income. H's benefit, the portion of W's income used to make monthly payments on the car loans, was more than a de minimis amount. While this benefit was not in excess of normal support, it is enough to preclude relief under the traditional relief provision of section 66(c). H may still qualify for equitable relief under section 66(c), depending on all of the facts and circumstances.

(f) *Fraudulent scheme.* If the Secretary establishes that a spouse transferred assets to his or her spouse as part of a fraudulent scheme, relief is not available under this section. For purposes of this section, a fraudulent scheme includes a scheme to defraud the Secretary or another third party, such as a creditor, ex-spouse, or business partner.

(g) *Definitions*—(1) *Requesting spouse.* A requesting spouse is an individual who does not file a joint Federal income tax return with the nonrequesting spouse for the taxable year in question, and who requests relief from the Federal income tax liability resulting from the operation of community property law under this section for the portion of the liability arising from his or her share of community income for such taxable year.

(2) *Nonrequesting spouse.* A nonrequesting spouse is the individual to whom the requesting spouse was married and whose income or deduction gave rise to the tax liability from which the requesting spouse seeks relief in whole or in part.

(h) *Effect of prior closing agreement or offer in compromise.* A requesting spouse is not entitled to relief from the Federal income tax liability resulting from the operation of community property law under section 66 for any taxable year for which the requesting spouse has entered into a closing agreement (other than an agreement pursuant to section 6224(c) relating to partnership items) with the Secretary that disposes of the same liability that is the subject of the request for relief. In addition, a requesting spouse is not entitled to relief from the Federal income tax liability resulting from the operation of community property law under section 66 for any taxable year for which the requesting spouse has entered into an offer in compromise with the Secretary. For rules relating to the effect of closing agreements and offers in compromise, see sections 7121 and 7122, and the regulations thereunder.

(i) [Reserved]

(j) *Time and manner for requesting relief*—(1) *Requesting relief.* To request relief from the Federal income tax liability resulting from the operation of community property law under this section, a requesting spouse must file, within the time period prescribed in paragraph (j)(2) of this section, Form 8857, ''Request for Innocent Spouse Relief'' (or other specified form), or other written request, signed under penalties of perjury, stating why relief is appropriate. The requesting spouse must include the nonrequesting spouse's name and taxpayer identification number in the written request. The requesting spouse must also comply with the Secretary's reasonable requests for information that will assist the Secretary in identifying and locating the nonrequesting spouse.

(2) *Time period for filing a request for relief*—(i) *Traditional relief.* The earliest time for submitting a request for relief from the Federal income tax liability resulting from the operation of community property law under paragraph (a) of this section, for an amount underreported on, or omitted from, the requesting spouse's separate return, is the date the requesting spouse receives notification of an audit or a letter or notice from the IRS stating that there may be an outstanding liability with regard to that year (as described in paragraph (j)(2)(iii) of this section). The latest time for requesting relief under paragraph (a) of this section is 6 months before the expiration of the period of limitations on assessment, including extensions, against the nonrequesting spouse for the taxable year that is the subject of the request for relief, unless the examination of the requesting spouse's return commences during that 6-month period. If the examination of the requesting spouse's return commences during that 6-month period, the latest time for requesting relief under paragraph (a) of this section is 30 days after the commencement of the examination.

(ii) *Equitable relief.* The earliest time for submitting a request for relief from the Federal income tax liability resulting from the operation of community property law under paragraph (b) of this section is the date the requesting spouse receives notification of an audit or a letter or notice from the IRS stating that there may be an outstanding liability with regard to that year (as described in paragraph (j)(2)(iii) of this section). A request for equitable relief from the Federal income tax liability resulting from the operation of community property law under paragraph (b) of this section for a liability that is properly reported but unpaid is properly submitted with the requesting spouse's individual Federal income tax return, or after the requesting spouse's individual Federal income tax return is filed.

(iii) *Premature requests for relief.* The Secretary will not consider a premature request for relief under this section. The notices or letters referenced in this paragraph (j)(2) do not include notices issued pursuant to section 6223 relating to TEFRA partnership proceedings. These notices or letters include notices of computational adjustment to a partner or partner's spouse (Notice of Income Tax Examination Changes) that reflect a computation of the liability attributable to partnership items of the partner or the partner's spouse.

(k) *Nonrequesting spouse's notice and opportunity to participate in administrative proceedings*—(1) *In general.* When the Secretary receives a request for relief from the Federal income tax liability resulting from the operation of community property law under this section, the Secretary must send a notice to the nonrequesting spouse's last known address that informs the nonrequesting spouse of the requesting spouse's request for relief. The notice must provide the nonrequesting spouse with an opportunity to submit any information for consideration in determining whether to grant the requesting spouse relief from the Federal income tax liability resulting from the operation of community property law. The Secretary will share with each spouse the information submitted by the other spouse, unless the Secretary determines that the sharing of this information will impair tax administration.

(2) *Information submitted.* The Secretary will consider all of the information (as relevant to the particular relief provision) that the nonrequesting spouse submits in determining whether to grant relief from the Federal income tax liability resulting from the operation of community property law under this section.

[T.D. 9074, 68 FR 41070, July 10, 2003]

§ 1.66–5 Effective date.

Sections 1.66–1 through 1.66–4 are applicable on July 10, 2003. In addition, § 1.66–4 applies to any request for relief filed prior to July 10, 2003, for which the Internal Revenue Service has not issued a preliminary determination as of July 10, 2003.

[T.D. 9074, 68 FR 41070, July 10, 2003]

§ 1.67–1T 2-percent floor on miscellaneous itemized deductions (temporary).

(a) *Type of expenses subject to the floor*—(1) *In general*. With respect to individuals, section 67 disallows deductions for miscellaneous itemized deductions (as defined in paragraph (b) of this section) in computing taxable income (*i.e.*, so-called ''below-the-line'' deductions) to the extent that such otherwise allowable deductions do not exceed 2 percent of the individual's adjusted gross income (as defined in section 62 and the regulations thereunder). Examples of expenses that, if otherwise deductible, are subject to the 2-percent floor include but are not limited to—

(i) Unreimbursed employee expenses, such as expenses for transportation, travel fares and lodging while away from home, business meals and entertainment, continuing education courses, subscriptions to professional journals, union or professional dues, professional uniforms, job hunting, and the business use of the employee's home.

(ii) Expenses for the production or collection of income for which a deduction is otherwise allowable under section 212 (1) and (2), such as investment advisory fees, subscriptions to investment advisory publications, certain attorneys' fees, and the cost of safe deposit boxes,

(iii) Expenses for the determination of any tax for which a deduction is otherwise allowable under section 212(3), such as tax counsel fees and appraisal fees, and

(iv) Expenses for an activity for which a deduction is otherwise allowable under section 183.

See section 62 with respect to deductions that are allowable in computing adjusted gross income (*i.e.*, so-called ''above-the-line'' deductions).

(2) *Other limitations*. Except as otherwise provided in paragraph (d) of this section, to the extent that any limitation or restriction is placed on the amount of a miscellaneous itemized deduction, that limitation shall apply prior to the application of the 2-percent floor. For example, in the case of an expense for food or beverages, only 80 percent of which is allowable as a deduction because of the limitations provided in section 274(n), the otherwise deductible 80 percent of the expense is treated as a miscellaneous itemized deduction and is subject to the 2-percent limitation of section 67.

(b) *Definition of miscellaneous itemized deductions*. For purposes of this section, the term ''miscellaneous itemized deductions'' means the deductions allowable from adjusted gross income in determining taxable income, as defined in section 63, other than—

(1) The standard deduction as defined in section 63(c),

(2) Any deduction allowable for impairment-related work expenses as defined in section 67(d),

(3) The deduction under section 72(b)(3) (relating to deductions if annuity payments cease before the investment is recovered),

(4) The deductions allowable under section 151 for personal exemptions,

(5) The deduction under section 163 (relating to interest),

(6) The deduction under section 164 (relating to taxes),

(7) The deduction under section 165(a) for losses described in subsection (c)(3) or (d) of section 165,

(8) The deduction under section 170 (relating to charitable contributions and gifts),

(9) The deduction under section 171 (relating to deductions for amortizable bond premiums),

(10) The deduction under section 213 (relating to medical and dental expenses),

(11) The deduction under section 216 (relating to deductions in connection with cooperative housing corporations),

(12) The deduction under section 217 (relating to moving expenses),

(13) The deduction under section 691(c) (relating to the deduction for estate taxes in the case of income in respect of the decedent),

(14) The deduction under 1341 (relating to the computation of tax if a taxpayer restores a substantial amount held under claim of right), and

(15) Any deduction allowable in connection with personal property used in a short sale.

(c) *Allocation of expenses*. If a taxpayer incurs expenses that relate to both a trade or business activity (within the meaning of section 162) and a production of income or tax preparation activity (within the meaning of section 212), the taxpayer shall allocate such expenses between the activities on a reasonable basis.

(d) *Members of Congress*—(1) *In general*. With respect to the deduction for living expenses of Members of Congress referred to in section 162(a), the 2-percent floor described in section 67 and paragraph (a) of this section shall be applied to the deduction before the application of the $3,000 limitation on deductions for living expenses referred to in section 162(a). (For purposes of this paragraph (d), the term ''Member(s) of Congress'' includes any Delegate or Resident Commissioner.) The amount of miscellaneous itemized deductions of a Member of Congress that is disallowed pursuant to section 67 and paragraph (a) of this section shall be allocated between deductions for living expenses (within the meaning of section 162(a)) and other miscellaneous itemized deductions. The amount of deductions for living expenses of a Member of Congress that is disallowed pursuant to section 67 and paragraph (a) of this section is determined by multiplying the aggregate amount of such living expenses (determined without regard to the $3,000 limitation of section 162(a) but with regard to any other limitations) by a fraction, the numerator of which is the aggregate amount disallowed pursuant to section 67 and paragraph (a) of this section with respect to miscellaneous itemized deductions of the Member of Congress and the denominator of which is the amount of miscellaneous itemized deductions (including deductions for living expenses) of the Member of Congress (determined without regard to the $3,000 limitation of section 162(a) but without regard to any other limitations). The amount of deductions for miscellaneous itemized deductions (other than deductions for living expenses) of a Member of Congress that are disallowed pursuant to section 67 and paragraph (a) of this section is determined by multiplying the amount of miscellaneous itemized deductions (other than deductions for living expenses) of the Member of Congress (determined with regard to any limitations) by the fraction described in the preceding sentence.

(2) *Example*. The provisions of this paragraph (d) may be illustrated by the following example:

Example. For 1987 A, a Member of Congress, has adjusted gross income of $100,000, and miscellaneous itemized deductions of $10,750 of which $3,750 is for meals, $3,000 is for other living expenses, and $4,000 is for other miscellaneous itemized deductions (none of which is subject to any percentage limitations other than the 2-percent floor of section 67). The amount of A's business meal expenses that are disallowed under section 274(n) is $750 ($3,750×20%). The amount of A's miscellaneous itemized deductions that are disallowed under section 67 is $2,000 ($100,000×2%). The portion of the amount disallowed under section 67 that is allocated to A's living expenses is $1,200. This portion is equal to the amount of A's deductions for living expenses allowable after the application of section 274(n) and before the application of section 67 ($6,000) multiplied by the ratio of A's total miscellaneous itemized deductions disallowed under section 67 to A's total miscellaneous itemized deductions, determined without regard to the $3,000 limitation of section 162(a) ($2,000/$10,000). Thus, after application of section 274(n) and section 67, A's deduction for living expenses is $4,800 ($6,750 − $750 − $1,200). However, pursuant to section 162(a), A may deduct only $3,000 of such expenses. The amount of A's other miscellaneous itemized deductions that are disallowed under section 67 is $800 ($4,000×$2,000/$10,000). Thus, $3,200 ($4,000 − $800) of A's miscellaneous itemized deductions (other than deductions for living expenses) are allowable after application of section 67. A's total allowable miscellaneous itemized deductions are $6,200 ($3,000+$3,200).

(e) *State legislators*. See § 1.62–1T(e)(4) with respect to rules regarding state legislator's expenses.

[T.D. 8189, 53 FR 9875, Mar. 28, 1988]

§ 1.67–2T Treatment of pass-through entities (temporary).

(a) *Application of section 67*. This section provides rules for the application of section 67 to partners, shareholders, beneficiaries, participants, and others with respect to their interests in pass-through entities (as defined in paragraph (g) of this section). In general, an affected investor (as defined in paragraph (h) of this section) in a pass-through entity shall separately take into account as an item of income and as an item of expense an amount equal to his or her allocable share of the affected expenses (as defined in paragraph (i) of this section) of the pass-through entity for purposes of determining his or her taxable income. Except as provided in paragraph (e)(1)(ii)(B) of this section, the expenses so taken into account shall be treated as paid or incurred by the affected investor in the same manner as paid or incurred by the pass-through entity. For rules regarding the application of section 67 to affected investors in—

(1) Partnerships, S corporations, and grantor trusts, see paragraph (b) of this section,

(2) Real estate mortgage investment conduits, see paragraph (c) of this section,

(3) Common trust funds, see paragraph (d) of this section,

(4) Nonpublicly offered regulated investment companies, see paragraph (e) of this section, and

(5) Publicly offered regulated investment companies, see paragraph (p) of this section.

(b) *Partnerships, S corporations, and grantor trusts*—(1) *In general.* Pursuant to section 702(a) and 1366(a) of the Code and the regulations thereunder, each partner of a partnership or shareholder of an S corporation shall take into account separately his or her distributive or pro rata share of any items of deduction of such partnership or corporation that are defined as miscellaneous itemized deductions pursuant to section 67(b). The 2-percent limitation described in section 67 does not apply to the partnership or corporation with respect to such deductions, but such deductions shall be included in the deductions of the partner or shareholder to which that limitation applies. Similarly, the limitation applies to the grantor or other person treated as the owner of a grantor trust with respect to items that are paid or incurred by a grantor trust and are treated as miscellaneous itemized deductions of the grantor or other person pursuant to Subpart E, Part 1, Subchapter J, Chapter 1 of the Code, but not to the trust itself. The 2-percent limitation applies to amounts otherwise deductible in taxable years of partners, shareholders, or grantors beginning after December 31, 1986, regardless of the taxable year of the partnership, corporation, or trust.

(2) *Example.* The provisions of this paragraph (b) may be illustrated by the following example:

Example. P, a partnership, incurs $1,000 in expenses to which section 212 applies during its taxable year. A, an individual, is a partner in P. A's distributive share of the expenses to which section 212 applies is $20, determined without regard to the 2-percent limitation of section 67. Pursuant to section 702(a), A must take $20 of expenses to which section 212 applies into account in determining his income tax. Pursuant to section 67, in determining his taxable income A may deduct his miscellaneous itemized deductions (including his $20 distributive share of deductions from P) to the extent the total amount exceeds 2 percent of his adjusted gross income.

(c) *Real estate mortgage investment conduit.* See §1.67–3T for rules regarding the application of section 67 to holders of interests in REMICs.

(d) *Common trust funds*—(1) *In general.* For purposes of determining the taxable income of an affected investor that is a participant in a common trust fund—

(i) The ordinary taxable income and ordinary net loss of the common trust fund shall be computed under section 584(d)(2) without taking into account any affected expenses, and

(ii) Each affected investor shall be treated as having paid or incurred an expense described in section 212 in an amount equal to the affected investor's proportionate share of the affected expenses.

The 2-percent limitation described in section 67 applies to amounts otherwise deductible in taxable years of participants beginning after December 31, 1986, regardless of the taxable year of the common trust fund.

(2) *Example.* The provisions of this paragraph (d) may be illustrated by the following example:

Example. During 1987, the gross income and deductions of common trust fund C, a calendar year taxpayer, consist of the following items: (i) $50,000 of short-term capital gains; (ii) $150,000 of long-term capital gains; (iii) $1,000,000 of dividend income; (iv) $10,000 of deductions that are not affected expenses; and (v) $60,000 of deductions that are affected expenses. The proportionate share of Trust T in the income and losses of C is one percent. In computing its taxable income for 1987, T, a calendar year taxpayer, shall take into account the following items: (A) $500 of short-term capital gains (one percent of $50,000, C's short-term capital gains); (B) $1,500 of long-term capital gains (one percent of $150,000, C's long-term capital gains); (C) $9,900 of ordinary taxable income (one percent of $990,000, the excess of $100,000, C's gross income after excluding capital gains and losses, over $10,000, C's deductions that are not affected expenses); (D) $600 of expenses described in section 212 (one percent of $60,000, C's affected expenses).

(e) *Nonpublicly offered regulated investment companies*—(1) *In general.* For purposes of determining the taxable income of an affected investor that is a shareholder of a nonpublicly offered regulated investment company (as defined in paragraph (g)(3) of this section) during a calendar year—

(i) The current earnings and profits of the nonpublicly offered regulated investment company shall be computed without taking into account any affected RIC expenses that are allocated among affected investors, and

(ii) The affected investor shall be treated—

(A) As having received or accrued a dividend in an amount equal to the affected investor's allocable share of the affected RIC expenses of the nonpublicly offered regulated investment company for the calendar year, and

(B) As having paid or incurred an expense described in section 212 (or section 162 in the case of an affected investor that is a nonpublicly offered regulated investment company) in an amount equal to the affected investor's allocable share of the affected RIC expenses of the nonpublicly offered regulated investment company for the calendar year

in the affected investor's taxable year with which (or within which) the calendar year with respect to which the expenses are allocated ends. An affected investor's allocable share of the affected RIC expenses is the amount allocated to that affected investor pursuant to paragraph (k) of this section.

(2) *Shareholders that are not affected investors.* A shareholder of a nonpublicly offered regulated investment company that is not an affected investor shall not take into account in computing its taxable income any amount of income or expense with respect to its allocable share of affected RIC expenses.

(3) *Example.* The provisions of this paragraph (e) may be illustrated by the following example:

Example. During calendar year 1987, nonpublicly offered regulated investment company M distributes to individual shareholder A, a calendar year taxpayer, capital gain dividends of $1,000 and other dividends of $5,000. A's allocable share of the affected RIC expenses of M is $200. In computing A's taxable income for 1987, A shall take into account the following items: (i) $1,000 of long-term capital gains (the capital gain dividends received by A); (ii) $5,200 of dividend income (the sum of the other dividends received by A and A's allocable share of the affected RIC expenses of M); and (iii) $200 of expenses described in section 212 (A's allocable share of the affected RIC expenses of M). A is allowed a deduction for miscellaneous itemized deductions (including A's $200 allocable share of the affected RIC expenses of M, which is treated as an expense described in section 212) for 1987 only to the extent the aggregate of such deductions exceeds 2 percent of A's adjusted gross income for 1987.

(f) *Cross-reference.* See §1.67–1T with respect to limitations on deductions for expenses described in section 212 (including amounts treated as such expenses under this section).

(g) *Pass-through entity*—(1) *In general.* Except as provided in paragraph (g)(2) of this section, for purposes of section 67(c) and this section, a pass-through entity is—

(i) A trust (or any portion thereof) to which Subpart E, Part 1, Subchapter J, Chapter 1 of the Code applies,

(ii) A partnership,

(iii) An S corporation,

(iv) A common trust fund described in section 584,

(v) A nonpublicly offered regulated investment company,

(vi) A real estate mortgage investment conduit, and

(vii) Any other person—

(A) Which is not subject to the income tax imposed by Subtitle A, Chapter 1, or which is allowed a deduction in computing such tax for distributions to owners or beneficiaries, and

(B) The character of the income of which may affect the character of the income recognized with respect to that person by its owners or beneficiaries.

Entities that do not meet the requirements of paragraph (g)(1)(vii) (A) and (B) of this section, such as qualified pension plans, individual retirement accounts, and insurance companies holding assets in separate asset accounts to fund variable contracts defined in section 817(d), are not described in this paragraph (g)(1).

(2) *Exception.* For purposes of section 67(c) and this section, a pass-through entity does not include:

(i) An estate;

(ii) A trust (or any portion thereof) not described in paragraph (g)(1)(i) of this section,

(iii) A cooperative described in section 1381(a)(2), determined without regard to subparagraphs (A) and (C) thereof, or

(iv) A real estate investment trust.

(3) *Nonpublicly offered regulated investment company—(i) In general.* For purposes of this section, the term ''nonpublicly offered regulated investment company'' means a regulated investment company to which Part I of Subchapter M of the Code applies that is not a publicly offered regulated investment company.

(ii) *Publicly offered regulated investment company.* For purposes of this section, the term ''publicly offered regulated investment company'' means a regulated investment company to which Part I of Subchapter M of the Code applies the shares of which are—

(A) Continuously offered pursuant to a public offering (within the meaning of section 4 of the Securities Act of 1933, as amended (15 U.S.C. 77a to 77aa)),

(B) Regularly traded on an established securities market, or

(C) Held by or for no fewer than 500 persons at all times during the taxable year.

(h) *Affected investor*—(1) *In general.* For purposes of this section, the term ''affected investor'' means a partner, shareholder, beneficiary, participant, or other interest holder in a pass-through entity at any time during the pass-through entity's taxable year that is—

(i) An individual (other than a nonresident alien whose income with respect to his or her interest in the pass-through entity is not effectively connected with the conduct of a trade or business within the United States),

(ii) A person, including a trust or estate, that computes its taxable income in the same manner as in the case of an individual; or

(iii) A pass-through entity if one or more of its partners, shareholders, beneficiaries, participants, or other interest holders is (A) a pass-through entity or (B) a person described in paragraph (h)(1) (i) or (ii) of this section.

(2) *Examples.* The provisions of this paragraph (h) may be illustrated by the following examples:

Example 1. Corporation X holds shares of nonpublicly offered regulated investment company R in its capacity as a nominee or custodian for individual A, the beneficial owner of the shares. Because the owner of the shares for Federal income tax purposes is an individual, the shares are owned by an affected investor.

Example 2. Individual retirement account I owns shares of a nonpublicly offered regulated investment company. Because an individual retirement account is not a person described in paragraph (h)(1) of this section, the shares are not owned by an affected investor.

(i) *Affected expenses*—(*1*) *In general.* In general, for purposes of this section, the term ''affected expenses'' means expenses that, if paid or incurred by an individual, would be deductible, if at all, as miscellaneous itemized deductions as defined in section 67(b).

(2) *Special rule for nonpublicly offered regulated investment companies.* In the case of a nonpublicly offered regulated investment company, the term ''affected expenses'' means only affected RIC expenses.

(j) *Affected RIC expenses*—(1) *In general.* In general, for purposes of this section the term ''affected RIC expenses'' means the excess of—

(i) The aggregate amount of the expenses (other than expenses described in sections 62(a)(3) and 67(b) and §1.67–1T(b)) paid or incurred in the calendar year that are allowable as a deduction in determining the investment company taxable income (without regard to section 852(b)(2)(D)) of the nonpublicly offered regulated investment company for a taxable year that begins or ends with or within the calendar year, over

(ii) The amount of expenses taken into account under paragraph (j)(1)(i) of this section that are allocable to the following items (whether paid separately or included as part of a fee paid to an investment advisor or other person for a variety of services):

(A) Registration fees;

(B) Directors' or trustees' fees;

(C) Periodic meetings of directors, trustees, or shareholders;

(D) Transfer agent fees;

(E) Legal and accounting fees (other than fees for income tax return preparation or income tax advice); and

(F) Shareholder communications required by law (e.g. the preparation and mailing of prospectuses and proxy statements).

Expenses described in paragraph (j)(1)(ii) (A) through (F) of this section do not include, for example, expenses allocable to investment advice, marketing activities, shareholder communications and other services not specifically described in paragraph (j)(1)(ii) (A) through (F) of this section, and custodian fees.

(2) *Safe harbor.* If a nonpublicly offered regulated investment company makes an election under this paragraph (j)(2), the affected RIC expenses for a calendar year shall be treated as equal to 40 percent of the amount determined under paragraph (j)(1)(i) of this section for that calendar year. The nonpublicly offered regulated investment company shall make the election by attaching to its income tax return for the taxable year that includes the last day of the first calendar year for which the nonpublicly offered regulated investment company makes the election a statement that it is making an election under paragraph (j)(2) of this section. An election made pursuant to this paragraph (j)(2) shall remain in effect for all subsequent calendar years unless revoked with the consent of the Commissioner.

(3) *Reduction for unused RIC expenses.* The amount determined under paragraph (j)(1)(i) of this section shall be reduced by the nonpublicly offered regulated investment company's net operating loss, if any, for the taxable year ending with or within the calendar year. In computing the nonpublicly offered regulated investment company's net operating loss for purposes of this section, the deduction for dividends paid shall not be allowed and any net capital gain for the taxable year shall be excluded.

(4) *Exception.* The affected RIC expenses of a nonpublicly offered regulated investment company will be treated as zero if the amount of its gross income for the calendar year (determined without regard to capital gain net income) is not greater than 1 percent of the sum of (i) such gross income and (ii) the amount of its interest income for the calendar year that is not includible in gross income pursuant to section 103.

(k) *Allocation of expenses among nonpublicly offered regulated investment company shareholders*—(1) *General rule.* A nonpublicly offered regulated investment company shall allocate to each of its affected investors that is a shareholder at any time during the calendar year, the affected investor's allocable share of the affected RIC expenses of the nonpublicly offered regulated investment company for that calendar year. (See paragraph (m) of this section for rules regarding estimates with respect to the amount of an affected investor's share of affected RIC expenses upon which certain persons can rely for certain purposes.) A nonpublicly offered regulated investment company may use any reasonable method to make the allocation. A method of allocation shall not be reasonable if—

(i) The method can be expected to have the effect, if applied to all affected RIC expenses and all shareholders (whether or not affected investors), of allocating to the shareholders an amount of affected RIC expenses that is less than the affected RIC expenses of the nonpublicly offered regulated investment company for the calendar year,

(ii) The method can be expected to have the effect of allocating a disproportionately high share of the affected RIC expenses of the nonpublicly offered regulated investment company to shareholders that are not affected investors or affected investors, the amount of whose miscellaneous itemized deductions (including their allocable share of affected RIC expenses) exceeds the 2-percent floor described in section 67, or

(iii) A principal purpose of the method of allocation is to avoid allocating affected RIC expenses to persons described in paragraph (h)(1) (i) or (ii) of this section whose miscellaneous itemized deductions (inclusive of their allocable share of affected RIC expenses) may not exceed the 2-percent floor described in section 67.

(2) *Reasonable allocation method described*—(i) *In general.* The allocation method described in this paragraph (k)(2) shall be treated as a reasonable allocation method. Under the method described in this paragraph, an affected investor's allocable share of the affected RIC expenses of a nonpublicly offered regulated investment company is the amount that bears the same ratio to the amount of affected RIC expenses of the nonpublicly offered regulated investment company for the calendar year as—

(A) The amount of dividends paid to the affected investor during the calendar year, bears to

(B) The sum of—

(*1*) The aggregate amount of dividends paid by the nonpublicly offered regulated investment company during the calendar year to all shareholders, and

(*2*) Any amount on which tax is imposed under section 852(b)(1) for any taxable year of the nonpublicly offered regulated investment company ending within or with the calendar year.

(ii) *Exception.* Paragraph (k)(2)(i) of this section does not apply if the amount of the deduction for dividends paid during the calendar year is zero.

(iii) *Dividends paid.* For purposes of this paragraph (k)(2)—

(A) Dividends that are treated as paid during a calendar year pursuant to section 852(b)(7) are treated as paid during that calendar year and not during the succeeding calendar year.

(B) The term ''dividends paid'' does not include capital gain dividends (as defined in section 852(b)(3)(C)), exempt-interest dividends (as defined in section 852(b)(5)(A)), or any amount to which section 302(a) applies.

(C) The dividends paid during a calendar year is determined without regard to section 855(a).

(3) *Reasonable allocation made by District Director.* If a nonpublicly offered regulated investment company does not make a reasonable allocation of affected RIC expenses to its affected investors as required by paragraph (k)(1) of this section, a reasonable allocation shall be made by the District Director of the internal revenue district in which the principal place of business or principal office or agency of the nonpublicly offered regulated investment company is located.

(4) *Examples.* The provisions of this paragraph (k) may be illustrated by the following examples:

Example 1. Nonpublicly offered regulated investment company M, in calculating its investment company taxable income, claims a dividends paid deduction for a portion of redemption distributions (to which section 302(a) applies) to shareholders, as well as for nonredemption distributions. M allocates affected expenses among shareholders who have received nonredemption distributions by multiplying the amount of nonredemption distributions distributed to each shareholder by a fraction, the numerator of which is the affected RIC expenses of M and the denominator of which is M's investment company taxable income, determined on a calendar year basis and without regard to deductions described in section 852(b)(2)(D). No affected RIC expenses are allocated with respect to the redemption distributions. This allocation method can be expected to have the effect of allocating among the shareholders an amount of expenses that is less than the total amount of affected RIC expenses of M. Accordingly, the allocation method is not reasonable.

Example 2. Nonpublicly offered regulated investment company N has two classes of stock, a ''capital'' class and an ''income'' class. Owners of the capital class receive the benefit of all capital appreciation on the stocks owned by N, and bear the burden of certain capital expenditures of N; owners of the income class receive the benefit of all other income of N, and bear the burden of all expenses of N that are deductible under section 162. M allocates all affected RIC expenses among shareholders of the income class shares under a method that would be reasonable if the income class were the only class of N stock. Corporations and other shareholders that are not affected investors own a higher proportion of income class shares than of capital class shares. The affected RIC expenses of N are properly allocated among the shareholders who bear the burden of those expenses. Accordingly, the allocation method does not have the effect of allocating a disproportionately high share of the affected RIC expenses of N to shareholders that are not affected investors merely because a disproportionate share of income class shares are owned by shareholders that are not affected investors. The allocation method is reasonable.

Example 3. Nonpublicly offered regulated investment company O has two classes of stock, Class A and Class B. Shares of Class A, which may be purchased without payment of a sales or brokerage commission, are charged with the expenses of a Rule 12b–1 distribution plan of O. Shares of Class B, which may be purchased only upon payment of a sales or brokerage commission, are not charged with the expenses of the Rule 12b–1 distribution plan of O. O allocates all affected RIC expenses among shareholders of Class A and Class B shares under a method that would be reasonable if Class A or Class B shares, respectively, were the only class of O stock. The affected RIC expenses attributable to the Rule 12b–1 plan are allocated to the shareholders of Class A shares. Shareholders that are not affected investors own a higher proportion of Class A shares than of Class B shares. The affected RIC expenses of O are properly allocated among the shareholders who bear the burden of those expenses. Accordingly, the allocation method does not have the effect of allocating a disproportionately high share of the affected RIC expenses of O to shareholders that are not affected investors merely because a disproportionately high share of Class A shares are owned by persons that are not affected investors. The allocation method is reasonable.

Example 4. Assume the facts are the same as in example (3) except that a portion of the affected RIC expenses attributable to the Rule 12b–1 plan are allocated to the shareholders of Class B shares, and shareholders that are not affected investors own a higher proportion of Class B shares than of Class A shares. Thus, the affected RIC expenses are not allocated among the class of shareholders that bear the burden of the expenses. Accordingly, the allocation method has the effect of allocating a disproportionate share of the affected RIC expenses of O to the shareholders of Class B shares. Because shareholders that are not affected investors own a higher proportion of Class B shares than Class A shares, the method can be expected to allocate a disproportionately high share of the affected RIC expenses of O to shareholders that are not affected investors. Accordingly, the allocation method is not reasonable.

(l) *Affected RIC expenses not subject to backup withholding.* The amount of dividend income that an affected investor in a nonpublicly offered regulated investment company is treated as having received or accrued under paragraph (e)(1)(ii) of this section is not subject to backup withholding under section 3406.

(m) *Reliance by nominees and pass-through investors on notices*—(1) *General rule.* Persons described in paragraph (m)(3) of this section may, for the purposes described in that paragraph (m)(3), treat an affected investor's allocable share of the affected RIC expenses of a nonpublicly offered regulated investment company as being equal to an amount determined by the nonpublicly offered regulated investment company on the basis of a reasonable estimate (e.g., of allocable expenses as a percentage of dividend distributions or allocable expenses per share) that is (i) reported in writing by the nonpublicly offered regulated investment company to the person or (ii) reported in a newspaper or financial publication having a nationwide circulation (e.g., the *Wall Street Journal* or *Standard and Poor's Weekly Dividend Record*).

(2) *Estimates must be reasonable.* In general, for purposes of paragraph (m)(1) of this section, estimates of affected RIC expenses of a nonpublicly offered regulated investment company will be treated as reasonable only if the nonpublicly offered regulated investment company makes a reasonable effort to offset material understatements (or overstatements) of affected RIC expenses for a period by increasing (or decreasing) estimates of affected RIC expenses for a subsequent period. Understatements or overstatements of affected RIC expenses that are not material may be corrected by making offsetting adjustments in future periods, provided that understatements and overstatements are treated consistently.

(3) *Application.* Paragraph (m)(1) of this section shall apply to the following persons for the following purposes:

(i) A nominee who, pursuant to section 6042(a)(1)(B) and paragraph (n)(2) of this section, is required to report dividends paid by a nonpublicly offered regulated investment company to the Internal Revenue Service and to the person to whom the payment is made, for purposes of reporting to the Internal Revenue Service and the person to whom the payment is made the amount of affected RIC expenses allocated to such person.

(ii) An affected investor to whom a nominee (to which paragraph (m)(3)(i) of this section applies) reports, for purposes of calculating the affected investor's taxable income and the amount of its affected expenses.

(iii) A shareholder that is a pass-through entity, for purposes of calculating its taxable income and the amount of its affected expenses.

(n) *Return of information and reporting to affected investors by a nonpublicly offered regulated investment company*—(1) *In general*—(i) *Return of information.* A nonpublicly offered regulated investment company shall make an information return (e.g., Form 1099–DIV, Dividends and Distributions, for 1987) with respect to each affected investor to which an allocation of affected RIC expenses is required to be made pursuant to paragraph (k) of this section and for which the nonpublicly offered regulated investment company is required to make an information return to the Internal Revenue Service pursuant to section 6042 (or would be required to make such information return but for the $10 threshold described in section 6042 (a)(1) (A) and (B). The nonpublicly offered regulated investment company shall make the information return for each calendar year and shall state separately on such return—

(A) The amount of affected RIC expenses required to be allocated to the affected investor for the calendar year pursuant to paragraph (k) of this section,

(B) The sum of—

(*1*) The aggregate amount of the dividends paid to the affected investor during the calendar year, and

(*2*) The amount of the affected RIC expenses required to be allocated to the affected investor for the calendar year pursuant to paragraph (k) of this section, and

(C) Such other information as may be specified by the form or its instructions.

(ii) *Statement to be furnished to affected investors.* A nonpublicly offered regulated investment company shall provide to each affected investor for each calendar year (whether or not the nonpublicly offered regulated investment company is required to make an information return with respect to the affected investor pursuant to section 6042), a written statement showing the following information:

(A) The information described in paragraph (n)(1)(i) of this section with respect to the affected investor;

(B) The name and address of the nonpublicly offered regulated investment company;

(C) The name and address of the affected investor; and

(D) If the nonpublicly offered regulated investment company is required to report the amount of the affected investor's allocation of affected RIC expense to the Internal Revenue Service pursuant to paragraph (n)(1)(i) of this section a statement to that effect.

(iii) *Affected investor's shares held by a nominee.* If an affected investor's shares in a nonpublicly offered regulated investment company are held in the name of a nominee, the nonpublicly offered regulated investment company may make the information return described in paragraph (n)(1)(i) of this section with respect to the nominee in lieu of the affected investor and may provide the written statement described in paragraph (n)(1)(ii) of this section to such nominee in lieu of the affected investor.

(2) *By a nominee*—(i) *In general.* Except as otherwise provided for in paragraph (n)(2)(iii) of this section, in any case in which a nonpublicly offered regulated investment company provides, pursuant to paragraph (n)(1)(iii) of this section, a written statement to the nominee of an affected investor for a calendar year, the nominee shall—

(A) If the nominee is required to make an information return pursuant to section 6042 (or would be required to make an information return but for the $10 threshold described in section 6042(a)(1) (A) and (B), make an information return (e.g., Form 1099–DIV, Dividends and Distributions, for 1987) for the calendar year with respect to each affected investor and state separately on such information return the information described in paragraph (n)(1)(i) of this section, and

(B) Furnish each affected investor with a written statement for the calendar year showing the information required by paragraph (n)(2)(ii) of this section (whether or not the nominee is required to make an information return with respect to the affected investor pursuant to section 6042).

(ii) *Form of statement.* The written statement required to be furnished for a calendar year pursuant to paragraph (n)(2)(i)(B) of this section shall show the following information:

(A) The affected investor's proportionate share of the items described in paragraph (n)(1)(i) of this section for the calendar year,

(B) The name and address of the nominee,

(C) The name and address of the affected investor, and

(D) If the nominee is required to report the affected investor's share of the allocable investment expenses to the Internal Revenue Service pursuant to paragraph (n)(2)(i)(A) of this section, a statement to that effect.

(iii) *Return not required.* A nominee is not required to make an information return with respect to an affected investor pursuant to paragraph (n)(2)(i)(A) of this section if the nominee is excluded from the requirements of section 6042 pursuant to §1.6042–2(a)(1) (ii) or (iii).

(iv) *Statement not required.* A nominee is not required to furnish a written statement to an affected investor pursuant to paragraph (n)(2)(i)(B) of this section if the nonpublicly offered regulated investment company furnishes the written statement to the affected investor pursuant to an agreement with the nominee described in §1.6042–2(a)(1)(iii).

(v) *Special rule.* Paragraph (n)(1) (i) and (ii) of this section applies to a nonpublicly offered regulated investment company that agrees with the nominee to satisfy the requirements of section 6042 as described in §1.6042–2(a)(1)(iii) with respect to the affected investor.

(3) *Time and place for furnishing returns.* The returns required by paragraph (n)(1)(i) and (2)(i)(A) of this section for any calendar year shall be filed at the time and place that a return required under section 6042 is required to be filed. See §1.6042–2(c) .

(4) *Time for furnishing statements.* The statements required by paragraph (n)(1)(ii) and (2)(i)(B) of this section to be furnished by a nonpublicly offered regulated investment company and a nominee, respectively, to an affected investor for a calendar year shall be furnished to such affected investor on or before January 31 of the following year.

(5) *Duplicative returns and statements not required*—(i) *Information return.* The requirements of paragraph (n)(1)(i) and (2)(i)(A) of this section for the making of an information return shall be met by the timely filing of an information return pursuant to section 6042 that contains the information required by paragraph (n)(1)(i).

(ii) *Written statement.* The requirements of paragraph (n)(1)(ii) and (2)(i)(B) of this section for the furnishing of a written statement (including the statement required by paragraph (n)(1)(ii)(D) and (2)(ii)(D) of this section) shall be met by furnishing the affected investor a copy of the information return to which section 6042 applies (whether or not the nonpublicly offered regulated investment company or nominee is required to file an information return with respect to the affected investor pursuant to section 6042) that contains the information required by paragraph (n)(1)(ii) or (2)(ii), whichever is applicable, of this section. Nonpublicly offered regulated investment companies and nominees may use a substitute form that contains provisions substantially similar to those of the prescribed form if the nonpublicly offered regulated investment company or nominee complies with all revenue procedures relating to substitute forms in effect at the time. The statement shall be furnished either in person or in a statement mailed by first-class mail that includes adequate notice that the statement is enclosed. A statement shall be considered to be furnished to an affected investor within the meaning of this section if it is mailed to such affected investor at its last known address.

(o) *Return of information by a common trust fund.* With respect to each affected investor to which paragraph (d) of this section applies, the common trust fund shall state on the return it is required to make pursuant to section 6032 for its taxable year, the following information:

(1) The amount of the affected investor's proportionate share of the affected expenses for the taxable year as described in paragraph (d)(1)(ii) of this section.

(2) The amount of the affected investor's proportionate share of ordinary taxable income or ordinary net loss for the taxable year determined pursuant to paragraph (d)(1)(i) of this section, and

(3) Such other information as may be specified by the form or its instructions.

(p) *Publicly offered regulated investment companies.* [Reserved]

[T.D. 8189, 53 FR 9876, Mar. 28, 1988; 53 FR 13464, Apr. 25, 1988]

§ 1.67–3 Allocation of expenses by real estate mortgage investment conduits.

(a) *Allocation of allocable investment expenses.* [Reserved]

(b) *Treatment of allocable investment expenses.* [Reserved]

(c) *Computation of proportionate share.* [Reserved]

(d) *Example.* [Reserved]

(e) *Allocable investment expenses not subject to backup withholding.* [Reserved]

(f) *Notice to pass-through interest holders*—(1) *Information required.* A REMIC must provide to each pass-through interest holder to which an allocation of allocable investment expense is required to be made under §1.67–3T(a)(1) notice of the following—

(i) If, pursuant to paragraph (f)(2)(i) or (ii) of this section, notice is provided for a calendar quarter, the aggregate amount of expenses paid or accrued during the calendar quarter for which the REMIC is allowed a deduction under section 212;

(ii) If, pursuant to paragraph (f)(2)(ii) of this section, notice is provided to a regular interest holder for a calendar year, the aggregate amount of expenses paid or accrued during each calendar quarter that the regular interest holder held the regular interest in the calendar year and for which the REMIC is allowed a deduction under section 212; and

(iii) The proportionate share of these expenses allocated to that pass-through interest holder, as determined under §1.67–3T(c).

(2) *Statement to be furnished*—(i) *To residual interest holder.* For each calendar quarter, a REMIC must provide to each pass-through interest holder who holds a residual interest during the calendar quarter the notice required under paragraph (f)(1) of this section on Schedule Q (Form 1066), as required in §1.860F–4(e).

(ii) *To regular interest holder.* For each calendar year, a single-class REMIC (as described in §1.67–3T(a)(2)(ii)(B)) must provide to each pass-through interest holder who held a regular interest during the calendar year the notice required under paragraph (f)(1) of this section. Quarterly reporting is not required. The information required to be included in the notice may be separately stated on the statement described in §1.6049–7(f) instead of on a separate statement provided in a separate mailing. See §1.6049–7(f)(4). The separate statement provided in a separate mailing must be furnished to each pass-through interest holder no later than the last day of the month following the close of the calendar year.

(3) *Returns to the Internal Revenue Service*—(i) *With respect to residual interest holders.* Any REMIC required under paragraphs (f)(1) and (2)(i) of this section to furnish information to any pass-through interest holder who holds a residual interest must also furnish such information to the Internal Revenue Service as required in §1.860F–4(e)(4).

(ii) *With respect to regular interest holders.* A single-class REMIC (as described in §1.67–3T(a)(2)(ii)(B)) must make an information return on Form 1099 for each calendar year, with respect to each pass-through interest holder who holds a regular interest to which an allocation of allocable investment expenses is required to be made pursuant to §1.67–3T(a)(1) and (2)(ii). The preceding sentence applies with respect to a holder for a calendar year only if the REMIC is required to make an information return to the Internal Revenue Service with respect to that holder for that year pursuant to section 6049 and §1.6049–7(b)(2)(i) (or would be required to make an information return but for the $10 threshold described in section 6049(a)(1) and § 1.6049–7(b)(2)(i)). The REMIC must state on the information return—

(A) The sum of—

(*1*) The aggregate amounts includible in gross income as interest (as defined in § 1.6049–7(a)(1)(i) and (ii)), for the calendar year; and

(*2*) The sum of the amount of allocable investment expenses required to be allocated to the pass-through interest holder for each calendar quarter during the calendar year pursuant to § 1.67–3T(a); and

(B) Any other information specified by the form or its instructions.

(4) *Interest held by nominees and other specified persons*—(i) *Pass-through interest holder's interest held by a nominee.* If a pass-through interest holder's interest in a REMIC is held in the name of a nominee, the REMIC may make the information return described in paragraphs (f)(3)(i) and (ii) of this section with respect to the nominee in lieu of the pass-through interest holder and may provide the written statement described in paragraphs (f)(2)(i) and (ii) of this section to that nominee in lieu of the pass-through interest holder.

(ii) *Regular interests in a single-class REMIC held by certain persons.* If a person specified in § 1.6049–7(e)(4) holds a regular interest in a single-class REMIC (as described in § 1.67–3T(a)(2)(ii)(B)), then the single-class REMIC must provide the information described in paragraphs (f)(1) and (f)(3)(ii)(A) and (B) of this section to that person with the information specified in § 1.6049–7(e)(2) as required in § 1.6049–7(e).

(5) *Nominee reporting*—(i) *In general.* In any case in which a REMIC provides information pursuant to paragraph (f)(4) of this section to a nominee of a pass-through interest holder for a calendar quarter or, as provided in paragraph (f)(2)(ii) of this section, for a calendar year—

(A) The nominee must furnish each pass-through interest holder with a written statement described in paragraph (f)(2)(i) or (ii) of this section, whichever is applicable, showing the information described in paragraph (f)(1) of this section; and

(B) The nominee must make an information return on Form 1099 for each calendar year, with respect to the pass-through interest holder and state on this information return the information described in paragraphs (f)(3)(ii)(A) and (B) of this section, if—

(*1*) The nominee is a nominee for a pass-through interest holder who holds a regular interest in a single-class REMIC (as described in § 1.67–3T(a)(2)(ii)(B)); and

(*2*) The nominee is required to make an information return pursuant to section 6049 and § 1.6049–7 (b)(2)(i) and (b)(2)(ii)(B) (or would be required to make an information return but for the $10 threshold described in section 6049(a)(2) and § 1.6049–7(b)(2)(i)) with respect to the pass-through interest holder.

(ii) *Time for furnishing statement.* The statement required by paragraph (f)(5)(i)(A) of this section to be furnished by a nominee to a pass-through interest holder for a calendar quarter or calendar year must be furnished to this holder no later than 30 days after receiving the written statement described in paragraph (f)(2)(i) or (ii) of this section from the REMIC. If, however, pursuant to paragraph (f)(2)(ii) of this section, the information is separately stated on the statement described in § 1.6049–7(f), then the information must be furnished to the pass-through interest holder in the time specified in § 1.6049–7(f)(5).

(6) *Special rules*—(i) *Time and place for furnishing returns.* The returns required by paragraphs (f)(3)(ii) and (f)(5)(i)(B) of this section for any calendar year must be filed at the time and place that a return required under section 6049 and § 1.6049–7(b)(2) is required to be filed. See § 1.6049–4(g) and § 1.6049–7(b)(2)(iv).

(ii) *Duplicative returns not required.* The requirements of paragraphs (f)(3)(ii) and (f)(5)(i)(B) of this section for the making of an information return are satisfied by the timely filing of an information return pursuant to section 6049 and § 1.6049–7(b)(2) that contains the information required by paragraph (f)(3)(ii) of this section.

[T.D. 8431, 57 FR 40321, Sept. 3, 1992]

§ 1.67–3T Allocation of expenses by real estate mortgage investment conduits (temporary).

(a) *Allocation of allocable investment expenses*—(1) *In general.* A real estate mortgage investment conduit or REMIC (as defined in section 860D) shall allocate to each of its pass-through interest holders that holds an interest at any time during the calendar quarter the holder's proportionate share (as determined under paragraph (c) of this section) of the aggregate amount of allocable investment expenses of the REMIC for the calendar quarter.

(2) *Pass-through interest holder*—(i) *In general*—(A) *Meaning of term.* Except as provided in paragraph (a)(2)(ii) of this section, the term "pass-through interest holder" means any holder of a REMIC residual interest (as definition in section 860G(a)(2)) that is—

(*1*) An individual (other than a nonresident alien whose income with respect to his or her interest in the REMIC is not effectively connected with the conduct of a trade or business within the United States),

(*2*) A person, including a trust or estate, that computes its taxable income in the same manner as in the case of an individual, or

(*3*) A pass-through entity (as defined in paragraph (a)(3) of this section) if one or more of its partners, shareholders, beneficiaries, participants, or other interest holders is (*i*) a pass-through entity or (*ii*) a person described in paragraph (a)(2)(i)(A) (*1*) or (*2*) of this section.

(B) *Examples.* The provisions of this paragraph (a)(2)(i) may be illustrated by the following examples:

Example 1. Corporation X holds a residual interest in REMIC R in its capacity as a nominee or custodian for individual A, the beneficial owner of the interest. Because the owner of the interest for Federal income tax purposes is an individual, the interest is owned by a pass-through interest holder.

Example 2. Individual retirement account I holds a residual interest in a REMIC. Because an individual retirement account is not a person described in paragraph (a)(2)(i)(A) of this section, the interest is not held by a pass-through interest holder.

(ii) *Single-class REMIC*—(A) *In general.* In the case of a single-class REMIC, the term "pass-through interest holder" means any holder of either—

(*1*) A REMIC regular interest (as defined in section 860G(a)(1)), or

(*2*) A REMIC residual interest, that is described in paragraph (a)(2)(i)(A) (*1*), (*2*), or (*3*) of this section.

(B) *Single-class REMIC.* For purposes of paragraph (a)(2)(ii)(A) of this section, a single-class REMIC IS either—

(*1*) A REMIC that would be classified as an investment trust under §301.7701–4(c)(1) but for its qualification as a REMIC under section 860D and §1.860D–1T, or

(*2*) A REMIC that—

(*i*) Is substantially similar to an investment trust under §301.7701–4(c)(1), and

(*ii*) Is structured with the principal purpose of avoiding the requirement of paragraphs (a)(1) and (2)(ii)(A) of this section to allocate allocable investment expenses to pass-through interest holders that hold regular interests in the REMIC.

For purposes of this paragraph (a)(2)(ii)(B), in determining whether a REMIC would be classified as an investment trust or is substantially similar to an investment trust, all interests in the REMIC shall be treated as ownership interests in the REMIC, without regard to whether or not they would be classified as debt for Federal income tax purposes in the absence of a REMIC election.

(C) *Examples.* The provisions of paragraph (a)(2)(ii) of this section must be illustrated by the following examples:

Example 1. Corporation M transfers mortgages to a bank under a trust agreement as described in Example (2) of §301.7701–4(c)(2). There are two classes of certificates. Holders of class C certificates are entitled to receive 90 percent of the payment of principal and interest on the mortgages; holders of class D certificates are entitled to receive the remaining 10 percent. The two classes of certificates are identical except that, in the event of a default on the underlying mortgages, the payment rights of class D certificates holders are subordinated to the rights of class C certificate holders. M sells the class C certificates to investors and retains the class D certificates. The trust would be classified as an investment trust under §301.7701–4(c)(1) but for its qualification a REMIC under section 860D the class C certificates represent regular interests in the

REMIC and the class D certificates represent residual interest in the REMIC. The REMIC is a single-class REMIC within the meaning of paragraph (a)(2)(ii)(B)(*1*) of this section and, accordingly, holders of both the class C and class D certificates who are described in paragraph (a)(2)(i)(A) (*1*), (*2*), or (*3*) of this section are treated as pass-through interest holders.

Example 2. Assume that the facts are the same as in Example (1) except that M structures the REMIC to include a second regular interest represented by class E certificates. The principal purpose of M in structuring the REMIC to include class E certificates is to avoid allocating allocable investment expenses to class C certificate holders. The class E certificate holders are entitled to receive the payments otherwise due the class D certificate holders until they have been paid a stated amount of principal plus interest. The fair market value of the class E certificate is ten percent of the fair market value of the class D certificate and, therefore, less than one percent of the fair market value of the REMIC. The REMIC would not be classified as an investment trust under §301.7701–4(c)(1) because the existence of the class E certificates is not incidental to the trust's purpose of facilitating direct investment in the assets of the trust. Nevertheless, because the fair market value of the class E certificates is de minimis, the REMIC is substantially similar to an investment trust under §301.7701–4(c)(1). In addition, avoidance of the requirement to allocate allocable investment expenses to regular interest holders is the principal purpose of M in structuring the REMIC to include class E certificates. Therefore, the REMIC is a single-class REMIC within the meaning of paragraph (a)(2)(ii)(B)(*2*) of this section, and, accordingly, holders of both residual and regular interests who are described in paragraph (a)(2)(i)(A) (*1*), (*2*), or (*3*) of this section are treated as pass-through interest holders.

(3) *Pass-through entity*—(i) *In general.* Except as provided in paragraph (a)(3)(ii) of this section, for purposes of this section, a pass-through entity is—

(A) A trust (or any portion thereof) to which Subpart E, Part 1, Subchapter J, Chapter 1 of the Code applies,

(B) A partnership,

(C) An S corporation,

(D) A common trust fund described in section 584,

(E) A nonpublicly offered regulated investment company (as defined in paragraph (a)(5)(i) of this section),

(F) A REMIC, and

(G) Any other person—

(*1*) Which is not subject to income tax imposed by Subtitle A, Chapter 1, or which is allowed a deduction in computing such tax for distributions to owners or beneficiaries, and

(*2*) The character of the income of which may affect the character of the income recognized with respect to that person by its owners or beneficiaries.

Entities that do not meet the requirements of paragraphs (a)(3)(i)(G) (*1*) and (*2*), such as qualified pension plans, individual retirement accounts, and insurance companies holding assets in separate asset accounts to fund variable contracts defined in section 817(d), are not described in this paragraph (a)(3)(i).

(ii) *Exception.* For purposes of this section, a pass-through entity does not include—

(A) An estate,

(B) A trust (or any portion thereof) not described in paragraph (a)(3)(i)(A) of this section,

(C) A cooperative described without regard to subparagraphs (A) and (C) thereof, or

(D) A real estate investment trust.

(4) *Allocable investment expenses.* The term ''allocable investment expenses'' means the aggregate amount of the expenses paid or accrued in the calendar quarter for which a deduction is allowable under section 212 in determining the taxable income of the REMIC for the calendar quarter.

(5) *Nonpublicly offered regulated investment company*—(i) *In general.* For purposes of this section, the term ''nonpublicly offered regulated investment company'' means a regulated investment company to which Part I of Subchapter M of the Code applies that is not a publicly offered regulated investment company.

(ii) *Publicly offered regulated investment company.* For purposes of this section, the term ''publicly offered regulated investment company'' means a regulated investment company to which Part I of subchapter M of the Code applies, the shares of which are—

(A) Continuously offered pursuant to a public offering (within the meaning of section 4 of the Securities Act of 1933, as amended (15 U.S.C. 77a to 77aa)),

(B) Regularly traded on an established securities market, or

(C) Held by or for no fewer than 500 persons at all times during the taxable year.

(b) *Treatment of allocable investment expenses*—(1) *By pass-through interest holders*—(i) *Taxable year ending with calendar quarter*. A pass-through interest holder whose taxable year is the calendar year or ends with a calendar quarter shall be treated as having—

(A) Received or accrued income, and

(B) Paid or incurred an expense described in section 212 (or section 162 in the case of a pass-through interest holder that is a regulated investment company), in an amount equal to the pass-through interest holder's proportionate share of the allocable investment expenses of the REMIC for those calendar quarters that fall within the holder's taxable year.

(ii) *Taxable year not ending with calendar quarter*. A pass-through interest holder whose taxable year does not end with a calendar quarter shall be treated as having—

(A) Received or accrued income, and

(B) Paid or incurred an expense described in section 212 (or section 162 in the case of a pass-through interest holder that is a regulated investment company), in an amount equal to the sum of—

(C) The pass-through interest holder's proportionate share of the allocable investment expenses of the REMIC for those calendar quarters that fall within the holder's taxable year, and

(D) For each calendar quarter that overlaps the beginning or end of the taxable year, the sum of the daily amounts of the allocable investment expenses allocated to the holder pursuant to paragraph (c)(1)(ii) of this section for the days in the quarter that fall within the holder's taxable year.

(2) *Proportionate share of allocable investment expenses*. For purposes of paragraph (b) of this section, a pass-through interest holder's proportionate share of the allocable investment expenses is the amount allocated to the pass-through interest holder pursuant to paragraph (a)(1) of this section.

(3) *Cross-reference*. See §1.67–1T with respect to limitations on deductions for expenses described in section 212 (including amounts treated as such expenses under this section).

(4) *Interest income to holders of regular interests in certain REMICs*. Any amount allocated under this section to the holder of a regular interest in a single-class REMIC (as described in paragraph (a)(2)(ii)(B) of this section) shall be treated as interest income.

(5) *No adjustment to basis*. The basis of any holder's interest in a REMIC shall not be increased or decreased by the amount of the holder's proportionate share of allocable investment expenses.

(6) *Interest holders other than pass-through interest holders*. An interest holder of a REMIC that is not a pass-through interest holder shall not take into account in computing its taxable income any amount of income or expense with respect to its proportionate share of allocable investment expenses.

(c) *Computation of proportionate share*—(1) *In general*. For purposes of paragraph (a)(1) of this section, a REMIC shall compute a pass-through interest holder's proportionate share of the REMIC's allocable investment expenses by—

(i) Determining the daily amount of the allocable investment expenses for the calendar quarter by dividing the total amount of such expenses by the number of days in that calendar quarter.

(ii) Allocating the daily amount of the allocable investment expenses to the pass-through interest holder in proportion to its respective holdings on that day, and

(iii) Totaling the interest holder's daily amounts of allocable investment expenses for the calendar quarter.

(2) *Other holders taken into account*. For purposes of paragraph (c)(1)(ii) of this section, a pass-through interest holder's proportionate share of the daily amount of the allocable investment expenses is determined by taking into account all holders of residual interests in the REMIC, whether or not pass-through interest holders.

(3) *Single-class REMIC*—(i) *Daily allocation*. In lieu of the allocation specified in paragraph (c)(1)(ii) of this section, a single-class REMIC (as described in paragraph (a)(2)(ii)(B) of this section) shall allocate the daily

amount of the allocable investment expenses to each pass-through interest holder in proportion to the amount of income accruing to the holder with respect to its interest in the REMIC on that day.

(ii) *Other holders taken into account.* For purposes of paragraph (c)(3)(i) of this section, the amount of the allocable investment expenses that is allocated on any day to each pass-through interest holder shall be determined by multiplying the daily amount of allocable investment expenses (determined pursuant to paragraph (c)(1)(i) of this section) by a fraction, the numerator of which is equal to the amount of income that accrues (but not less than zero) to the pass-through interest holder on that day and the denominator of which is the total amount of income (as determined under paragraph (c)(3)(iii) of this section) that accrues to all regular and residual interest holders, whether or not pass-through interest holders, on that day.

(iii) *Total income accruing.* The total amount of income that accrues to all regular and residual interest holders is the sum of—

(A) The amount includible under section 860B in the gross income (but not less than zero) of the regular interest holders, and

(B) The amount of REMIC taxable income (but not less than zero) taken into account under section 860C by the residual interest holders.

(4) *Dates of purchase and disposition.* For purposes of this section, a pass-through interest holder holds an interest on the date of its purchase but not on the date of its disposition.

(d) *Example.* The provisions of this section may be illustrated by the following example:

Example. (i) During the calendar quarter ending March 31, 1989, REMIC X, which is not a single-class REMIC, incurs $900 of allocable investment expenses. At the beginning of the calendar quarter, X has 4 residual interest holders, who hold equal proportionate shares, and 10 regular interest holders. The residual interest holders, all of whom have calendar-year taxable years, are as follows:

A, an individual,

C, a C corporation that is a nominee for individual I.

S, an S corporation, and

M, a C corporation that is not a nominee.

(ii) Except for A, all of the residual interest holders hold their interests in X for the entire calendar quarter. On January 31, 1989, A sells his interest to S. Thus, for the first month of the calendar quarter, each residual interest holder holds a 25 percent interest (100%/4 interest holders) in X. For the last two months, S's holding is increased to 50 percent and A's holding is decreased to zero. The daily amount of allocable investment expenses for the calendar quarter is $10 ($900/90 days).

(iii) The amount of allocable investment expenses apportioned to the residual interest holders is as follows:

(A) $75 ($10 × 25% × 30 days) is allocated to A for the 30 days that A holds an interest in X during the calendar quarter. A includes $75 in gross income in calendar year 1989. The amount of A's expenses described in section 212 is increased by $75 in calendar year 1989. A's deduction under section 212 (including the $75 amount of the allocation) is subject to the limitations contained in section 67.

(B) $225 ($10 × 25% × 90 days) is allocated to C. Because C is a nominee for I, C does not include $225 in gross income or increase its deductible expenses by $225. Instead, I includes $225 in gross income in calendar year 1989, her taxable year. The amount of I's expenses described in section 212 is increased by $225. I's deduction under section 212 (including the $225 amount of the allocation) is subject to the limitations contained in section 67.

(C) $375 (($10 × 25% × 30 days) + ($10 × 50% × 60 days)) is allocated to S. S includes in gross income $375 of allocable investment expenses in calendar year 1989. The amount of S's expenses described in section 212 for that taxable year is increased by $375. S allocates the $375 to its shareholders in accordance with the rules described in sections 1366 and 1377 in calendar year 1989. Thus, each shareholder of S includes its pro rata share of the $375 in gross income in its taxable year in which or with which calendar year 1989 ends. The amount of each shareholder's expenses described in section 212 is increased by the amount of the shareholder's allocation for the shareholder's taxable year in which or with which calendar year 1989 ends. The shareholder's deduction under section 212 (including the allocation under this section) is subject to the limitations contained in section 67.

(D) No amount is allocated to M. However, M's interest is taken into account for purposes of determining the proportionate share of those residual interest holders to whom an allocation is required to be made.

(iv) No allocation is made to the 10 regular interest holders pursuant to paragraph (a) of this section. In addition, the interests held by these interest holders are not taken into account for purposes of determining the proportionate share of the residual interest holders to whom an allocation is required to be made.

(e) *Allocable investment expenses not subject to backup withholding.* The amount of allocable investment expenses required to be allocated to a pass-through interest holder pursuant to paragraph (a)(1) of this section is not subject to backup withholding under section 3406.

(f) *Notice to pass-through interest holders*—(1) *Information required.* A REMIC must provide to each pass-through interest holder to which an allocation of allocable investment expense is required to be made under paragraph (a)(1) of this section notice of the following—

(i) If, pursuant to paragraph (f)(2) (i) or (ii) of this section, notice is provided for a calendar quarter, the aggregate amount of expenses paid or accrued during the calendar quarter for which the REMIC is allowed a deduction under section 212;

(ii) If, pursuant to paragraph (f)(2)(ii) of this section, notice is provided to a regular interest holder for a calendar year, the aggregate amount of expenses paid or accrued during each calendar quarter that the regular interest holder held the regular interest in the calendar year and for which the REMIC is allowed a deduction under section 212; and

(iii) The proportionate share of these expenses allocated to that pass-through interest holder, as determined under paragraph (c) of this section.

(2) *Statement to be furnished*—(i) *To residual interest holder.* For each calendar quarter, a REMIC shall provide to each pass-through interest holder who holds a residual interest during the calendar quarter the notice required under paragraph (f)(1) of this section on Schedule Q (Form 1066), as required in §1.860F–4(e).

(ii) *To regular interest holder*—(A) *In general.* For each calendar year, a single-class REMIC (as described in paragraph (a)(2)(ii)(B) of this section) must provide to each pass-through interest holder who held a regular interest during the calendar year the notice required under paragraph (f)(1) of this section. Quarterly reporting is not required. The information required to be included in the notice may be separately stated on the statement described in §1.6049–7(f) instead of on a separate statement provided in a separate mailing. See §1.6049–7(f)(4). The separate statement provided in a separate mailing must be furnished to each pass-through interest holder no later than the last day of the month following the close of the calendar year.

(B) *Special rule for 1987.* The information required under paragraph (f)(2)(ii)(A) of this section for any calendar quarter of 1987 shall be mailed (or otherwise delivered) to each pass-through interest holder who holds a regular interest during that calendar quarter no later than March 28, 1988.

(3) *Returns to the Internal Revenue Service*—(i) *With respect to residual interest holders.* Any REMIC required under paragraphs (f)(1) and (2)(i) of this section to furnish information to any pass-through interest holder who holds a residual interest shall also furnish such information to the Internal Revenue Service as required in §1.860F–4(e)(4).

(ii) *With respect to regular interest holders.* A single-class REMIC (as described in paragraph (a)(2)(ii)(B) of this section) shall make an information return on Form 1099 for each calendar year beginning after December 31, 1987, with respect to each pass-through interest holder who holds a regular interest to which an allocation of allocable investment expenses is required to be made pursuant to paragraphs (a)(1) and (2)(ii) of this section. The preceding sentence applies with respect to a holder for a calendar year only if the REMIC is required to make an information return to the Internal Revenue Service with respect to that holder for that year pursuant to section 6049 and §1.6049–7(b)(2)(i) (or would be required to make an information return but for the $10 threshold described in section 6049(a)(1) and §1.6049–7(b)(2)(i)). The REMIC shall state on the information return—

(A) The sum of—

(*1*) The aggregate amounts includible in gross income as interest (as defined in §1.6049–7(a)(1) (i) and (ii)), for the calendar year, and

(*2*) The sum of the amount of allocable investment expenses required to be allocated to the pass-through interest holder for each calendar quarter during the calendar year pursuant to paragraph (a) of this section, and

(B) Any other information specified by the form or its instructions.

(4) *Interest held by nominees and other specified persons*—(i) *Pass-through interest holder's interest held by a nominee.* If a pass-through interest holder's interest in a REMIC is held in the name of a nominee, the REMIC may make the information return described in paragraphs (f)(3) (i) and (ii) of this section with respect to the nominee in lieu of the pass-through interest holder and may provide the written statement described in paragraphs (f)(2) (i) and (ii) of this section to that nominee in lieu of the pass-through interest holder.

(ii) *Regular interests in a single-class REMIC held by certain persons.* For calendar quarters and calendar years after December 31, 1991, if a person specified in §1.6049–7(e)(4) holds a regular interest in a single-class REMIC (as described in paragraph (a)(2)(ii)(B) of this section), then the single-class REMIC must provide the information described in paragraphs (f)(1) and (f)(3)(ii) (A) and (B) of this section to that person with the information specified in §1.6049–7(e)(2) as required in §1.6049–7(e).

(5) *Nominee reporting*—(i) *In general.* In any case in which a REMIC provides information pursuant to paragraph (f)(4) of this section to a nominee of a pass-through interest holder for a calendar quarter or, as provided in paragraph (f)(2)(ii) of this section, for a calendar year—

(A) The nominee shall furnish each pass-through interest holder with a written statement described in paragraph (f)(2) (i) or (ii) of this section, whichever is applicable, showing the information described in paragraph (f)(1) of this section, and

(B) If—

(*1*) The nominee is a nominee for a pass-through interest holder who holds a regular interest in a single-class REMIC (as described in paragraph (a)(2)(ii)(B) of this section), and

(*2*) The nominee is required to make an information return pursuant to section 6049 and §1.6049–7(b)(2)(i) and (b)(2)(ii)(B) (or would be required to make an information return but for the $10 threshold described in section 6049(a)(2) and §1.6049–7(b)(2)(i)) with respect to the pass-through interest holder,

the nominee shall make an information return on Form 1099 for each calendar year beginning after December 31, 1987, with respect to the pass-through interest holder and state on this information return the information described in paragraph (f)(3)(ii) (A) and (B) of this section.

(ii) *Time for furnishing statement.* The statement required by paragraph (f)(5)(i)(A) of this section to be furnished by a nominee to a pass-through interest holder for a calendar quarter or calendar year shall be furnished to this holder no later than 30 days after receiving the written statement described in paragraph (f)(2) (i) or (ii) of this section from the REMIC. If, however, pursuant to paragraph (f)(2)(ii) of this section, the information is separately stated on the statement described in §1.6049–7(f), then the information must be furnished to the pass-through interest holder in the time specified in §1.6049–7(f)(5).

(6) *Special rules*—(i) *Time and place for furnishing returns.* The returns required by paragraphs (f)(3)(ii) and (f)(5)(i)(B) of this section for any calendar year shall be filed at the time and place that a return required under section 6049 and §1.6049–7(b)(2) is required to be filed. See §1.6049–4(g) and §1.6049–7(b)(2)(iv).

(ii) *Duplicative returns not required.* The requirements of paragraphs (f)(3)(ii) and (f)(5)(i)(B) of this section for the making of an information return shall be met by the timely filing of an information return pursuant to section 6049 and §1.6049–7(b)(2) that contains the information required by paragraph (f)(3)(ii) of this section.

[T.D. 8186, 53 FR 7507, Mar. 9, 1988, as amended by T.D. 8366, 56 FR 49515, Sept. 30, 1991]

§ 1.67–4T Allocation of expenses by nongrantor trusts and estates (temporary). [Reserved]

ITEMS SPECIFICALLY INCLUDED IN GROSS INCOME

§ 1.71–1 Alimony and separate maintenance payments; income to wife or former wife.

(a) *In general.* Section 71 provides rules for treatment in certain cases of payments in the nature of or in lieu of alimony or an allowance for support as between spouses who are divorced or separated. For convenience, the payee spouse will hereafter in this section be referred to as the ''wife'' and the spouse from whom she is divorced or separated as the ''husband.'' See section 7701(a)(17). For rules relative to the deduction by the husband of periodic payments not attributable to transferred property, see section 215 and the regulations thereunder. For rules relative to the taxable status of income of an estate or trust in case of divorce, etc., see section 682 and the regulations thereunder.

(b) *Alimony or separate maintenance payments received from the husband*—(1) *Decree of divorce or separate maintenance.* (i) In the case of divorce or legal separation, paragraph (1) of section 71(a) requires the inclusion in the gross income of the wife of periodic payments (whether or not made at regular intervals) received by her after a decree of divorce or of separate maintenance. Such periodic payments must be made in discharge of a legal obligation imposed upon or incurred by the husband because of the marital or family relationship under a court order or decree divorcing or legally separating the husband and wife or a written instrument incident to the divorce status or legal separation status.

(ii) For treatment of payments attributable to property transferred (in trust or otherwise), see paragraph (c) of this section.

(2) *Written separation agreement.* (i) Where the husband and wife are separated and living apart and do not file a joint income tax return for the taxable year, paragraph (2) of section 71(a) requires the inclusion in the gross income of the wife of periodic payments (whether or not made at regular intervals) received by her pursuant to a written separation agreement executed after August 16, 1954. The periodic payments must be made under the terms of the written separation agreement after its execution and because of the marital or family relationship. Such payments are includable in the wife's gross income whether or not the agreement is a legally enforceable instrument. Moreover, if the wife is divorced or legally separated subsequent to the written separation agreement, payments made under such agreement continue to fall within the provisions of section 71(a)(2).

(ii) For purposes of section 71(a)(2) any written separation agreement executed on or before August 16, 1954, which is altered or modified in writing by the parties in any material respect after that date will be treated as an agreement executed after August 16, 1954, with respect to payments made after the date of alteration or modification.

(iii) For treatment of payments attributable to property transferred (in trust or otherwise), see paragraph (c) of this section.

(3) *Decree for support.* (i) Where the husband and wife are separated and living apart and do not file a joint income tax return for the taxable year, paragraph (3) of section 71(a) requires the inclusion in the gross income of the wife of periodic payments (whether or not made at regular intervals) received by her after August 16, 1954, from her husband under any type of court order or decree (including an interlocutory decree of divorce or a decree of alimony pendente lite) entered after March 1, 1954, requiring the husband to make the payments for her support or maintenance. It is not necessary for the wife to be legally separated or divorced from her husband under a court order or decree; nor is it necessary for the order or decree for support to be for the purpose of enforcing a written separation agreement.

(ii) For purposes of section 71(a)(3), any decree which is altered or modified by a court order entered after March 1, 1954, will be treated as a decree entered after such date.

(4) *Scope of section 71(a).* Section 71(a) applies only to payments made because

of the family or marital relationship in recognition of the general obligation to support which is made specific by the decree, instrument, or agreement. Thus, section 71(a) does not apply to that part of any periodic payment which is attributable to the repayment by the husband of, for example, a bona fide loan previously made to him by the wife, the satisfaction of which is specified in the decree, instrument, or agreement as a part of the general settlement between the husband and wife.

(5) *Year of inclusion.* Periodic payments are includible in the wife's income under section 71(a) only for the taxable year in which received by her. As to such amounts, the wife is to be treated as if she makes her income tax returns on the cash receipts and disbursements method, regardless of whether she normally makes such returns on the accrual method. However, if the periodic payments described in section 71(a) are to be made by an estate or trust, such periodic payments are to be included in the wife's taxable year in which they are includible according to the rules as to income of estates and trusts provided in sections 652, 662, and 682, whether or not such payments are made out of the income of such estates or trusts.

(6) *Examples.* The foregoing rules are illustrated by the following examples in which it is assumed that the husband and wife file separate income tax returns on the calendar year basis:

Example 1. W files suit for divorce from H in 1953. In consideration of W's promise to relinquish all marital rights and not to make public H's financial affairs, H agrees in writing to pay $200 a month to W during her lifetime if a final decree of divorce is granted without any provision for alimony. Accordingly, W does not request alimony and no provision for alimony is made under a final decree of divorce entered December 31, 1953. During 1954, H pays W $200 a month, pursuant to the promise. The $2,400 thus received by W is includible in her gross income under the provisions of section 71(a)(1). Under section 215, H is entitled to a deduction of $2,400 from his gross income.

Example 2. During 1945, H and W enter into an antenuptial agreement, under which, in consideration of W's relinquishment of all marital rights (including dower) in H's property, and, in order to provide for W's support and household expenses, H promises to pay W $200 a month during her lifetime. Ten years after their marriage, W sues H for divorce but does not ask for or obtain alimony because of the provision already made for her support in the antenuptial agreement. Likewise, the divorce decree is silent as to such agreement and H's obligation to support W. Section 71(a) does not apply to such a case. If, however, the decree were modified so as to refer to the antenuptial agreement, or if reference had been made to the antenuptial agreement in the court's decree or in a written instrument incident to the divorce status, section 71(a)(1) would require the inclusion in W's gross income of the payments received by her after the decree. Similarly, if a written separation agreement were executed after August 16, 1954, and incorporated the payment provisions of the antenuptial agreement, section 71(a)(2) would require the inclusion in W's income of payments received by W after W begins living apart from H, whether or not the divorce decree was subsequently entered and whether or not W was living apart from H when the separation agreement was executed, provided that such payments were made after such agreement was executed and pursuant to its terms. As to including such payments in W's income, if made by a trust created under the antenuptial agreement, regardless of whether referred to in the decree or a later instrument, or created pursuant to the written separation agreement, see section 682 and the regulations thereunder.

Example 3. H and W are separated and living apart during 1954. W sues H for support and on February 1, 1954, the court enters a decree requiring H to pay $200 a month to W for her support and maintenance. No part of the $200 a month support payments is includible in W's income under section 71(a)(3) or deductible by H under section 215. If, however, the decree had been entered after March 1, 1954, or had been altered or modified by a court order entered after March 1, 1954, the payments received by W after August 16, 1954, under the decree as altered or modified would be includible in her income under section 71(a)(3) and deductible by H under section 215.

Example 4. W sues H for divorce in 1954. On January 15, 1954, the court awards W temporary alimony of $25 a week pending the final decree. On September 1, 1954, the court grants W a divorce and awards her $200 a month permanent alimony. No part of the $25 a week temporary alimony received prior to the decree is includible in W's income under section 71(a), but the $200 a month received during the remainder of 1954 by W is includible in her income for 1954. Under section 215, H is entitled to deduct such $200 payments from his income. If, however, the decree awarding W temporary alimony had been entered after March 1, 1954, or had been altered or modified by a court order entered after March 1, 1954, temporary alimony received by her after August 16, 1954, would be includible in her income under section 71(a)(3) and deductible by H under section 215.

(c) *Alimony and separate maintenance payments attributable to property.* (1)(i) In the case of divorce or legal separation, paragraph (1) of section 71(a) requires the inclusion in the gross income of the wife of periodic payments (whether or not made at regular intervals) attributable to property transferred, in trust or otherwise, and received by her after a decree of divorce or of separate maintenance. Such property must have been transferred in discharge of a legal obligation imposed upon or incurred by the husband because of the marital or family relationship under a decree of divorce or separate maintenance or under a written instrument incident to such divorce status or legal separation status.

(ii) Where the husband and wife are separated and living apart and do not file a joint income tax return for the taxable year, paragraph (2) of section 71(a) requires the inclusion in the gross income of the wife of periodic payments (whether or not made at regular intervals) received by her which are attributable to property transferred, in trust or otherwise, under a written separation agreement executed after August 16, 1954. The property must be transferred because of the marital or family relationship. The periodic payments attributable to the property must be received by the wife after the written separation agreement is executed.

(iii) The periodic payments received by the wife attributable to property transferred under subdivisions (i) and (ii) of this subparagraph and includible in her gross income are not to be included in the gross income of the husband.

(2) The full amount of periodic payments received under the circumstances described in section 71(a) (1), (2), and (3) is required to be included in the gross income of the wife regardless of the source of such payments. Thus, it matters not that such payments are attributable to property in trust, to life insurance, endowment, or annuity contracts, or to any other interest in property, or are paid directly or indirectly by the husband from his income or capital. For example, if in order to meet an alimony or separate maintenance obligation of $500 a month the husband purchases or assigns for the benefit of his wife a commercial annuity contract paying such amount, the full $500 a month received by the wife is includible in her income, and no part of such amount is includible in the husband's income or deductible by him. See section 72(k) and the regulations thereunder. Likewise, if property is transferred by the husband, subject to an annual charge of $5,000, payable to his wife in discharge of his alimony or separate maintenance obligation under the divorce or separation decree or written instrument incident to the divorce status or legal separation status or if such property is transferred pursuant to a written separation agreement and subject to a similar annual charge, the $5,000 received annually is, under section 71(a) (1) or (2), includible in the wife's income, regardless of whether such amount is paid out of income or principal of the property.

(3) The same rule applies to periodic payments attributable to property in trust. The full amount of periodic payments to which section 71(a) (1) and (2) applies is includible in the wife's income regardless of whether such payments are made out of trust income. Such periodic payments are to be included in the wife's income under section 71(a) (1) or (2) and are to be excluded from the husband's income even though the income of the trust would otherwise be includible in his income under Subpart E, Part I, Subchapter J, Chapter 1 of the Code, relating to trust income attributable to grantors and others as substantial owners. As to periodic payments received by a wife attributable to property in trust in cases to which section 71(a) (1) or (2) does not apply because the husband's obligation is not specified in the decree or an instrument incident to the divorce status or legal separation status or the property was not transferred under a written separation agreement, see section 682 and the regulations thereunder.

(4) Section 71(a) (1) or (2) does not apply to that part of any periodic payment attributable to that portion of any interest in property transferred in discharge of the husband's obligation under the decree or instrument incident to the divorce status or legal separation status, or transferred pursuant to the written separation agreement, which interest originally belonged to the wife. It will apply, however, if she received such interest from her husband in contemplation of or as an incident to the divorce or separation without adequate and full consideration in money or money's worth, other than the release of the husband or his property from marital obligations. An example of the first rule is a case where the husband and wife transfer securities, which were owned by them jointly, in trust to pay an annuity to the wife. In this case, the full amount of that part of the annuity received by the wife attributable to the husband's interest in the securities transferred in discharge of his obligation under the decree, or instrument incident to the divorce status or legal separation status, or transferred under the written separation agreement, is taxable to her under section 71(a) (1) or (2), while that portion of the annuity attributable to the wife's interest in the securities so transferred is taxable to her only to the extent it is out of trust income as provided in Part I (sections 641 and following), Subchapter J, Chapter 1 of the Code. If, however, the husband's transfer to his wife is made before such property is transferred in discharge of his obligation under the decree or written instrument, or pursuant to the separation agreement in an attempt to avoid the application of section 71(a) (1) or (2) to part of such payments received by his wife, such transfers will be considered as a part of the same transfer by the husband of his property in discharge of his obligation or pursuant to such agreement. In such a case, section 71(a) (1) or (2) will be applied to the full amount received by the wife. As to periodic payments received under a joint purchase of a commercial annuity contract, see section 72 and the regulations thereunder.

(d) *Periodic and installment payments.* (1) In general, installment payments discharging a part of an obligation the principal sum of which is, in terms of money or property, specified in the decree, instrument, or agreement are not considered ''periodic payments'' and therefore are not to be included under section 71(a) in the wife's income.

(2) An exception to the general rule stated in subparagraph (1) of this paragraph is provided, however, in cases where such principal sum, by the terms of the decree, instrument, or agreement, may be or is to be paid over a period ending more than 10 years from the date of such decree, instrument, or agreement. In such cases, the installment payment is considered a periodic payment for the purposes of section 71(a) but only to the extent that the installment payment, or sum of the installment payments, received during the wife's taxable year does not exceed 10 percent of the principal sum. This 10-percent limitation applies to installment payments made in advance but does not apply to delinquent installment payments for a prior taxable year of the wife made during her taxable year.

(3)(i) Where payments under a decree, instrument, or agreement are to be paid over a period ending 10 years or less from the date of such decree, instrument, or agreement, such payments are not installment payments discharging a part of an obligation the principal sum of which is, in terms of money or property, specified in the decree, instrument, or agreement (and are considered periodic payments for the purposes of section 71(a)) only if such payments meet the following two conditions:

(*a*) Such payments are subject to any one or more of the contingencies of death of either spouse, remarriage of the wife, or change in the economic status of either spouse, and

(*b*) Such payments are in the nature of alimony or an allowance for support.

(ii) Payments meeting the requirements of subdivision (i) are considered periodic payments for the purposes of section 71(a) regardless of whether—

(*a*) The contingencies described in subdivision (i)(*a*) of this subparagraph are set forth in the terms of the decree, instrument, or agreement, or are imposed by local law, or (*b*) The aggregate amount of the payments to be made in the absence of the occurrence of the contingencies described in subdivision (i)(*a*) of this subparagraph is explicitly stated in the decree, instrument, or agreement or may be calculated from the face of the decree, instrument, or agreement, or

(*c*) The total amount which will be paid may be calculated actuarially.

(4) Where payments under a decree, instrument, or agreement are to be paid over a period ending more than ten years from the date of such decree, instrument, or agreement, but where such payments meet the conditions set forth in subparagraph (3)(i) of this paragraph, such payments are considered to be periodic payments for the purpose of section 71 without regard to the rule set forth in subparagraph (2) of this paragraph. Accordingly, the rules set forth in subparagraph (2) of this paragraph are not applicable to such payments.

(5) The rules as to periodic and installment payments are illustrated by the following examples:

Example 1. Under the terms of a written instrument, H is required to make payments to W which are in the nature of alimony, in the amount of $100 a month for nine years. The instrument provides that if H or W dies the payments are to cease. The payments are periodic.

Example 2. The facts are the same as in example (1) except that the written instrument explicitly provides that H is to pay W the sum of $10,800 in monthly payments of $100 over a period of nine years. The payments are periodic.

Example 3. Under the terms of a written instrument, H is to pay W $100 a month over a period of nine years. The monthly payments are not subject to any of the contingencies of death of H or W, remarriage of W, or change in the economic status of H or W under the terms of the written instrument or by reason of local law. The payments are not periodic.

Example 4. A divorce decree in 1954 provides that H is to pay W $20,000 each year for the next five years, beginning with the date of the decree, and then $5,000 each year for the next ten years. Assuming the wife makes her returns on the calendar year basis, each payment received in the years 1954 to 1958, inclusive, is treated as a periodic payment under section 71(a)(1), but only to the extent of 10 percent of the principal sum of $150,000. Thus, for such taxable years, only $15,000 of the $20,000 received is includible under section 71(a)(1) in the wife's income and is deductible by the husband under section 215. For the years 1959 to 1968, inclusive, the full $5,000 received each year by the wife is includible in her income and is deductible from the husband's income.

(e) *Payments for support of minor children.* Section 71(a) does not apply to that part of any periodic payment which, by the terms of the decree, instrument, or agreement under section 71(a), is specifically designated as a sum payable for the support of minor children of the husband. The statute prescribes the treatment in cases where an amount or portion is so fixed but the amount of any periodic payment is less than the amount of the periodic payment specified to be made. In such cases, to the extent of the amount which would be payable for the support of such children out of the originally specified periodic payment, such periodic payment is considered a payment for such support. For example, if the husband is by terms of the decree, instrument, or agreement required to pay $200 a month to his divorced wife, $100 of which is designated by the decree, instrument, or agreement to be for the support of their minor children, and the husband pays only $150 to his wife, $100 is nevertheless considered to be a payment by the husband for the support of the children. If, however, the periodic payments are received by the wife for the support and maintenance of herself and of minor children of the husband without such specific designation of the portion for the support of such children, then the whole of such amounts is includible in the income of the wife as provided in section 71(a). Except in cases of a designated amount or portion for the support of the husband's minor children, periodic payments described in section 71(a) received by the wife for herself and any other person or persons are includible in whole in the wife's income, whether or not the amount or portion for such other person or persons is designated.

§ 1.71–1T Alimony and separate maintenance payments (temporary).

(a) *In general.*

Q–1 What is the income tax treatment of alimony or separate maintenance payments?

A–1 Alimony or separate maintenance payments are, under section 71, included in the gross income of the payee spouse and, under section 215, allowed as a deduction from the gross income of the payor spouse.

Q–2 What is an alimony or separate maintenance payment?

A–2 An alimony or separate maintenance payment is any payment received by or on behalf of a spouse (which for this purpose includes a former spouse) of the payor under a divorce or separation instrument that meets all of the following requirements:

(a) The payment is in cash (see A–5).

(b) The payment is not designated as a payment which is excludible from the gross income of the payee and nondeductible by the payor (see A–8).

(c) In the case of spouses legally separated under a decree of divorce or separate maintenance, the spouses are not members of the same household at the time the payment is made (see A–9).

(d) The payor has no liability to continue to make any payment after the death of the payee (or to make any payment as a substitute for such payment) and the divorce or separation instrument states that there is no such liability (see A–10).

(e) The payment is not treated as child support (see A–15).

(f) To the extent that one or more annual payments exceed $10,000 during any of the 6-post-separation years, the payor is obligated to make annual payments in each of the 6-post-separation years (see A–19).

Q–3 In order to be treated as alimony or separate maintenance payments, must the payments be ''periodic'' as that term was defined prior to enactment of the Tax Reform Act of 1984 or be made in discharge of a legal obligation of the payor to support the payee arising out of a marital or family relationship?

A–3 No. The Tax Reform Act of 1984 replaces the old requirements with the requirements described in A–2 above. Thus, the requirements that alimony or separate maintenance payments be ''periodic'' and be made in discharge of a legal obligation to support arising out of a marital or family relationship have been eliminated.

Q–4 Are the instruments described in section 71(a) of prior law the same as divorce or separation instruments described in section 71, as amended by the Tax Reform Act of 1984?

A–4 Yes.

(b) *Specific requirements.*

Q–5 May alimony or separate maintenance payments be made in a form other than cash?

A–5 No. Only cash payments (including checks and money orders payable on demand) qualify as alimony or separate maintenance payments. Transfers of services or property (including a debt instrument of a third party or an annuity contract), execution of a debt instrument by the payor, or the use of property of the payor do not qualify as alimony or separate maintenance payments.

Q–6 May payments of cash to a third party on behalf of a spouse qualify as alimony or separate maintenance payments if the payments are pursuant to the terms of a divorce or separation instrument?

A–6 Yes. Assuming all other requirements are satisfied, a payment of cash by the payor spouse to a third party under the terms of the divorce or separation instrument will qualify as a payment of cash which is received ''on behalf of a spouse''. For example, cash payments of rent, mortgage, tax, or tuition liabilities of the payee spouse made under the terms of the divorce or separation instrument will qualify as alimony or separate maintenance payments. Any payments to maintain property owned by the payor spouse and used by the payee spouse (including mortgage payments, real estate taxes and insurance premiums) are not payments on behalf of a spouse even if those payments are made pursuant to the terms of the divorce or separation instrument. Premiums paid by the payor spouse for term or whole life insurance on the payor's life made under the terms of the divorce or separation instrument will qualify as payments on behalf of the payee spouse to the extent that the payee spouse is the owner of the policy.

Q–7 May payments of cash to a third party on behalf of a spouse qualify as alimony or separate maintenance payments if the payments are made to the third party at the written request of the payee spouse?

A–7 Yes. For example, instead of making an alimony or separate maintenance payment directly to the payee, the payor spouse may make a cash payment to a charitable organization if such payment is pursuant to the written request, consent or ratification of the payee spouse. Such request, consent or ratification must state that the parties intend the payment to be treated as an alimony or separate maintenance payment to the payee spouse subject to the rules of section 71, and must be received by the payor spouse prior to the date of filing of the payor's first return of tax for the taxable year in which the payment was made.

Q–8 How may spouses designate that payments otherwise qualifying as alimony or separate maintenance payments shall be excludible from the gross income of the payee and nondeductible by the payor?

A–8 The spouses may designate that payments otherwise qualifying as alimony or separate maintenance payments shall be nondeductible by the payor and excludible from gross income by the payee by so providing in a divorce or separation instrument (as defined in section 71(b)(2)). If the spouses have executed a written separation agreement (as described in section 71(b)(2)(B)), any writing signed by both spouses which designates otherwise qualifying alimony or separate maintenance payments as nondeductible and excludible and which refers to the written separation agreement will be treated as a written separation agreement (and thus a divorce or separation instrument) for purposes of the preceding sentence. If the spouses are subject to temporary support orders (as described in section 71(b)(2)(C)), the designation of otherwise qualifying alimony or separate payments as nondeductible and excludible must be made in the original or a subsequent temporary support order. A copy of the instrument containing the designation of payments as not alimony or separate maintenance payments must be attached to the payee's first filed return of tax (Form 1040) for each year in which the designation applies.

Q–9 What are the consequences if, at the time a payment is made, the payor and payee spouses are members of the same household?

A–9 Generally, a payment made at the time when the payor and payee spouses are members of the same household cannot qualify as an alimony or separate maintenance payment if the spouses are legally separated under a decree of divorce or of separate maintenance. For purposes of the preceding sentence, a dwelling unit formerly shared by both spouses shall not be considered two separate households even if the spouses physically separate themselves within the dwelling unit. The spouses will not be treated as members of the same household if one spouse is preparing to depart from the household of the other spouse, and does depart not more than one month after the date the payment is made. If the spouses are not legally separated under a decree of divorce or separate maintenance, a payment under a written separation agreement or a decree described in section 71(b)(2)(C) may qualify as an alimony or separate maintenance payment notwithstanding that the payor and payee are members of the same household at the time the payment is made.

Q–10 Assuming all other requirements relating to the qualification of certain payments as alimony or separate maintenance payments are met, what are the consequences if the payor spouse is required to continue to make the payments after the death of the payee spouse?

A–10 None of the payments before (or after) the death of the payee spouse qualify as alimony or separate maintenance payments.

Q–11 What are the consequences if the divorce or separation instrument fails to state that there is no liability for any period after the death of the payee spouse to continue to make any payments which would otherwise qualify as alimony or separate maintenance payments?

A–11 If the instrument fails to include such a statement, none of the payments, whether made before or after the death of the payee spouse, will qualify as alimony or separate maintenance payments.

Example 1. A is to pay B $10,000 in cash each year for a period of 10 years under a divorce or separation instrument which does not state that the payments will terminate upon the death of B. None of the payments will qualify as alimony or separate maintenance payments.

Example 2. A is to pay B $10,000 in cash each year for a period of 10 years under a divorce or separation instrument which states that the payments will terminate upon the death of B. In addition, under the instrument, A is to pay B or B's estate $20,000 in cash each year for a period of 10 years. Because the $20,000 annual payments will not terminate upon the death of B, these payments will not qualify as alimony or separate maintenance payments. However, the separate $10,000 annual payments will qualify as alimony or separate maintenance payments.

Q–12 Will a divorce or separation instrument be treated as stating that there is no liability to make payments after the death of the payee spouse if the liability to make such payments terminates pursuant to applicable local law or oral agreement?

A–12 No. Termination of the liability to make payments must be stated in the terms of the divorce or separation instrument.

Q–13 What are the consequences if the payor spouse is required to make one or more payments (in cash or property) after the death of the payee spouse as a substitute for the continuation of pre-death payments which would otherwise qualify as alimony or separate maintenance payments?

A–13 If the payor spouse is required to make any such substitute payments, none of the otherwise qualifying payments will qualify as alimony or separate maintenance payments. The divorce or separation instrument need not state, however, that there is no liability to make any such substitute payment.

Q–14 Under what circumstances will one or more payments (in cash or property) which are to occur after the death of the payee spouse be treated as a substitute for the continuation of payments which would otherwise qualify as alimony or separate maintenance payments?

A–14 To the extent that one or more payments are to begin to be made, increase in amount, or become accelerated in time as a result of the death of the payee spouse, such payments may be treated as a substitute for the continuation of payments terminating on the death of the payee spouse which would otherwise qualify as alimony or separate maintenance payments. The determination of whether or not such payments are a substitute for the continuation of payments which would otherwise qualify as alimony or separate maintenance payments, and of the amount of the otherwise qualifying alimony or separate maintenance payments for which any such payments are a substitute, will depend on all of the facts and circumstances.

Example 1. Under the terms of a divorce decree, A is obligated to make annual alimony payments to B of $30,000, terminating on the earlier of the expiration of 6 years or the death of B. B maintains custody of the minor children of A and B. The decree provides that at the death of B, if there are minor children of A and B remaining, A will be obligated to make annual payments of $10,000 to a trust, the income and corpus of which are to be used for the benefit of the children until the youngest child attains the age of majority. These facts indicate that A's liability to make annual $10,000 payments in trust for the benefit of his minor children upon the death of B is a substitute for $10,000 of the $30,000 annual payments to B. Accordingly, $10,000 of each of the $30,000 annual payments to B will not qualify as alimony or separate maintenance payments.

Example 2. Under the terms of a divorce decree, A is obligated to make annual alimony payments to B of $30,000, terminating on the earlier of the expiration of 15 years or the death of B. The divorce decree provides that if B dies before the expiration of the 15 year period, A will pay to B's estate the difference between the total amount that A would have paid had B survived, minus the amount actually paid. For example, if B dies at the end of the 10th year in which payments are made, A will pay to B's estate $150,000 ($450,000–$300,000). These facts indicate that A's liability to make a lump sum payment to B's estate upon the death of B is a substitute for the full amount of each of the annual $30,000 payments to B. Accordingly, none of the annual $30,000 payments to B will qualify as alimony or separate maintenance payments. The result would be the same if the lump sum payable at B's death were discounted by an appropriate interest factor to account for the prepayment.

(c) *Child support payments.*

Q–15 What are the consequences of a payment which the terms of the divorce or separation instrument fix as payable for the support of a child of the payor spouse?

A–15 A payment which under the terms of the divorce or separation instrument is fixed (or treated as fixed) as payable for the support of a child of the payor spouse does not qualify as an alimony or separate maintenance payment. Thus, such a payment is not deductible by the payor spouse or includible in the income of the payee spouse.

Q–16 When is a payment fixed (or treated as fixed) as payable for the support of a child of the payor spouse?

A–16 A payment is fixed as payable for the support of a child of the payor spouse if the divorce or separation instrument specifically designates some sum or portion (which sum or portion may fluctuate) as payable for the support of a child of the payor spouse. A payment will be treated as fixed as payable for the support of a child of the payor spouse if the payment is reduced (a) on the happening of a contingency relating to a child of the payor, or (b) at a time which can clearly be associated with such a contingency. A payment may be treated as fixed as payable for the support of a child of the payor spouse even if other separate payments specifically are designated as payable for the support of a child of the payor spouse.

Q–17 When does a contingency relate to a child of the payor?

A–17 For this purpose, a contingency relates to a child of the payor if it depends on any event relating to that child, regardless of whether such event is certain or likely to occur. Events that relate to a child of the payor include the following: the child's attaining a specified age or income level, dying, marrying, leaving school, leaving the spouse's household, or gaining employment.

Q–18 When will a payment be treated as to be reduced at a time which can clearly be associated with the happening of a contingency relating to a child of the payor?

A–18 There are two situations, described below, in which payments which would otherwise qualify as alimony or separate maintenance payments will be presumed to be reduced at a time clearly associated with the happening of a contingency relating to a child of the payor. In all other situations, reductions in payments will not be treated as clearly associated with the happening of a contingency relating to a child of the payor.

The first situation referred to above is where the payments are to be reduced not more than 6 months before or after the date the child is to attain the age of 18, 21, or local age of majority. The second situation is where the payments are to be reduced on two or more occasions which occur not more than one year before or after a different child of the payor spouse attains a certain age between the ages of 18 and 24, inclusive. The certain age referred to in the preceding sentence must be the same for each such child, but need not be a whole number of years.

The presumption in the two situations described above that payments are to be reduced at a time clearly associated with the happening of a contingency relating to a child of the payor may be rebutted (either by the Service or by taxpayers) by showing that the time at which the payments are to be reduced was determined independently of any contingencies relating to the children of the payor. The presumption in the first situation will be rebutted conclusively if the reduction is a complete cessation of alimony or separate maintenance payments during the sixth post-separation year (described in A–21) or upon the expiration of a 72-month period. The presumption may also be rebutted in other circumstances, for example, by showing that alimony payments are to be made for a period customarily provided in the local jurisdiction, such as a period equal to one-half the duration of the marriage.

Example: A and B are divorced on July 1, 1985, when their children, C (born July 15, 1970) and D (born September 23, 1972), are 14 and 12, respectively. Under the divorce decree, A is to make alimony payments to B of $2,000 per month. Such payments are to be reduced to $1,500 per month on January 1, 1991 and to $1,000 per month on January 1, 1995. On January 1, 1991, the date of the first reduction in payments, C will be 20 years 5 months and 17 days old. On January 1, 1995, the date of the second reduction in payments, D will be 22 years 3 months and 9 days old. Each of the reductions in payments is to occur not more than one year before or after a different child of A attains the age of 21 years and 4 months. (Actually, the reductions are to occur not more than one year before or after C and D attain *any* of the ages 21 years 3 months and 9 days through 21 years 5 months and 17 days.) Accordingly, the reductions will be presumed to clearly be associated with the happening of a contingency relating to C and D. Unless this presumption is rebutted, payments under the divorce decree equal to the sum of the reduction ($1,000 per month) will be treated as fixed for the support of the children of A and therefore will not qualify as alimony or separate maintenance payments.

(d) *Excess front-loading rules.*

Q–19 What are the excess front-loading rules?

A–19 The excess front-loading rules are two special rules which may apply to the extent that payments in any calendar year exceed $10,000. The first rule is a minimum term rule, which must be met in order for any annual payment, to the extent in excess of $10,000, to qualify as an alimony or separate maintenance payment (see A–2(f)). This rule requires that alimony or separate maintenance payments be called for, at a minimum, during the 6 ''post-separation years''. The second rule is a recapture rule which characterizes payments retrospectively by requiring a recalculation and inclusion in income by the payor and deducation by the payee of previously paid alimony or separate maintenance payment to the extent that the amount of such payments during any of the 6 ''post-separation years'' falls short of the amount of payments during a prior year by more than $10,000.

Q–20 Do the excess front-loading rules apply to payments to the extent that annual payments never exceed $10,000?

A–20 No. For example, A is to make a single $10,000 payment to B. Provided that the other requirements of section 71 are met, the payment will qualify as an alimony or separate maintenance payment. If A were to make a single $15,000 payment to B, $10,000 of the payment would qualify as an alimony or separate maintenance payment and $5,000 of the payment would be disqualified under the minimum term rule because payments were not to be made for the minimum period.

Q–21 Do the excess front-loading rules apply to payments received under a decree described in section 71(b)(2)(C)?

A–21 No. Payments under decrees described in section 71(b)(2)(C) are to be disregarded entirely for purposes of applying the excess front-loading rules.

Q–22 Both the minimum term rule and the recapture rule refer to 6 ''post-separation years''. What are the 6 ''post separation years''?

A–22 The 6 ''post-separation years'' are the 6 consecutive calendar years beginning with the first calendar year in which the payor pays to the payee an alimony or separate maintenance payment (except a payment made under a decree described in section 71(b)(2)(C)). Each year within this period is referred to as a ''post-separation year''. The 6-year period need not commence with the year in which the spouses separate or divorce, or with the year in which payments under the divorce or separation instrument are made, if no payments during such year qualify as alimony or separate maintenance payments. For example, a decree for the divorce of A and B is entered in October, 1985. The decree requires A to make monthly payments to B commencing November 1, 1985, but A and B are members of the same household until February 15, 1986 (and as a result, the payments prior to January 16, 1986, do not qualify as alimony payments). For purposes of applying the excess front-loading rules to payments from A to B, the 6 calendar years 1986 through 1991 are post-separation years. If a spouse has been making payments pursuant to a divorce or separation instrument described in section 71(b)(2) (A) or (B), a modification of the instrument or the substitution of a new instrument (for example, the substitution of a divorce decree for a written separation agreement) will not result in the creation of additional post-separation years. However, if a spouse has been making payments pursuant to a divorce or separation instrument described in section 71(b)(2)(C), the 6-year period does not begin until the first calendar year in which alimony or separate maintenance payments are made under a divorce or separation instrument described in section 71(b)(2) (A) or (B).

Q–23 How does the minimum term rule operate?

A–23 The minimum term rule operates in the following manner. To the extent payments are made in excess of $10,000, a payment will qualify as an alimony or separate maintenance payment only if alimony or separate maintenance payments are to be made in each of the 6 post-separation years. For example, pursuant to a divorce decree, A is to make alimony payments to B of $20,000 in each of the 5 calendar years 1985 through 1989. A is to make no payment in 1990. Under the minimum term rule, only $10,000 will qualify as an alimony payment in each of the calendar years 1985 through 1989. If the divorce decree also required A to make a $1 payment in 1990, the minimum term rule would be satisfied and $20,000 would be treated as an alimony payment in each of the calendar years 1985 through 1989. The recapture rule would, however, apply for 1990. For purposes of determining whether alimony or separate maintenance payments are to be made in any year, the possible termination of such payments upon the happening of a contingency (other than the passage of time) which has not yet occurred is ignored (unless such contingency may cause all or a portion of the payment to be treated as a child support payment).

Q–24 How does the recapture rule operate?

A–24 The recapture rule operates in the following manner. If the amount of alimony or separate maintenance payments paid in any post-separation year (referred to as the ''computation year'') falls short of the amount of alimony or separate maintenance payments paid in any prior post-separation year by more than $10,000, the payor must compute an ''excess amount'' for the computation year. The excess amount for any computation year is the sum of excess amounts determined with respect to each prior post-separation year. The excess amount determined with respect to a prior post-separation year is the excess of (1) the amount of alimony or separate maintenance payments paid by the payor spouse during such prior post-separation year, over (2) the amount of the alimony or separate maintenance payments paid by the payor spouse during the computation year plus $10,000. For purposes of this calculation, the amount of alimony or separate maintenance payments made by the payor spouse during any post-separation year preceding the computation year is reduced by any excess amount previously determined with respect to such year. The rules set forth above may be illustrated by the following example. A makes alimony payments to B of $25,000 in 1985 and $12,000 in 1986. The excess amount with respect to 1985 that is recaptured in 1986 is $3,000 ($25,000−($12,000+$10,000)). For purposes of subsequent computation years, the amount deemed paid in 1985 is $22,000. If A makes alimony payments to B of $1,000 in 1987, the excess amount that is recaptured in 1987 will be $12,000. This is the sum of an $11,000 excess amount with respect to 1985 ($22,000−$1,000+$10,000)) and a $1,000 excess amount with respect to 1986 ($12,000−($1,000+$10,000)). If, prior to the end of 1990, payments decline further, additional recapture will occur. The payor spouse must include the excess amount in gross income for his/her taxable year begining with or in the computation year. The payee spouse is allowed a deduction for the excess amount in computing adjusted gross income for his/her taxable year beginning with or in the computation year. However, the payee spouse must compute the excess amount by reference to the date when payments were made and not when payments were received.

Q–25 What are the exceptions to the recapture rule?

A–25 Apart from the $10,000 threshold for application of the recapture rule, there are three exceptions to the recapture rule. The first exception is for payments received under temporary support orders described in section 71(b)(2)(C) (see A–21). The second exception is for any payment made pursuant to a continuing liability over the period of the post-separation years to pay a fixed portion of the payor's income from a business or property or from compensation for employment or self-employment. The third exception is where the alimony or separate manitenance payments in any post-separation year cease by reason of the death of the payor or payee or the remarriage (as defined under applicable local law) of the payee before the close of the computation year. For example, pursuant to a divorce decree, A is to make cash payments to B of $30,000 in each of the calendar years 1985 through 1990. A makes cash payments of $30,000 in 1985 and $15,000 in 1986, in which year B remarries and A's alimony payments cease. The recapture rule does not apply for 1986 or any subsequent year. If alimony or separate maintenance payments made by A decline or cease during a post-separation year for any other reason (including a failure by the payor to make timely payments, a modification of the divorce or separation instrument, a reduction in the support needs of the payee, or a reduction in the ability of the payor to provide support) excess amounts with respect to prior post-separation years will be subject to recapture.

(e) *Effective dates.*

Q–26 When does section 71, as amended by the Tax Reform Act of 1984, become effective?

A–26 Generally, section 71, as amended, is effective with respect to divorce or separation instruments (as defined in section 71(b)(2)) executed after December 31, 1984. If a decree of divorce or separate maintenance executed after December 31, 1984, incorporates or adopts without change the terms of the alimony or separate maintenance payments under a divorce or separation instrument executed before January 1, 1985, such decree will be treated as executed before January 1, 1985. A change in the amount of alimony or separate maintenance payments or the time period over which such payments are to continue, or the addition or deletion of any contingencies or conditions relating to such payments is a change in the terms of the alimony or separate maintenance payments. For example, in November 1984, A and B executed a written separation agreement. In February 1985, a decree of divorce is entered in substitution for the written separation agreement. The decree of divorce does not change the terms of the alimony A pays to B. The decree of divorce will be treated as executed before January 1, 1985 and hence alimony payments under the decree will be subject to the rules of section 71 prior to amendment by the Tax Reform Act of 1984. If the amount or time period of the alimony or separate maintenance payments are not specified in the pre-1985 separation agreement or if the decree of divorce changes the amount or term of such payments, the decree of divorce will not be treated as executed before January 1, 1985, and alimony payments under the decree will be subject to the rules of section 71, as amended by the Tax Reform Act of 1984.

Section 71, as amended, also applies to any divorce or separation instrument executed (or treated as executed) before January 1, 1985 that has been modified on or after January 1, 1985, if such modification expressly provides that section 71, as amended by the Tax Reform Act of 1984, shall apply to the instrument as modified. In this case, section 71, as amended, is effective with respect to payments made after the date the instrument is modified.

(Secs. 1041(d)(4) (98 Stat. 798, 26 U.S.C. 1041(d)(4), 152(e)(2)(A) (98 Stat. 802, 26 U.S.C. 152(e)(2)(A), 215(c) (98 Stat. 800, 26 U.S.C. 215(c)) and 7805 (68A Stat. 917, 26 U.S.C. 7805) of the Internal Revenue Code of 1954.

[T.D. 7973, 49 FR 34455, Aug. 31, 1984; 49 FR 36645, Sept. 19, 1984]

§ 1.71–2 Effective date; taxable years ending after March 31, 1954, subject to the Internal Revenue Code of 1939.

Pursuant to section 7851(a)(1)(C), the regulations prescribed in § 1.71–1, to the extent that they relate to payments under a written separation agreement executed after August 16, 1954, and to the extent that they relate to payments under a decree for support received after August 16, 1954, under a decree entered after March 1, 1954, shall also apply to taxable years beginning before January 1, 1954, and ending after August 16, 1954, although such years are subject to the Internal Revenue Code of 1939.

§ 1.72–1 Introduction.

(a) *General principle.* Section 72 prescribes rules relating to the inclusion in gross income of amounts received under a life insurance, endowment, or annuity contract unless such amounts are specifically excluded from gross income under other provisions of Chapter 1 of the Code. In general, these rules provide that amounts subject to the provisions of section 72 are includible in the gross income of the recipient except to the extent that they are considered to represent a reduction or return of premiums or other consideration paid.

(b) *Amounts to be considered as a return of premiums.* For the purpose of determining the extent to which amounts received represent a reduction or return of premiums or other consideration paid, the provisions of section 72 distinguish between ''amounts received as an annuity'' and ''amounts not received as an annuity''. In general, ''amounts received as an annuity'' are amounts which are payable at regular intervals over a period of more than one full year from the date on which they are deemed to begin, provided the total of the amounts so payable or the period for which they are to be paid can be determined as of that date. See paragraph (b) (2) and (3) of §1.72–2. Any other amounts to which the provisions of section 72 apply are considered to be ''amounts not received as an annuity''. See §1.72–11.

(c) *''Amounts received as an annuity.''* (1) In the case of ''amounts received as an annuity'' (other than certain employees' annuities described in section 72(d) and in §1.72–13), a proportionate part of each amount so received is considered to represent a return of premiums or other consideration paid. The proportionate part of each annuity payment which is thus excludable from gross income is determined by the ratio which the investment in the contract as of the date on which the annuity is deemed to begin bears to the expected return under the contract as of that date. See §1.72–4.

(2) In the case of employees' annuities of the type described in section 72(d), no amount received as an annuity in a taxable year to which the Internal Revenue Code of 1954 applies is includible in the gross income of a recipient until the aggregate of all amounts received thereunder and excluded from gross income under the applicable income tax law exceeds the consideration contributed (or deemed contributed) by the employee under §1.72–8. Thereafter, all amounts so received are includible in the gross income of the recipient. See §1.72–13.

(d) *''Amounts not received as an annuity''.* In the case of ''amounts not received as an annuity'', if such amounts are received after an annuity has begun and during its continuance, amounts so received are generally includible in the gross income of the recipient. Amounts not received as an annuity which are received at any other time are generally includible in the gross income of the recipient only to the extent that such amounts, when added to all amounts previously received under the contract which were excludable from the gross income of the recipient under the income tax law applicable at the time of receipt, exceed the premiums or other consideration paid (see §1.72–11). However, if the aggregate of premiums or other consideration paid for the contract includes amounts for which a deduction was allowed under section 404 as contributions on behalf of an owner-employee, the amounts received under the circumstances of the preceding sentence shall be includible in gross income until the amount so included equals the amount for which the deduction was so allowed. See paragraph (b) of §1.72–17.

(e) *Classification of recipients.* For the purpose of the regulations under section 72, a recipient shall be considered an ''annuitant'' if he receives amounts under an annuity contract during the period that the annuity payments are to continue, whether for a term certain or during the continuing life or lives of the person or persons whose lives measure the duration of such annuity. However, a recipient shall be considered a ''beneficiary'' rather than an ''annuitant'' if the amounts he receives under a contract are received after the term of the annuity for a life or lives has expired and such amounts are paid by reason of the fact that the contract guarantees that payments of some minimum amount or for some minimum period shall be made. For special rules with respect to beneficiaries, see paragraphs (a)(1)(iii) and (c) of § 1.72–11.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6676, 28 FR 10134, Sept. 17, 1963]

§ 1.72–2 Applicability of section.

(a) *Contracts.* (1) The contracts under which amounts paid will be subject to the provisions of section 72 include contracts which are considered to be life insurance, endowment, and annuity contracts in accordance with the customary practice of life insurance companies. For the purposes of section 72, however, it is immaterial whether such contracts are entered into with an insurance company. The term ''endowment contract'' also includes the ''face-amount certificates'' described in section 72(1).

(2) If two or more annuity obligations or elements to which section 72 applies are acquired for a single consideration, such as an obligation to pay an annuity to A for his life accompanied by an obligation to pay an annuity to B for his life, there being a single consideration paid for both obligations (whether paid by one or more persons in equal or different amounts, and whether paid in a single sum or otherwise), such annuity elements shall be considered to comprise a single contract for the purpose of the application of section 72 and the regulations thereunder. For rules relating to the allocation of investment in the contract in the case of annuity elements payable to two or more persons, see paragraph (b) of § 1.72–6.

(3)(i) Sections 402 and 403 provide that certain distributions by employees' trusts and certain payments under employee plans are taxable under section 72. For taxable years beginning before January 1, 1964, section 72(e)(3), as in effect before such date, does not apply to such distributions or payments. For purposes of applying section 72 to such distributions and payments (other than those described in subdivision (iii) of this subparagraph), each separate program of the employer consisting of interrelated contributions and benefits shall be considered a single contract. Therefore, all distributions or payments (other than those described in subdivision (iii) of this subparagraph) which are attributable to a separate program of interrelated contributions and benefits are considered as received under a single contract. A separate program of interrelated contributions and benefits may be financed by the purchase from an insurance company of one or more group contracts or one or more individual contracts, or may be financed partly by the purchase of contracts from an insurance company and partly through an investment fund, or may be financed completely through an investment fund. A program may be considered separate for purposes of section 72 although it is only a part of a plan which qualifies under section 401. There may be several trusts under one separate program, or several separate programs may make use of a single trust. See, however, subdivision (iii) of this subparagraph for rules relating to what constitutes a ''contract'' for purposes of applying section 72 to distributions commencing before October 20, 1960.

(ii) The following types of benefits, and the contributions used to provide them, are examples of separate programs of interrelated contributions and benefits:

(*a*) Definitely determinable retirement benefits.

(*b*) Definitely determinable benefits payable prior to retirement in case of disability.

(*c*) Life insurance.

(*d*) Accident and health insurance.

However, retirement benefits and life insurance will be considered part of a single separate program of interrelated contributions and benefits to the extent they are provided under retirement income, endowment, or other contracts providing life insurance protection. See examples (6), (7), and (8) contained in subdivision (iv) of this subparagraph for illustrations of the principles of this subdivision. See, also, § 1.72–15 for rules relating to the taxation of amounts received under an employee plan which provides both retirement benefits and accident and health benefits.

(iii) If any amount which is taxable under section 72 by reason of section 402 or 403 is actually distributed or made available to any person under an employees' trust or plan (other than the Civil Service Retirement Act, 5

U.S.C. ch. 14) before October 20, 1960, section 72 shall, notwithstanding any other provisions in this subparagraph, be applied to all the distributions with respect to such person (or his beneficiaries) under such trust or plan (whether received before or after October 20, 1960) as though such distributions were provided under a single contract. For purposes of applying section 72 to distributions to which this subdivision applies, therefore, the term ''contract'' shall be considered to include the entire interest of an employee in each trust or plan described in sections 402 and 403 to the extent that distributions thereunder are subject to the provisions of section 72. Section 72 shall be applied to distributions received under the Civil Service Retirement Act in the manner prescribed in subdivision (i) of this subparagraph (see example (4) in subdivision (iv) of this subparagraph).

(iv) The application of this subparagraph may be illustrated by the following examples:

Example 1. On January 1, 1961, X Corporation established a noncontributory profit-sharing plan for its employees providing that the amount standing to the account of each participant will be paid to him at the time of his retirement and also established a contributory pension plan for its employees providing for the payment to each participant of a lifetime pension after retirement. The profit-sharing plan is designed to enable the employees to participate in the profits of X Corporation; the amount of the contributions to it are determined by reference to the profits of X Corporation; and the amount of any distribution is determined by reference to the amount of contributions made on behalf of any participant and the earnings thereon. On the other hand, the pension plan is designed to provide a lifetime pension for a retired employee; the amount of the pension is to be determined by a formula set forth in the plan; and the amount of contributions to the plan is the amount necessary to provide such pensions. In view of the fact that each of these plans constitutes a separate program of interrelated contributions and benefits, the distributions from each shall be treated as received under a separate contract. If these plans had been established before October 20, 1960, then, in the case of an employee who receives a distribution under the plans before October 20, 1960, the determination as to whether that distribution and all subsequent distributions to such employee are received under a single contract or under more than one contract shall be made by applying the rules in subdivision (iii) of this subparagraph. On the other hand, in the case of an employee who does not receive any distribution under these plans before October 20, 1960, the determination as to whether distributions to him are received under a single contract or under more than one contract shall be made in accordance with the rules illustrated by this example.

Example 2. On January 1, 1961, Z Corporation established a profit-sharing plan for its employees providing that any employee may make contributions, not in excess of 6 percent of his compensation, to a trust and that the employer would make matching contributions out of profits. Under the plan, a participant may receive a periodic distribution of the amount standing in his account during any period that he is absent from work due to a personal injury or sickness. On separation from service, the participant is entitled to receive a distribution of the balance standing in his account in accordance with one of several options. One option provides for the immediate distribution of one-half of the account and for the periodic distribution of the remaining one-half of the account. In addition, any participant may, after the completion of five years of participation, withdraw any part of his account, but in the case of such a withdrawal, the participant forfeits his rights to participate in the plan for a period of two years. Thus, a participant may receive distributions before separation from service; he may receive a distribution of a lump sum upon separation from service; he may also receive periodic distributions upon separation from service. However, since it is the total amount received under all the options that is interrelated with the contributions to the plan and not the amount received under any one option, this profit-sharing plan consists of only one separate program of interrelated contributions and benefits and all distributions under the plan (regardless of the option under which received) are treated as received under one contract. However, if, instead of providing that the amount standing in an employee's account would be paid to him during any period that he is absent from work due to a personal injury or sickness, the plan provided that a portion of the amount in the employee's account would be used to purchase incidental accident and health insurance, this plan would consist of two separate programs of interrelated contributions and benefits. The accident and health insurance, and the contributions used to purchase it, would be considered as one separate program of interrelated contributions and benefits and, therefore, a separate contract; whereas, the remaining contributions and benefits would be considered another separate program of interrelated contributions and benefits and, consequently, another separate contract.

Example 3. On January 1, 1961, N Corporation established a profit-sharing plan for its employees providing that the employees may make contributions, not in excess of 6 percent of their compensation, to a trust and that N Corporation would make matching contributions out of its profits. Under the plan, the employee may elect each year to have his and the employer's contributions for such year placed in either a savings arrangement or a retirement arrangement. Such an election is irrevocable. Under the savings arrangement, contributions to such arrangement for any one year and the earnings thereon will be distributed five years later. The retirement arrangement provides that all contributions thereto and the earnings thereon will be distributed when the employee is separated from the service of N Corporation. Since the distributions under the retirement arrangement are attributable solely to the contributions made to such arrangement and are not affected in any manner by contributions or distributions under the savings arrangement or any other plan, such distributions are treated as received under a separate program of interrelated contributions and benefits. Similarly, since distributions during any year under the savings arrangement are attributable only to contributions to such arrangement made during the fifth preceding year and are not affected in any manner by any other contributions to or distributions from such arrangement or any other plan, the savings arrangement constitutes a series of separate programs of interrelated contributions and benefits. The contributions to the savings arrangement for any year and the distribution in a subsequent year based thereon constitute a separate contract for purposes of section 72.

Example 4. The Civil Service Retirement Act (5 U.S.C. Ch. 14) which provides retirement benefits for participating employees, consists of a compulsory program and a voluntary program. Under the compulsory program, all participating employees are required to make certain contributions and, upon retirement, are provided retirement benefits computed on the basis of compensation and length of service. Under the voluntary program, such participating employees are permitted to make contributions in addition to those required under the compulsory program and, upon retirement, are provided additional retirement benefits computed on the basis of their voluntary contributions. Distributions received under the Act constitute distributions from two separate contracts for purposes of section 72. Distributions received under the compulsory program are considered as received under a separate program of interrelated contributions and benefits since they are computed solely under the compulsory program and are not affected by any contributions or distributions under the voluntary program or under any other plan. For similar reasons, distributions which are attributable to the voluntary contributions are considered as received under a separate program of interrelated contributions and benefits.

Example 5. On January 1, 1961, M Corporation established a contributory pension plan for its employees and created a trust to which it makes contributions to fund such plan. The plan provides that each participant will receive after age 65 a pension of 1½ percent of his compensation for each year of service performed subsequent to the establishment of such plan. In order to fund part of the benefits under the plan, the trustee purchased a group annuity contract. The remaining part of the benefits are to be paid out of a separate investment fund. This pension plan constitutes a single program of interrelated contributions and benefits and, therefore, all distributions received by an employee under the plan are considered as received under a single contract for purposes of section 72.

Example 6. On January 1, 1961, Y Corporation established a noncontributory pension plan (including incidental death benefits) for its employees and created a trust to which it makes contributions to fund such plan. The plan provides that each participant will receive after age 65 a pension of 1½ percent of his compensation for each year of service performed subsequent to the establishment of such plan. In addition, such plan provides for the payment of a death benefit if the employee dies before age 65. The trustee funded the death benefits through the purchase of a group term insurance policy and funded the retirement benefits through the purchase of a group annuity contract. Because of a subsequent change in funding from the deferred annuity method to the deposit administration method, the trustee purchased a second group annuity contract to provide the retirement benefits under the plan accruing after the effective date of the change in method of funding. Thus, retirement benefits distributed to an employee whose service with Y Corporation commenced before the effective date of the change in method of funding will be attributable to both group annuity contracts. This pension plan includes two separate programs of interrelated contributions and benefits. The death benefits, and the contributions required to provide them, are considered as one separate program of interrelated contributions and benefits; whereas, the retirement benefits, and the contributions required to provide them, are considered as another separate program of interrelated contributions and benefits. Therefore, any retirement benefits received by an employee, whether attributable to one or both of the group annuity contracts, shall be considered as received under a single contract for purposes of section 72. In determining the tax treatment of any such retirement benefits under section 72, no amount of the premiums used to purchase the group term insurance policy shall be taken into account, since such premiums, and the death benefits which they purchased, constitute a separate program of interrelated contributions and benefits.

Example 7. Assume the same facts as in example (6) except that, in lieu of funding the benefits in the manner described in that example, the trustee purchased individual retirement income contracts from an insurance company. Additional individual retirement income contracts are purchased in order to fund any increase in benefits resulting from increases in salary. Therefore, distributions to a particular employee may be attributable to a single retirement income contract or to more than one such contract. All distributions received by an employee under the pension plan, whether attributable to one or more retirement income contracts and whether made directly from the insurance company to the employee or made through the trustee, are considered as received under a single contract for purposes of section 72. For rules relating to the tax treatment of contributions and distributions under retirement income, endowment, or other life insurance contracts purchased by a trust described in section 401(a) and exempt under section 501(a), see paragraph (a) (2), (3), and (4) of §1.402(a)–1.

Example 8. Assume the same facts as in example (6) except that, in lieu of funding the benefits in the manner described in that example, the trustee funded the death benefits and part of the retirement benefits by purchasing individual retirement income contracts from an insurance company. The remaining part of the retirement benefits (such as any increase in benefits resulting from increases in salary) are to be paid out of a separate investment fund. This pension plan includes, with respect to each participant, two separate contracts for purposes of section 72. The retirement income contract purchased by the trust for each participant is a separate program of interrelated contributions and benefits and all distributions attributable to such contract (whether made directly from the insurance company to the employee or made through the trustee) are considered as received under a single contract. For rules relating to the tax treatment of contributions and distributions under retirement income, endowment, or other life insurance contracts purchased by a trust described in section 401(a) and exempt under section 501(a), see paragraph (a) (2), (3), and (4) of §1.402(a)–1. The remaining distributions under the plan are considered as received under another separate program of interrelated contributions and benefits.

(b) *Amounts.* (1)(i) In general, the amounts to which section 72 applies are any amounts received under the contracts described in paragraph (a)(1) of this section. However, if such amounts are specifically excluded from gross income under other provisions of Chapter 1 of the Code, section 72 shall not apply for the purpose of including such amounts in gross income. For example, section 72 does not apply to amounts received under a life insurance contract if such amounts are paid by reason of the death of the insured and are excludable from gross income under section 101(a). See also sections 101(d), relating to proceeds of life insurance paid at a date later than death, and 104(a)(4), relating to compensation for injuries or sickness.

(ii) Section 72 does not exclude from gross income any amounts received under an agreement to hold an amount and pay interest thereon. See paragraph (a) of §1.72–14. However, section 72 does apply to amounts received by a surviving annuitant under a joint and survivor annuity contract since such amounts are not considered to be paid by reason of the death of an insured. For a special deduction for the estate tax attributable to the inclusion of the value of the interest of a surviving annuitant under a joint and survivor annuity contract in the estate of the deceased primary annuitant, see section 691(d) and the regulations thereunder.

(2) Amounts subject to section 72 in accordance with subparagraph (1) of this paragraph are considered "amounts received as an annuity" only in the event that all of the following tests are met:

(i) They must be received on or after the "annuity starting date" as that term is defined in paragraph (b) of §1.72–4;

(ii) They must be payable in periodic installments at regular intervals (whether annually, semiannually, quarterly, monthly, weekly, or otherwise) over a period of more than one full year from the annuity starting date; and

(iii) Except as indicated in subparagraph (3) of this paragraph, the total of the amounts payable must be determinable at the annuity starting date either directly from the terms of the contract or indirectly by the use of either mortality tables or compound interest computations, or both, in conjunction with such terms and in accordance with sound actuarial theory.

For the purpose of determining whether amounts subject to section 72(d) and §1.72–13 are ''amounts received as an annuity'', however, the provisions of subdivision (i) of this subparagraph shall be disregarded. In addition, the term ''amounts received as an annuity'' does not include amounts received to which the provisions of paragraph (b) or (c) of §1.72–11 apply, relating to dividends and certain amounts received by a beneficiary in the nature of a refund. If an amount is to be paid periodically until a fund plus interest at a fixed rate is exhausted, but further payments may be made thereafter because of earnings at a higher interest rate, the requirements of subdivision (iii) of this subparagraph are met with respect to the payments determinable at the outset by means of computations involving the fixed interest rate, but any payments received after the expiration of the period determinable by such computations shall be taxable as dividends received after the annuity starting date in accordance with paragraph (b)(2) of §1.72–11.

(3)(i) Notwithstanding the requirement of subparagraph (2)(iii) of this paragraph, if amounts are to be received for a definite or determinable time (whether for a period certain or for a life or lives) under a contract which provides:

(*a*) That the amount of the periodic payments may vary in accordance with investment experience (as in certain profit-sharing plans), cost of living indices, or similar fluctuating criteria, or

(*b*) For specified payments the value of which may vary for income tax purposes, such as in the case of any annuity payable in foreign currency,

each such payment received shall be considered as an amount received as an annuity only to the extent that it does not exceed the amount computed by dividing the investment in the contract, as adjusted for any refund feature, by the number of periodic payments anticipated during the time that the periodic payments are to be made. If payments are to be made more frequently than annually, the amount so computed shall be multiplied by the number of periodic payments to be made during the taxable year for the purpose of determining the total amount which may be considered received as an annuity during such year. To this extent, the payments received shall be considered to represent a return of premium or other consideration paid and shall be excludable from gross income in the taxable year in which received. See paragraph (d) (2) and (3) of §1.72–4. To the extent that the payments received under the contract during the taxable year exceed the total amount thus considered to be received as an annuity during such year, they shall be considered to be amounts not received as an annuity and shall be included in the gross income of the recipient. See section 72(e) and paragraph (b)(2) of §1.72–11.

(ii) For purposes of subdivision (i) of this subparagraph, the number of periodic payments anticipated during the time payments are to be made shall be determined by multiplying the number of payments to be made each year (*a*) by the number of years payments are to be made, or (*b*) if payments are to be made for a life or lives, by the multiple found by the use of the appropriate tables contained in §1.72–9, as adjusted in accordance with the table in paragraph (a)(2) of §1.72–5.

(iii) For an example of the computation to be made in accordance with this subparagraph and a special election which may be made in a taxable year subsequent to a taxable year in which the total payments received under a contract described in this subparagraph are less than the total of the amounts excludable from gross income in such year under subdivision (i) of this subparagraph, see paragraph (d)(3) of § 1.72–4.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6497, 25 FR 10019, Oct. 20, 1960; T.D. 6885, 31 FR 7798, June 2, 1966]

§ 1.72–3 Excludable amounts not income.

In general, amounts received under contracts described in paragraph (a)(1) of § 1.72–2 are not to be included in the income of the recipient to the extent that such amounts are excludable from gross income as the result of the application of section 72 and the regulations thereunder.

§ 1.72–4 Exclusion ratio.

(a) *General rule.* (1)(i) To determine the proportionate part of the total amount received each year as an annuity which is excludable from the gross income of a recipient in the taxable year of receipt (other than amounts received under (*a*) certain employee annuities described in section 72(d) and § 1.72–13, or (*b*) certain annuities described in section 72(o) and § 1.122–1), an exclusion ratio is to be determined for each contract. In general, this ratio is determined by dividing the investment in the contract as found under § 1.72–6 by the expected return under such contract as found under § 1.72–5. Where a single consideration is given for a particular contract which provides for two or more annuity elements, an exclusion ratio shall be determined for the contract as a whole by dividing the investment in such contract by the aggregate of the expected returns under all the annuity elements provided thereunder. However, where the provisions of paragraph (b)(3) of § 1.72–2 apply to payments received under such a contract, see paragraph (b)(3) of § 1.72–6. In the case of a contract to which § 1.72–6(d) (relating to contracts in which amounts were invested both before July 1, 1986, and after June 30, 1986) applies, the exclusion ratio for purposes of this paragraph (a) is determined in accordance with § 1.72–6(d) and, in particular, § 1.72–6(d)(5)(i).

(ii) The exclusion ratio for the particular contract is then applied to the total amount received as an annuity during the taxable year by each recipient. See, however, paragraph (e)(3) of § 1.72–5. Any excess of the total amount received as an annuity during the taxable year over the amount determined by the application of the exclusion ratio to such total amount shall be included in the gross income of the recipient for the taxable year of receipt.

(2) The principles of subparagraph (1) may be illustrated by the following example:

Example. Taxpayer A purchased an annuity contract providing for payments of $100 per month for a consideration of $12,650. Assuming that the expected return under this contract is $16,000 the exclusion ratio to be used by A is $12,650÷16,000; or 79.1 percent (79.06 rounded to the nearest tenth). If 12 such monthly payments are received by A during his taxable year, the total amount he may exclude from his gross income in such year is $949.20 ($1,200×79.1 percent).The balance of $250.80 ($1,200 less $949.20) is the amount to be included in gross income. If A instead received only five such payments during the year, he should exclude $395.50 (500×79.1 percent) of the total amounts received.

For examples of the computation of the exclusion ratio in cases where two annuity elements are acquired for a single consideration, see paragraph (b)(1) of § 1.72–6.

(3) The exclusion ratio shall be applied only to amounts received as an annuity within the meaning of that term under paragraph (b) (2) and (3) of § 1.72–2. Where the periodic payments increase in amount after the annuity starting date in a manner not provided by the terms of the contract at such date, the portion of such payments representing the increase is not an amount received as an annuity. For the treatment of amounts not received as an annuity, see section 72(e) and § 1.72–11. For special rules where paragraph (b)(3) of § 1.72–2 applies to amounts received, see paragraph (d)(3) of this section.

(4) After an exclusion ratio has been determined for a particular contract, it shall be applied to any amounts received as an annuity thereunder unless or until one of the following occurs:

(i) The contract is assigned or transferred for a valuable consideration (see section 72(g) and paragraph (a) of § 1.72–10);

(ii) The contract matures or is surrendered, redeemed, or discharged in accordance with the provisions of paragraph (c) or (d) of §1.72–11;

(iii) The contract is exchanged (or is considered to have been exchanged) in a manner described in paragraph (e) of §1.72–11.

(b) *Annuity starting date.* (1) Except as provided in subparagraph (2) of this paragraph, the annuity starting date is the first day of the first period for which an amount is received as an annuity, except that if such date was before January 1, 1954, then the annuity starting date is January 1, 1954. The first day of the first period for which an amount is received as an annuity shall be whichever of the following is the later:

(i) The date upon which the obligations under the contract became fixed, or

(ii) The first day of the period (year, half-year, quarter, month, or otherwise, depending on whether payments are to be made annually, semiannually, quarterly, monthly, or otherwise) which ends on the date of the first annuity payment.

(2) Notwithstanding the provisions of paragraph (b)(1) of this section, the annuity starting date shall be determined in accordance with whichever of the following provisions is appropriate:

(i) In the case of a joint and survivor annuity contract described in section 72(i) and paragraph (b)(3) of §1.72–5, the annuity starting date is January 1, 1954, or the first day of the first period for which an amount is received as an annuity by the surviving annuitant, whichever is the later;

(ii) In the case of the transfer of an annuity contract for a valuable consideration, as described in section 72(g) and paragraph (a) of §1.72–10, the annuity starting date shall be January 1, 1954, or the first day of the first period for which the transferee received an amount as an annuity, whichever is the later;

(iii) If the provisions of paragraph (e) of §1.72–11 apply to an exchange of one contract for another, or to a transaction deemed to be such an exchange, the annuity starting date of the contract received (or deemed received) in exchange shall be January 1, 1954, or the first day of the first period for which an amount is received as an annuity under such contract, whichever is the later; and

(iv) In the case of an employee who has retired from work because of personal injuries or sickness, and who is receiving amounts under a plan that is a wage continuation plan under section 105(d) and §1.105–4, the annuity starting date shall be the date the employee reaches mandatory retirement age, as defined in §1.105–4(a)(3)(i)(B). (See also §§1.72–15 and 1.105–6 for transitional and other special rules.)

(c) *Fiscal year taxpayers.* Fiscal year taxpayers receiving amounts as annuities in a taxable year to which the Internal Revenue Code of 1954 applies shall determine the annuity starting date in accordance with section 72(c)(4) and this section. The annuity starting date for fiscal year taxpayers receiving amounts as an annuity in a taxable year to which the Internal Revenue Code of 1939 applies shall be January 1, 1954, except where the first day of the first period for which an amount is received by such a taxpayer as an annuity is subsequent thereto and before the end of a fiscal year to which the Internal Revenue Code of 1939 applied. In such case, the latter date shall be the annuity starting date. In all cases where a fiscal year taxpayer received an amount as an annuity in a taxable year to which the Internal Revenue Code of 1939 applied and subsequent to the annuity starting date determined in accordance with the provisions of this paragraph, such amount shall be disregarded for the purposes of section 72 and the regulations thereunder.

(d) *Exceptions to the general rule.* (1) Where the provisions of section 72 would otherwise require an exclusion ratio to be determined, but the investment in the contract (determined under §1.72–6) is an amount of zero or less, no exclusion ratio shall be determined and all amounts received under such a contract shall be includible in the gross income of the recipient for the purposes of section 72.

(2) Where the investment in the contract is equal to or greater than the total expected return under such contract found under §1.72–5, the exclusion

ratio shall be considered to be 100 percent and all amounts received as an annuity under such contract shall be excludable from the recipient's gross income. See, for example, paragraph (f)(1) of §1.72–5. In the case of a contract to which §1.72–6(d) (relating to contracts in which amounts were invested both before July 1, 1986, and after June 30, 1986) applies, this paragraph (d)(2) is applied in the manner prescribed in §1.72–6(d) and, in particular, §1.72–6(d)(5)(ii).

(3)(i) If a contract provides for payments to be made to a taxpayer in the manner described in paragraph (b)(3) of §1.72–2, the investment in the contract shall be considered to be equal to the expected return under such contract and the resulting exclusion ratio (100%) shall be applied to all amounts received as an annuity under such contract. For any taxable year, payments received under such a contract shall be considered to be amounts received as an annuity only to the extent that they do not exceed the portion of the investment in the contract which is properly allocable to that year and hence excludable from gross income as a return of premiums or other consideration paid for the contract. The portion of the investment in the contract which is properly allocable to any taxable year shall be determined by dividing the investment in the contract (adjusted for any refund feature in the manner described in paragraph (d) of §1.72–7) by the applicable multiple (whether for a term certain, life, or lives) which would otherwise be used in determining the expected return for such a contract under §1.72–5. The multiple shall be adjusted in accordance with the provisions of the table in paragraph (a)(2) of §1.72–5, if any adjustment is necessary, before making the above computation. If payments are to be made more frequently than annually and the number of payments to be made in the taxable year in which the annuity begins are less than the number of payments to be made each year thereafter, the amounts considered received as an annuity (as otherwise determined under this subdivision) shall not exceed, for such taxable year (including a short taxable year), an amount which bears the same ratio to the portion of the investment in the contract considered allocable to each taxable year as the number of payments to be made in the first year bears to the number of payments to be made in each succeeding year. Thus, if payments are to be made monthly, only seven payments will be made in the first taxable year, and the portion of the investment in the contract allocable to a full year of payments is $600, the amounts considered received as an annuity in the first taxable year cannot exceed $350 ($\$600 \times 7/12$). See subdivision (iii) of this subparagraph for an example illustrating the determination of the portion of the investment in the contract allocable to one taxable year of the taxpayer.

(ii) If subdivision (i) of this subparagraph applies to amounts received by a taxpayer and the total amount of payments he receives in a taxable year is less than the total amount excludable for such year under subdivision (i) of this subparagraph, the taxpayer may elect, in a succeeding taxable year in which he receives another payment, to redetermine the amounts to be received as an annuity during the current and succeeding taxable years. This shall be computed in accordance with the provisions of subdivision (i) of this subparagraph except that:

(*a*) The difference between the portion of the investment in the contract allocable to a taxable year, as found in accordance with subdivision (i) of this subparagraph, and the total payments actually received in the taxable year prior to the election shall be divided by the applicable life expectancy of the annuitant (or annuitants), found in accordance with the appropriate table in §1.72–9 (and adjusted in accordance with paragraph (a)(2) of §1.72–5), or by the remaining term of a term certain annuity, computed as of the first day of the first period for which an amount is received as an annuity in the taxable year of the election; and

(*b*) The amount determined under (*a*) of this subdivision shall be added to the portion of the investment in the contract allocable to each taxable year (as otherwise found). To the extent that the total periodic payments received under the contract in the taxable year of the election or any succeeding taxable year does not equal this total sum, such payments shall be excludable from the gross income of the recipient. To the extent such payments exceed the sum so found, they shall be fully includible in the recipient's gross income. See subdivision (iii) of this subparagraph for an example illustrating the redetermination of amounts to be received as an annuity and subdivision (iv) of this subparagraph for the method of making the election provided by this subdivision.

(iii) The application of the principles of paragraph (d)(3) (i) and (ii) of this section may be illustrated by the following example:

Example. Taxpayer A, a 64 year old male, files his return on a calendar year basis and has a life expectancy of 15.6 years on June 30, 1954, the annuity starting date of a contract to which §1.72–2(b)(3) applies and which he purchased for $20,000. The contract provides for variable annual payments for his life. He receives a payment of $1,000 on June 30, 1955, but receives no other payment until June 30, 1957. He excludes the $1,000 payment from his gross income for the year 1955 since this amount is less than $1,324.50, the amount determined by dividing his investment in the contract ($20,000) by his life expectancy adjusted for annual payments, 15.1 (15.6 − 0.5), as of the original annuity starting date. Taxpayer A may elect, in his return for the taxable year 1957, to redetermine amounts to be received as an annuity under his contract as of June 30, 1956. For the purpose of determining the extent to which amounts received in 1957 or thereafter shall be considered amounts received as an annuity (to which a 100 percent exclusion ratio shall apply) he shall add $118.63 to the $1,324.50 originally determined to be receivable as an annuity under the contract, making a total of $1,443.13. This is determined by dividing the difference between what was excludable in 1955 and 1956, $2,649 (2×$1,324.50) and what he actually received in those years ($1,000) by his life expectancy adjusted for annual payments, 13.9 (14.4 − 0.5), as of his age at his nearest birthday (66) on the first day of the first period for which he received an amount as an annuity in the taxable year of election (June 30, 1956). The result, $1,443.13, is excludable in that year and each year thereafter as an amount received as an annuity to which the 100% exclusion ratio applies. It will be noted that in this example the taxpayer received amounts less than the excludable amounts in two successive years and deferred making his election until the third year, and thus was able to accumulate the portion of the investment in the contract allocable to each taxable year to the extent he failed to receive such portion in both years. Assuming that he received $1,500 in the taxable year of his election, he would include $56.87 in his gross income and exclude $1,443.13 therefrom for that year.

(iv) If the taxpayer chooses to make the election described in subdivision (ii) of this subparagraph, he shall file with his return a statement that he elects to make a redetermination of the amounts excludable from gross income under his annuity contract in accordance with the provisions of paragraph (d)(3) of §1.72–4. This statement shall also contain the following information:

(*a*) The original annuity starting date and his age on that date,

(*b*) The date of the first day of the first period for which he received an amount in the current taxable year,

(*c*) The investment in the contract originally determined (as adjusted for any refund feature), and

(*d*) The aggregate of all amounts received under the contract between the date indicated in (*a*) of this subdivision and the day after the date indicated in (*b*) of this subdivision to the extent such amounts were excludable from gross income.

He shall include in gross income any amounts received during the taxable year for which the return is made in accordance with the redetermination made under this subparagraph.

(v) In the case of a contract to which §1.72–6(d) (relating to contracts in which amounts were invested both before July 1, 1986, and after June 30, 1986) applies, this paragraph (d)(3) is applied in the manner prescribed in §1.72–6(d) and, in particular, §1.72–6(d)(5)(iii). This application may be illustrated by the following example:

Example. B, a male calendar year taxpayer, purchases a contract which provides for variable annual payments for life and to which §1.72–2(b)(3) applies. The annuity starting date of the contract is June 30, 1990, when B is 64 years old. B receives a payment of $1,000 on June 30, 1991, but receives no other payment until June 30, 1993. B's total investment in the contract is $25,000. B's pre-July 1986 investment in the contract is $12,000. If B makes the election described in §1.72–6(d)(6), separate computations are required to determine the amounts received as an annuity and excludable from gross income with respect to the pre-July 1986 investment in the contract and the post-June 1986 investment in the contract. In the separate computations, B first determines the applicable portions of the total payment received which are allocable to the pre-July 1986 investment in the contract and the post-June 1986 investment in the contract. The portion of the payment received allocable to the pre-July 1986 investment in the contract is $480 ($12,000/$25,000 × $1,000). The portion of the payment received allocable to the post-June 1986 investment in the contract is $520 ($13,000/$25,000 × $1,000).

Second, B determines the pre-July 1986 investment in the contract and the post-June 1986 investment in the contract allocable to the taxable year by dividing the pre-July 1986 and post-June 1986 investments in the contract by the applicable life expectancy multiple. The life expectancy multiple applicable to pre-July 1986 investment in the contract is B's life expectancy as of the original annuity starting date adjusted for annual payments and is determined under Table I of §1.72–9 [15.1 (15.6 − 0.5)]. The life expectancy multiple applicable to post-June 1986 investment in the contract is determined under Table V of §1.72–9 (20.3 (20.8–0.5)). Thus, the pre-July 1986 investment in the contract allocable to each taxable year is $794.70 ($12,000÷15.1), and the post-June 1986 investment in the contract so allocable is $640.39 ($13,000÷20.3). Because the applicable portions of the total payment received in 1991 under the contract ($480 allocable to the pre-July 1986 investment in the contract and $520 allocable to the post-June 1986 investment in the contract) are treated as amounts received as an annuity and are excludable from gross income to the extent they do not exceed the portion of the corresponding investment in the contract allocable to 1991 ($794.70 pre-July 1986 investment in the contract and $640.39 post-June 1986 investment in the contract), the entire amount of each applicable portion of the total payment is excludable from gross income. B may elect, in the return filed for taxable year 1993, to redetermine amounts to be received as an annuity under the contract as of June 30, 1992. The extent to which the amounts received in 1993 or thereafter shall be considered amounts received as an annuity is determined as follows:

Pre-July 1986 investment in the contract allocable to taxable years 1991 and 1992 ($794.70 × 2)	$1,589.40
Less: Portion of total payments allocable to pre-July 1986 investment in the contract actually received as an annuity in taxable years 1991 and 1992	480.00
	1,109.40
Divided by: Life expectancy multiple applicable to pre-July 1986 investment in the contract for B, age 66 (14.4—0.5)	13.9
	79.81
Plus: Amount originally determined with respect to pre-July 1986 investment in the contract	794.70
Pre-July 1986 amount	874.51
Post-June 1986 investment in the contract allocable to taxable years 1991 and 1992 ($640.39 × 2)	$1,280.78
Less: Portion of total payments allocable to post-June 1986 investment in the contract actually received as an annuity in taxable years 1991 and 1992	520.00
	760.78
Divided by: Life expectancy multiple applicable to post-June 1986 investment in the contract for B, age 66 (19.2 − 0.5)	18.7
	40.68
Plus: Amount originally determined with respect to post-June 1986 investment in the contract	640.39
Post-June 1986 amount	681.07

(vi) The method of making an election to perform the separate computations illustrated in paragraph (d)(3)(v) of this section is described in §1.72–6(d)(6).

(e) *Exclusion ratio in the case of two or more annuity elements acquired for a single consideration.* (1)(i) Where two or more annuity elements are provided under a contract described in paragraph (a)(2) of §1.72–2, an exclusion ratio shall be determined for the contract as a whole and applied to all amounts received as an annuity under any of the annuity elements. To obtain this ratio, the investment in the contract determined in accordance with §1.72–6 shall be divided by the aggregate of the expected returns found with respect to each of the annuity elements in accordance with §1.72–5. For this purpose, it is immaterial that payments under one or more of the annuity elements involved have not commenced at the time when an amount is first received as an annuity under one or more of the other annuity elements.

(ii) The exclusion ratio found under subdivision (i) of this subparagraph does not apply to:

(*a*) An annuity element payable to a surviving annuitant under a joint and survivor annuity contract to which section 72(i) and paragraphs (b)(3) and (e)(3) of §1.72–5 apply, or to

(*b*) A contract under which one or more of the constituent annuity elements provides for payments described in paragraph (b)(3) of §1.72–2.

For rules with respect to a contract providing for annuity elements described in (*b*) of this subdivision, see subparagraph (2) of this paragraph.

(2) If one or more of the annuity elements under a contract described in paragraph (a)(2) of § 1.72–2 provides for payments to which paragraph (b)(3) of § 1.72–2 applies:

(i) With respect to the annuity elements to which paragraph (b)(3) of § 1.72–2 does not apply, an exclusion ratio shall be determined by dividing the portion of the investment in the entire contract which is properly allocable to all such elements (in the manner provided in paragraph (b)(3)(ii) of § 1.72–6) by the aggregate of the expected returns thereunder and such ratio shall be applied in the manner described in subdivision (i) of subparagraph (1); and

(ii) With respect to the annuity elements to which paragraph (b)(3) of § 1.72–2 does apply, the investment in the entire contract shall be reduced by the portion thereof found in subdivision (i) of this subparagraph and the resulting amount shall be used to determine the extent to which the aggregate of the payments received during the taxable year under all such elements is excludable from gross income. The amount so excludable shall be allocated to each recipient under such elements in the same ratio that the total of payments he receives each year bears to the total of the payments received by all such recipients during the year. The exclusion ratio with respect to the amounts so allocated shall be 100 percent. See paragraph (f)(2) of § 1.72–5 and paragraph (b)(3) of § 1.72–6.

(iii) In the case of a contract to which § 1.72–6(d) (relating to contracts in which amounts were invested both before July 1, 1986, and after June 30, 1986) applies, this paragraph (e) is applied in the manner prescribed in § 1.72–6(d) and, in particular, § 1.72–6(d)(5)(iv).

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 7352, 40 FR 16663, Apr. 14, 1975; T.D. 8115, 51 FR 45691, Dec. 19, 1986; 52 FR 10223, Mar. 31, 1987]

§ 1.72–5 Expected return.

(a) *Expected return for but one life.* (1) If a contract to which section 72 applies provides that one annuitant is to receive a fixed monthly income for life, the expected return is determined by multiplying the total of the annuity payments to be received annually by the multiple shown in Table I or V (whichever is applicable) of § 1.72–9 under the age (as of the annuity starting date) and, if applicable, sex of the measuring life (usually the annuitant's). Thus, where a male purchases a contract before July 1, 1986, providing for an immediate annuity of $100 per month for his life and, as of the annuity starting date (in this case the date of purchase), the annuitant's age at his nearest birthday is 66, the expected return is computed as follows:

Monthly payment of $100×12 months equals annual payment of	$1,200
Multiple shown in Table I, male, age 66	14.4
Expected return (1,200×14.4)	17,280

If, however, the taxpayer had purchased the contract after June 30, 1986, the expected return would be $23,040, determined by multiplying 19.2 (multiple shown in Table V, age 66) by $1,200.

(2)(i) If payments are to be made quarterly, semiannually, or annually, an adjustment of the applicable multiple shown in Table I or V (whichever is applicable) may be required. A further adjustment may be required where the interval between the annuity starting date and the date of the first payment is less than the interval between future payments. Neither adjustment shall be made, however, if the payments are to be made more frequently than quarterly. The amount of the adjustment, if any, is to be found in accordance with the following table:

If the number of whole months from the annuity starting date to the first payment date is—	0–1	2	3	4	5	6	7	8	9	10	11	12
And the payments under the contract are to be made:												
Annually	+0.5	+0.4	+0.3	+0.2	+0.1	0	0	−0.1	−0.2	−0.3	−0.4	−0.5
Semiannually	+.2	+.1	0	0	−.1	−.2						
Quarterly	+.1	0	−.1									

Thus, for a male, age 66, the multiple found in Table I, adjusted for quarterly payments the first of which is to be made one full month after the annuity starting date, is 14.5 (14.4+0.1); for semiannual payments the first of which is to be made six full months from the annuity starting date, the adjusted multiple is 14.2 (14.4−0.2); for annual payments the first of which is to be made one full month from the annuity starting date, the adjusted multiple is 14.9 (14.4+0.5). If the annuitant in the example shown in subparagraph (1) of this paragraph were to receive an annual payment of $1,200 commencing 12 full months after his annuity starting date, the amount of the expected return would be $16,680 ($1,200×13.9 [14.4−0.5]). Similarly, for an annuitant, age 50, the multiple found in Table V, adjusted for quarterly payments the first of which is to be made one full month after the annuity starting date, is 33.2 (33.1+0.1); for semiannual payments the first of which is to be made six full months from the annuity starting date, the adjusted multiple is 32.9 (33.1−0.2); for annual payments the first of which is to be made one full month from the annuity starting date, the adjusted multiple is 33.6 (33.1+0.5).

(ii) Notwithstanding the table in subdivision (i) of this subparagraph, adjustments of multiples for early or other than monthly payments determined prior to February 19, 1956, under the table prescribed in paragraph 1(b)(4) of T.D. 6118 (19 FR 9897, C.B. 1955–1, 699), approved December 30, 1954, need not be redetermined.

(3) If the contract provides for fixed payments to be made to an annuitant until death or until the expiration of a specified limited period, whichever occurs earlier, the expected return of such temporary life annuity is determined by multiplying the total of the annuity payments to be received annually by the multiple shown in Table IV or VIII (whichever is applicable) of §1.72–9 for the age (as of the annuity starting date) and, if applicable, sex of the annuitant and the nearest whole number of years in the specified period. For example, if a male annuitant, age 60 (at his nearest birthday), is to receive $60 per month for five years or until he dies, whichever is earlier, and there is no post-June 1986, investment in the contract, the expected return under such a contract is $3,456, computed as follows:

Monthly payments of $60×12 months equals annual payment of	$720
Multiple shown in Table IV for male, age 60, for term of 5 years	4.8
Expected return for 5 year temporary life annuity of $720 per year ($720×4.8)	$3,456

If the annuitant purchased the same contract after June 30, 1986, the expected return under the contract would be $3,528, computed as follows:

Monthly payments of $60×12 months equals annual payment of	$720.00
Multiple shown in Table VIII for annuitant, age 60, for term of 5 years	4.9
Expected return for 5-year temporary life annuity of $720 per year ($720×4.9)	$3,528.00

The adjustment provided by subparagraph (2) of this paragraph shall not be made with respect to the multiple found in Table IV or VIII (whichever is applicable).

(4) If the contract provides for payments to be made to an annuitant for the annuitant's lifetime, but the amount of the annual payments is to be decreased after the expiration of a specified limited period, the expected return is computed by considering the contract as a combination of a whole life annuity for the smaller amount

plus a temporary life annuity for an amount equal to the difference between the larger and the smaller amount. For example, if a male annuitant, age 60, is to receive $150 per month for five years or until his earlier death, and is to receive $90 per month for the remainder of his lifetime after such five years, the expected return is computed as if the annuitant's contract consisted of a whole life annuity for $90 per month plus a five year temporary life annuity of $60 per month. In such circumstances, the expected return if there is no post-June 1986 investment in the contract is computed as follows:

Monthly payments of $90×12 months equals annual payment of	$1,080
Multiple shown in Table I for male, age 60	18.2
Expected return for whole life annuity of $1,080 per year	$19,656
Expected return for 5-year temporary life annuity of $720 per year (as found in subparagraph (3) of this paragraph (a))	$3,456
Total expected return	$23,112

If the annuitant purchased the same contract after June 30, 1986, the expected return would be $29,664, computed as follows:

Monthly payments of $90×12 months equals annual payment of	$1,080
Multiple shown in Table V for annuitant, age 60	24.2
Expected return for whole life annuity of $1,080 per year	$26,136
Plus: Expected return for 5-year temporary life annuity of $720 per year (as found in subparagraph (3) of this paragraph (a))	$3,528
Total expected return	$29,664

If payments are to be made quarterly, semiannually, or annually, an appropriate adjustment of the multiple found in Table I or V (whichever is applicable) for the whole life annuity should be made in accordance with subparagraph (2) of this paragraph.

(5) If the contract described in subparagraph (4) of this paragraph provided that the amount of the annual payments to the annuitant were to be increased (instead of decreased) after the expiration of a specified limited period, the expected return would be computed as if the annuitant's contract consisted of a whole life annuity for the larger amount minus a temporary life annuity for an amount equal to the difference between the larger and smaller amount. Thus, if the annuitant described in subparagraph (4) of this paragraph were to receive $90 per month for five years or until his earlier death, and to receive $150 per month for the remainder of his lifetime after such five years, the expected return would be computed by subtracting the expected return under a five year temporary life annuity of $60 per month from the expected return under a whole life annuity of $150 per month. In such circumstances, the expected return if there is no post-June 1986 investment in the contract is computed as follows:

Monthly payments of $150×12 months equals annual payment of	$1,800
Multiple shown in Table 1 (male, age 60)	18.2
Expected return for annuity for whole life of $1,800 per year	$32,760
Less expected return for 5-year temporary life annuity of $720 per year (as found in subparagraph (3))	$3,456
Net expected return	$29,304

If the annuitant purchased the same contract after June 30, 1986, the expected return would be $40,032, computed as follows:

Monthly payments of $150×12 months equals annual payments of	$1,800
Multiple shown in Table V (age 60)	24.2
Expected return for annuity for whole life of $1,800 per year	$43,560
Less expected return for 5-year temporary life annuity of $720 per year (as found in subparagraph (3) of this paragraph (a))	$3,528
Net expected return	$40,032

If payments are to be made quarterly, semiannually, or annually, an appropriate adjustment of the multiple found in Table I or V (whichever is applicable) for the whole life annuity should be made in accordance with subparagraph (2) of this paragraph.

(b) *Expected return under joint and survivor and joint annuities.* (1) In the case of a joint and survivor annuity contract involving two annuitants which provides the first annuitant with a fixed monthly income for life and, after the death of the first annuitant, provides an identical monthly income for life to a second annuitant, the expected return shall be determined by multiplying the total amount of the payments to be received annually by the multiple obtained from Table II or VI (whichever is applicable) of §1.72–9 under the ages (as of the annuity starting date) and, if applicable, sexes of the living annuitants. For example, a husband purchases a joint and survivor annuity contract providing for payments of $100 per month for life and, after his death, for the same amount to his wife for the remainder of her life. As of the annuity starting date his age at his nearest birthday is 70 and that of his wife at her nearest birthday is 67. If there is no post-June 1986 investment in the contract, the expected return is computed as follows:

Monthly payments of $100×12 months equals annual payment of	$1,200
Multiple shown in Table II (male, age 70, female, age 67)	19.7
Expected return ($1,200×19.7)	$23,640

If the annuitants purchased the same contract after June 30, 1986, the expected return would be $26,400, computed as follows:

Monthly payments of $100×12 months equals annual payment of	$1,200
Multiple shown in Table VI (ages 70, 67)	22.0
Expected return ($1,200×22.0)	$26,400

If payments are to be made quarterly, semiannually, or annually, an appropriate adjustment of the multiple found in Table II or VI (whichever is applicable) should be made in accordance with paragraph (a)(2) of this section.

(2) If a contract of the type described in subparagraph (1) of this paragraph provides that a different (rather than an identical) monthly income is payable to the second annuitant, the expected return is computed in the following manner. The applicable multiple in Table II or VI (whichever is applicable) is first found as in the example in subparagraph (1) of this paragraph. The multiple applicable to the first annuitant is then found in Table I or V (whichever is applicable) as though the contract were for a single life annuity. The multiple from Table I or V is then subtracted from the multiple obtained from Table II or VI and the resulting multiple is applied to the total payments to be received annually under the contract by the second annuitant. The result is the expected return with respect to the second annuitant. The portion of the expected return with respect to payments to be made during the first annuitant's life is then computed by applying the multiple found in Table I or V to the total annual payments to be received by such annuitant under the contract. The expected returns with respect to each of the annuitants separately are then aggregated to obtain the expected return under the entire contract.

Example 1. A husband purchases a joint and survivor annuity providing for payments of $100 per month for his life and, after his death, payments to his wife of $50 per month for her life. As of the annuity starting date his age at his nearest birthday is 70 and that of his wife at her nearest birthday is 67. There is no post-June 1986 investment in the contract.

Multiple from Table II (male, age 70, female, age 67)	19.7
Multiple from Table I (male, age 70)	12.1
Difference (multiple applicable to second annuitant)	7.6
Portion of expected return, second annuitant ($600×7.6)	$4,560
Portion of expected return, first annuitant ($1,200×12.1)	$14,520
Expected return under the contract	$19,080

The expected return thus found, $19,080, is to be used in computing the amount to be excluded from gross income. Thus, if the investment in the contract in this example is $14,310, the exclusion ratio is $14,310÷$19,080; or 75 percent. The amount excludable from each monthly payment made to the husband is 75 percent of $100, or $75, and the remaining $25 of each payment received by him shall be included in his gross income. After the husband's death, the amount excludable by the second annuitant (the surviving wife) would be 75 percent of each monthly payment of $50, or $37.50, and the remaining $12.50 of each payment shall be included in her gross income.

Example 2. If the same contract were purchased after June 30, 1986, the expected return would be $22,800, computed as follows:

Multiple from Table VI (ages 70, 67)	22.0
Multiple from Table V (age 70)	16.0
Difference (multiple applicable to second annuitant)	6.0
Portion of expected return, second annuitant ($600×6.0)	$3,600
Plus: Portion of expected return, first annuitant ($1,200×16.0)	$19,200
Expected return under the contract	$22,800

If the investment in the contract is $14,310, the exclusion ratio is $14,310÷$22,800, or 62.8 percent. Thus, the husband would exclude $62.80 of each $100 payment received by him.

After his death, his wife would exclude 62.8 percent, or $31.40, of each $50 monthly payment.

Example 3. If amounts were invested in the same contract both before July 1, 1986, and after June 30, 1986, and the election described in §1.72–6(d)(6) were made, two exclusion ratios would be determined pursuant to §1.72–6(d). Assume that the husband's total investment in the contract is $14,310 and that $7,310 is the pre-July 1986 investment in the contract. The pre-July 1986 exclusion ratio would be $7,310÷$19,080, or 38.3 percent. The post-June 1986 exclusion ratio would be $7,000÷$22,800, or 30.7 percent. The husband would exclude $69.00 ($38.30+$30.70) of the $100 monthly payment received by him. The remaining $31.00 would be included in his gross income. After the husband's death, the amount excludable by his wife would be $34.50 (38.3 percent of $50 plus 30.7 percent of $50). The remaining $15.50 would be included in gross income.

The same method is used if the payments are to be increased after the death of the first annuitant. Thus, if the payments to be made until the husband's death were $50 per month and his widow were to receive $100 per month thereafter until her death, the 7.6 multiple in example (1) above would be applied to the $100 payments, yielding an expected return with respect to this portion of the annuity contract of $9,120 ($1,200×7.6). An expected return of $7,260 ($600×12.1) would be obtained with respect to the payments to be made to the husband, yielding a total expected return under the contract of $16,380 ($9,120 plus $7,260). If payments are to be made quarterly, semiannually, or annually, an appropriate adjustment of the multiples found in Tables I and II or Tables V and VI (whichever are applicable) should be made in accordance with paragraph (a)(2) of this section.

(3) In the case of a joint and survivor annuity contract in respect of which the first annuitant died in 1951, 1952, or 1953, and the basis of the surviving annuitant's interest in the contract was determinable under section 113(a)(5) of the Internal Revenue Code of 1939, such basis shall be considered the ''aggregate of premiums or other consideration paid'' by the surviving annuitant for the contract. (For rules governing this determination, see 26 CFR (1939) 39.22(b)(2)–2 and 39.113(a)(5)–1 (Regulations 118).) In determining such an annuitant's investment in the contract, such aggregate shall be reduced by any amounts received under the contract by the surviving annuitant before the annuity starting date, to the extent such amounts were excludable from his gross income at the time of receipt. The expected return of the surviving annuitant in such cases shall be determined in the manner prescribed in paragraph (a) of this section, as though the surviving annuitant alone were involved. For this purpose, the appropriate multiple for the survivor shall be obtained from Table I as of the annuity starting date determined in accordance with paragraph (b)(2)(i) of §1.72–4.

(4) If a contract involving two annuitants provides for fixed monthly payments to be made as a joint life annuity until the death of the first annuitant to die (in other words, only as long as both remain alive), the expected return under such contract shall be determined by multiplying the total of the annuity payments to be received annually under the contract by the multiple obtained from Table IIA or VIA (whichever is applicable) of §1.72–9 under the ages (as of the annuity starting date) and, if applicable, sexes of the annuitants. If, however, payments are to be made under the contract quarterly, semiannually, or annually, an appropriate adjustment of the multiple found in Table IIA or VIA shall be made in accordance with paragraph (a)(2) of this section.

(5) If a joint and survivor annuity contract involving two annuitants provides that a specified amount shall be paid during their joint lives and a different specified amount shall be paid to the survivor upon the death of whichever of the annuitants is the first to die, the following preliminary computation shall be made in all cases preparatory to determining the expected return under the contract:

(i) From Table II or VI (whichever is applicable), obtain the multiple under both of the annuitants' ages (as of the annuity starting date) and, if applicable, their appropriate sexes;

(ii) From Table IIA or VIA (whichever is applicable), obtain the multiple applicable to both annuitants' ages (as of the annuity starting date) and, if applicable, their appropriate sexes;

(iii) Apply the multiple found in subdivision (i) of this subparagraph to the total of the amounts to be received annually after the death of the first to die; and

(iv) Apply the multiple found in subdivision (ii) of this subparagraph to the difference between the total of the amounts to be received annually before and the total of the amounts to be received annually after the death of the first to die.

If the original annual payment is in excess of the annual payment to be made after the death of the first to die, the expected return is the sum of the amounts determined under subdivisions (iii) and (iv) of this subparagraph. This may be illustrated by the following examples:

Example 1. A husband purchases a joint and survivor annuity providing for payments of $100 a month for as long as both he and his wife live, and, after the death of the first to die, payments to the survivor of $75 a month for life. As of the annuity starting date, his age at his nearest birthday is 70 and that of his wife at her nearest birthday is 67. If there is no post-June 1986 investment in the contract, the expected return under the contract is computed as follows:

Multiple from Table II (male age 70, female age 67)	19.7
Multiple from Table IIA (male age 70, female age 67)	9.3
Portion of expected return ($900×19.7—sum per year after first death)	$17,730
Plus: Portion of expected return ($300×9.3—amount of change in sum at first death)	$2,790
Expected return under the contract	$20,520

The total expected return in this example, $20,520, is to be used in computing the amount to be excluded from gross income. Thus, if the investment in the contract is $17,887, the exclusion ratio is $17,887÷$20,520, or 87.2 percent. The amount excludable from each monthly payment made while both are alive is 87.2 percent of $100, or $87.20, and the remaining $12.80 of each payment shall be included in gross income. After the death of the first to die, the amount excludable by the survivor shall be 87.2 percent of each monthly payment of $75, or $65.40, and the remaining $9.60 of each payment shall be included in gross income.

Example 2. Assume the same facts as in example (1), except that the contract is purchased after June 30, 1986.

The expected return under the contract is computed as follows:

Multiple from Table VI (ages 70, 67)	22.0
Multiple from Table VIA (ages 70, 67)	12.4
Portion of expected return ($900×22.0—sum per year after first death)	$19,800
Plus: Portion of expected return ($300×12.4—amount of change in sum at first death)	$3,720
Expected return under the contract	$23,520

Thus, if the investment in the contract is $17,887, the exclusion ratio is $17,887÷$23,520, or 76.1 percent. The amount excludable from each monthly payment made while both are alive would be 76.1 percent of $100, or $76.10, and the remaining $23.90 of each payment would be included in gross income. After the death of the first to die, the amount excludable by the survivor would be 76.1 percent of each monthly payment of $75, or $57.08, and the remaining $17.92 of each payment would be included in gross income.

Example 3. Assume the same facts as in examples (1) and (2), except that the total investment in the contract is $17,887, and that the pre-July 1986 investment in the contract is $8,000. Assume also that one of the annuitants makes the election described in §1.72–6(d)(6). Separate computations shall be performed pursuant to §1.72–6(d) to determine the amount excludable from gross income. The pre-July 1986 exclusion ratio would be $8,000÷$20,520, or 39 percent. The post-June 1986 exclusion ratio would be $9,887÷$23,520, or 42 percent. The amount excludable from each monthly payment made while both are alive would be $81 ((.39×100)+(.42×100)), and the remaining $19 would be included in gross income. After the death of the first to die, the amount excludable by the survivor would be $60.75 ((.39×75)+(.42×75)), and the remaining $14.25 would be included in gross income.

If the original annual payment is less than the annual payment to be made after the death of the first to die, the expected return is the difference between the amounts determined under subdivisions (iii) and (iv) of this subparagraph. If, however, payments are to be made quarterly, semiannually, or annually under the contract, the multiples obtained from both Tables II and IIA or Tables VI and VIA (whichever are applicable) shall first be adjusted in a manner prescribed in paragraph (a)(2) of this section.

(6) If a contract provides for the payment of life annuities to two persons during their respective lives and, after the death of one (without regard to which one dies first), provides that the survivor shall receive for life both his own annuity payments and the payments made formerly to the deceased

person, the expected return shall be determined in accordance with paragraph (e)(4) of this section.

(7) If paragraph (b)(3) of § 1.72–2 applies to payments provided under a contract and this paragraph applies to such payments, the principles of this paragraph shall be used in making the computations described in paragraph (d)(3) of § 1.72–4. This may be illustrated by the following examples, examples (1) through (3) of which assume that there is no post-June 1986 investment in the contract:

Example 1. Taxpayer A, a male age 63, pays $24,000 for a contract which provides that the proceeds (both income and return of capital) from eight units of an investment fund shall be paid monthly to him for his life and that after his death the proceeds from six such units shall be paid monthly to B, a female age 55, for her life. The portion of the investment in the contract allocable to each taxable year of A is $955.20 and that allocable to each taxable year of B is $716.40. This is determined in the following manner:

Multiple from Table II (male, age 63, and female, age 55)	28.1
Number of units to be paid, in effect, as a joint and survivor annuity	×6
Number of total annual unit payments anticipatable with respect to the joint and survivor annuity element	168.6
Multiple from Table I (male, age 63)	16.2
Number of units to be paid, in effect, as a single life annuity	×2
Number of total annual unit payments anticipatable with respect to A alone	32.4
Total number of unit payments anticipatable	201
Portion of investment in the contract allocable to unit payments ($24,000÷201) on an annual basis	$119.40
Number of units payable to A while he continues to live	×8
Portion of the investment in the contract allocable to each taxable year of A	$955.20
Portion of investment in the contract allocable to unit payments ($24,000÷201) on an annual basis	$119.40
Number of units payable to B for her life after A's death	×6
Portion of the investment in the contract allocable to each taxable year of B	$716.40

For the purpose of the above computation it is immaterial whether or not A lives to or beyond the life expectancy shown for him in Table I.

Example 2. Assume that Taxpayer A in example (1) receives payments for five years which are at least as large as the portion of the investment in the contract allocable to such years, but in the sixth year he receives a total of only $626.40 rather than the $955.20 allocable to such year. A is 69 and B is 61 at the beginning of the first monthly period for which an amount is payable in the seventh taxable year. A makes the election in that year provided under paragraph (d)(3) of § 1.72–4. The difference between the portion of the investment in the contract allocable to the sixth year and the amount actually received in that year is $328.80 ($955.20 less $626.40). In this case, 139.2 unit payments are anticipatable (on an annual basis), since the appropriate multiple from Table II of § 1.72–9, 23.2, multiplied by the number of units payable, in effect, as a joint and survivor annuity yields this result (6×23.2). A's appropriate multiple from Table I of § 1.72–9 for the two units which will cease to be paid at his death is 12.6, and the total number of unit payments anticipatable (on an annual basis) is, therefore, 164.4 (2×12.6 plus 139.2). Dividing the difference previously found ($328.80) by the total number of unit payments thus determined (164.4) indicates that A will have an additional allocation of the investment in the contract of $16 to the seventh and every succeeding full taxable year (8 units×$2), and B will have an additional allocation of the investment in the contract of $12 (6 units×$2) to each taxable year in which she receives 12 monthly payments subsequent to the death of A. The total allocable to each taxable year of A is, therefore, $971.20, and that allocable to each taxable year of B will be $728.40.

Example 3. If, in example (2), A had died at the end of the fifth year, in the sixth year B would have received a payment of $469.80 (that portion of the $626.40 that A would have received which is in the same ratio that 6 units bear to 8 units) and would thus have received $246.60 less than the portion of the investment in the contract originally determined to be allocable to each of her taxable years. In these circumstances, B would be entitled to elect to redetermine the portion of the investment in the contract allocable to the taxable year of election and all subsequent years. The new amount allocable thereto would be found by dividing the $246.60 difference by her life expectancy as of the first day of the first period for which she received an amount as an annuity in the seventh year of the annuity contract, and adding the result to her originally determined allocation of $716.40.

Example 4. On July 1, 1986, Taxpayer C, age 60, pays $28,000 for a contract which provides that the proceeds (both income and return of capital) from 10 units of an investment fund shall be paid monthly to C for C's life and that after C's death the proceeds from 4 such units shall be paid monthly to D, age 57, for D's life. The portion of the investment in the contract allocable to each taxable year of C is $1,037.00 and that allocable to each taxable year of D is $414.80. This is determined as follows:

Multiple from Table VI (ages 60, 57)	31.2
Number of units to be paid, in effect, as a joint and survivor annuity	×4
Number of total annual unit payments anticipatable with respect to the joint and survivor annuity element	124.8
Multiple from Table V (age 60)	24.2
Number of units to be paid, in effect, as a single life annuity	×6
Number of total annual unit payments anticipatable with respect to C alone	145.2
Total number of unit payments anticipatable	270
Portion of investment in the contract allocable to unit payments ($28,000÷270) on an annual basis	103.70
Number of units payable to C while C continues to live	×10
Portion of the investment in the contract allocable to each taxable year of C	$1,037.00
Portion of investment in the contract allocable to unit payments ($28,000÷270) on an annual basis	$103.70
Number of units payable to D for D's life after C's death	×4
Portion of the investment in the contract allocable to each taxable year of D	$414.80

For purposes of the above computation it is immaterial whether or not C lives to or beyond the life expectancy shown in Table V.

Example 5. Assume the same facts as in example (4), except that C's total investment in the contract is $28,000, and C's pre-July 1986 investment in the contract is $16,000. If C makes the election described in §1.72–6(d)(6), separate computations are required to determine the amount excludable from gross income with respect to the pre-July 1986 investment in the contract and the post-June 1986 investment in the contract. The annuitant shall apply the appropriate pre-July 1986 and post-June 1986 life expectancy multiples to the applicable portions of the units to be paid as a joint and survivor annuity, and as a single life annuity.

Pre-July 1986 Computation (all references to unit payments are to the pre-July 1986 applicable portion of such payments):

Multiple from Table II (male, age 60, female, age 57)	27.6
Number of units to be paid, in effect, as a joint and survivor annuity	×4
Number of total annual unit payments anticipatable with respect to the joint and survivor annuity element	110.40
Multiple from Table I (male, age 60)	18.2
Number of units to be paid, in effect, as a single life annuity	×6
Number of total annual unit payments anticipatable with respect to C alone	109.20
Total number of unit payments anticipatable	219.6
Portion of pre-July 1986 investment in the contract allocable to unit payments ($16,000÷219.60) on an annual basis	$72.86
Number of units payable to C while C continues to live	×10
Portion of pre-July 1986 investment in the contract allocable to each taxable year of C	728.60
Portion of pre-July 1986 investment in the contract allocable to unit payments ($16,000÷219.60) on an annual basis	72.86
Number of units payable to D for D's life after C's death	×4
Portion of pre-July 1986 investment in the contract allocable to each taxable year of D	$291.44

Post-June 1986 Computation (all references to unit payments are to the post-June 1986 applicable portion of such payments):

Multiple from Table VI (ages 60, 57)	31.2
Number of units to be paid, in effect, as a joint and survivor annuity	x4
Number of total annual unit payments anticipatable with respect to the joint and survivor annuity element	124.80
Multiple from Table V (age 60)	24.2
Number of units to be paid, in effect, as a single life annuity	×6
Number of total annual unit payments anticipatable with respect to C alone	145.20
Total number of unit payments anticipatable	270
Portion of post-June 1986 investment in the contract allocable to unit payments ($12,000÷270) on an annual basis	$44.44
Number of units payable to C while C continues to live	×10
Portion of post-June 1986 investment in the contract allocable to each taxable year of C	$444.40
Portion of post-June 1986 investment in the contract allocable to unit payments ($12,000÷270) on an annual basis	44.44
Number of units payable to D for D's life after C's death	×4
Portion of post-June 1986 investment in the contract allocable to each taxable year of D	$177.78
Total computation:	
Total portion of the investment in the contract allocable to each taxable year of C ($728.60+$444.40)	$1,173.00
Total portion of the investment in the contract allocable to each taxable year of D ($291.44+$177.78)	$469.22

Example 6. Assume that taxpayer C in example (4) receives payments for four years which are at least as large as the portion of the investment in the contract allocable to such years, but in the fifth year receives a total of only $600 rather than the $1,037 allocable to such year. C is 65 and D is 62 at the beginning of the first monthly period for which an amount is payable in the sixth taxable year. C makes the election in that year provided under paragraph (d)(3) of § 1.72–4. The difference between the portion of the investment in the contract allocable to the fifth year and the amount actually received in that year is $437 ($1,037 − $600). In this case, 106 unit payments are anticipatable with respect to the joint and survivor annuity element, since the appropriate multiple from Table VI of § 1.72–9, 26.5, multiplied by the number of units payable, in effect, as a joint and survivor annuity yields this result (4 × 26.0). C's appropriate multiple from Table V of § 1.72–9 for the six units which will cease to be paid at C's death is 20.0, and the number of unit payments anticipatable with respect to C alone is 120 (6 × 20). The total number of unit payments anticipatable is, therefore, 226 (120 plus 106). Dividing the difference previously found ($437) by the total number of unit payments thus determined (226) indicates that C will have an additional allocation of the investment in the contract of $19.30 to the sixth and every succeeding full taxable year (10 units × $1.93), and D will have an additional allocation of the investment in the contract of $7.72 (4 units × $1.93) to each taxable year in which D receives 12 monthly payments subsequent to the death of C. The total allocable to each taxable year of C is, therefore, $1,056.30, and that allocable to each taxable year of D will be $422.52.

Example 7. If, in example (6), C had died at the end of the fourth year, in the fifth year D would have received a payment of $240 (that portion of the $600 that C would have received which is in the same ratio that 4 units bear to 10 units) and would thus have received $174.80 less than the portion of the investment in the contract allocable to each of D's taxable years. In these circumstances, D would be entitled to elect to redetermine the portion of the investment in the contract allocable to the taxable year of election and all subsequent years. The new amount allocable thereto would be found by dividing the $174.80 difference by D's life expectancy as of the first day of the first period for which D received an amount as an annuity in the sixth year of the annuity contract, and adding the result to D's originally determined allocation of $414.80.

(c) *Expected return for term certain.* In the case of a contract providing for specific periodic payments which are to be paid for a term certain such as a fixed number of months or years, without regard to life expectancy, the expected return is determined by multiplying the fixed number of years or months for which payments are to be made on or after the annuity starting date by the amount of the payment provided in the contract for each such period.

(d) *Expected return with respect to amount certain.* In the case of contracts involving no life or lives as a measurement of their duration, but under which a determinable total amount is to be paid in installments of lesser amounts paid at periodic intervals, the expected return shall be the total amount guaranteed. If an amount is to be paid periodically until a fund plus interest at a fixed rate is exhausted, but further payments may be made thereafter because of earnings at a higher interest rate, this paragraph shall apply to the total amount anticipatable as a result of the amount of the fund plus the fixed interest thereon. Any amount which may be paid as the result of earnings at a greater interest rate shall be disregarded in determining the expected return. If such an amount is later received, it shall be considered an amount not received as an annuity after the annuity starting date. See paragraph (b)(2) of § 1.72–11.

(e) *Expected return where two or more annuity elements providing for fixed payments are acquired for a single consideration.* (1) In the case of a contract described in paragraph (a)(2) of § 1.72–2, which provides for specified payments to be made under two or more annuity elements, the expected return shall be found for the contract as a whole by aggregating the expected returns found with respect to each annuity element. If individual life annuity elements are involved (including joint and survivor annuities where the primary annuitant died before January 1, 1954) the expected return for each of them shall be determined in the manner prescribed in paragraph (a) of this section. If joint and survivor annuity elements are involved, the expected return for such elements shall be determined under the appropriate subparagraph of paragraph (b) of this section. If terms certain or amounts certain are involved, the expected returns for such elements shall be determined under paragraph (c) or (d) of this section, respectively.

(2) The aggregate expected return found in accordance with the rules set forth in subparagraph (1) of this paragraph shall constitute the expected return for the contract as a whole. The investment in the contract shall be divided by the amount thus determined to obtain the exclusion ratio for the contract as a whole, This exclusion ratio shall be applied to all amounts received as an annuity under the contract by any recipient (in accordance with the provisions of §1.72–4), except in the case of amounts received by a surviving annuitant under a joint and survivor annuity element to which the provisions of section 72(i) and paragraph (b)(3) of this section would apply if it were a separate contract. See subparagraph (3) of this paragraph.

(3) In the case of a contract providing two or more annuity elements, one of which is a joint and survivor annuity element of the type described in section 72(i) and paragraph (b)(3) of this section, the general exclusion ratio for the contract as a whole, for the purpose of computations with respect to all the other annuity elements shall be determined in accordance with the principles of subparagraphs (1) and (2) of this paragraph. A special exclusion ratio shall thereafter be determined for the surviving annuitant receiving payments under the annuity element described in section 72(i) and paragraph (b)(3) of this section by using the investment in the contract and the expected return determined in accordance with the provisions of paragraph (b)(3) of this section.

(4) In the case of a contract providing for payments to be made to two persons in the manner described in paragraph (b)(6) of this section, the expected return is to be computed as though there were two joint and survivor annuities under the same contract, in the following manner. First, the multiple appropriate to the ages (as of the annuity starting date) and, if applicable, sexes of the annuitants involved shall be found in Table II or VI (whichever is applicable) of §1.72–9 and adjusted, if necessary, in the manner described in paragraph (a)(2) of this section. Second, the multiple so found shall be applied to the sum of the payments to be made each year to both annuitants. The result is the expected return for the contract as a whole.

(5) For rules relating to expected return where two or more annuity elements are acquired for a single consideration and one or more of such elements does not specify a fixed payment for each period, see paragraph (f) of this section.

(f) *Expected return with respect to obligations providing for payments described in paragraph (b)(3) of §1.72–2.* (1) If a contract to which section 72 applies provides only for payments to be made in a manner described in paragraph (b)(3) of §1.72–2, the expected return for such contract as a whole shall be an amount equal to the investment in the contract found in accordance with section 72(c)(1) and §1.72–6, as adjusted for any refund feature in accordance with §1.72–7.

(2) If a contract to which section 72 applies provides for annuity elements, one or more of which (but not all) provide for payments to be made in a manner described in paragraph (b)(3) of §1.72–2:

(i) With respect to the portion of the contract providing for annuity elements to which paragraph (b)(3) of §1.72–2 does not apply, the expected return shall be the aggregate of the expected returns found for each of such elements in accordance with the appropriate paragraph of this section; and

(ii) With respect to all annuity elements to which paragraph (b)(3) of §1.72–2 does apply, the expected return for all such elements shall be an amount equal to the portion of the investment in the contract allocable to such elements in accordance with the provisions of paragraph (e)(2)(ii) of §1.72–4 and paragraph (b)(3)(ii)(*b*) of §1.72–6.

(g) *Expected return with respect to contracts subject to §1.72–6(d).* In the case of a contract to which §1.72–6(d) (relating to contracts in which amounts were invested both before July 1, 1986, and after June 30, 1986) applies, an expected return is computed using the multiples in Tables I through IV of §1.72–9 with respect to the pre-July 1986 investment in the contract and a second expected return is computed using the multiples in Tables V through VIII of § 1.72–9 with respect to the post-June 1986 investment in the contract.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960; 25 FR 14021, Dec. 21, 1960, as amended by T.D. 8115, 51 FR 45694, Dec. 19, 1986]

§ 1.72–6 Investment in the contract.

(a) *General rule.* (1) For the purpose of computing the ''investment in the contract'', it is first necessary to determine the ''aggregate amount of premiums or other consideration paid'' for such contract. See section 72(c)(1). This determination is made as of the later of the annuity starting date of the contract or the date on which an amount is first received thereunder as an annuity. The amount so found is then reduced by the sum of the following amounts in order to find the investment in the contract:

(i) The total amount of any return of premiums or dividends received (including unrepaid loans or dividends applied against the principal or interest on such loans) on or before the date on which the foregoing determination is made, and

(ii) The total of any other amounts received with respect to the contract on or before such date which were excludable from the gross income of the recipient under the income tax law applicable at the time of receipt.

Amounts to which subdivision (ii) of this subparagraph applies shall include, for example, amounts considered to be return of premiums or other consideration paid under section 22(b)(2) of the Internal Revenue Code of 1939 and amounts considered to be an employer-provided death benefit under section 22(b)(1)(B) of such Code. For rules relating to the extent to which an employee or his beneficiary may include employer contributions in the aggregate amount of premiums or other consideration paid, see § 1.72–8. If the aggregate amount of premiums or other consideration paid for the contract includes amounts for which deductions were allowed under section 404 as contributions on behalf of a self-employed individual, such amounts shall not be included in the investment in the contract.

(2) For the purpose of subparagraph (1) of this paragraph, amounts received subsequent to the receipt of an amount as an annuity or subsequent to the annuity starting date, whichever is the later, shall be disregarded. See, however, § 1.72–11.

(3) The application of this paragraph may be illustrated by the following examples:

Example 1. In 1950, B purchased an annuity contract for $10,000 which was to provide him with an annuity of $1,000 per year for life. He received $1,000 in each of the years 1950, 1951, 1952, and 1953, prior to the annuity starting date (January 1, 1954). Under the Internal Revenue Code of 1939, $300 of each of these payments (3 percent of $10,000) was includible in his gross income, and the remaining $700 was excludable therefrom during each of the taxable years mentioned. In computing B's investment in the contract as of January 1, 1954, the total amount excludable from his gross income during the years 1950 through 1953 ($2,800) must be subtracted from the consideration paid ($10,000). Accordingly, B's investment in the contract as of January 1, 1954, is $7,200 ($10,000 less $2,800).

Example 2. In 1945, C contracted for an annuity to be paid to him beginning December 31, 1960. In 1945 and in each successive year until 1960, he paid a premium of $5,000. Assuming he receives no payments of any kind under the contract until the date on which he receives the first annual payment as an annuity (December 31, 1960), his investment in the contract as of the annuity starting date (December 31, 1959) will be $75,000 ($5,000 paid each year for the 15 years from 1945 to 1959, inclusive).

Example 3. Assume the same facts as in example (2), except that prior to the annuity starting date C has already received from the insurer dividends of $1,000 each in 1949, 1954, and 1959, such dividends not being includible in his gross income in any of those years. C's investment in the contract, as of the annuity starting date, will then be $72,000 ($75,000–$3,000).

(b) *Allocation of the investment in the contract where two or more annuity elements are acquired for a single consideration.* (1) In the case of a contract described in § 1.72–2(a)(2) which provides for two or more annuity elements, the investment in the contract determined under paragraph (a) shall be allocated to each of the annuity elements in the ratio that the expected return under each annuity element bears to the aggregate of the expected returns under all the annuity elements. The exclusion ratio for the contract as a whole shall be determined by dividing the investment in the contract (after adjustment for the present value of any or all refund features) by the aggregate of the expected returns under all the annuity elements. This may be illustrated by the following examples:

Example 1. If a contract provides for annuity payments of $1,000 per year for life (with no refund feature) to both A and B, a male and female, respectively, each 70 years of age as of the annuity starting date, such contract is acquired for consideration of $19,575 (without regard to whether paid by A, B, or both), and there is no post-June 1986 investment in the contract, the investment in the contract shall be allocated by determining the exclusion ratio for the contract as a whole in the following manner:

Expectancy of A under Table I and § 1.72–5(a)(2), 11.6 (12.1–0.5), multiplied by $1,000	$11,600
Plus: Expectancy of B computed in a similar manner ($1,000×14.5 [15.0 − 0.5])	14,500
Total expected return	26,100

The exclusion ratio for both A and B is then $19,575÷$26,100, or 75 percent. A and B shall each exclude from gross income three-fourths ($750) of each $1,000 annual payment received and shall include the remaining one-fourth ($250) of each $1,000 annual payment received in gross income.

Example 2. Assume the same facts as in example (1) except that of the total investment in the contract of $19,575, the pre-July 1986 investment in the contract is $10,000. If the election described in §1.72–6(d)(6) is made with respect to the contract, the investment in the contract shall be allocated by determining an exclusion ratio for the contract as a whole based on separately computed exclusion ratios with respect to the pre-July 1986 investment in the contract and the post-June 1986 investment in the contract in the following manner:

Expectancy of A under Table I and § 1.72–5(a)(2), 11.6 (12.1–0.5), multiplied by $1,000	$11,600
Plus: Expectancy of B under Table I and § 1.72–5(a)(2), 14.5 (15.0–0.5), multiplied by $1,000	$14,500
Pre-July 1986 expected return	$26,100
Expectancy of A under Table V and § 1.72–5(a)(2), 15.5 (16.0–0.5), multiplied by $1,000	$15,500
Plus: Expectancy of B under Table V and § 1.72–5(a)(2), 15.5 (16.0–0.5), multiplied by $1,000	$15,500
Post-June 1986 expected return	$31,000
Pre-July 1986 exclusion ratio ($10,000÷$26,100)	38.3
Post-June 1986 exclusion ratio ($9,575÷31,000)	30.9
A and B shall each exclude from gross income $692 (38.3 percent of $1,000+30.9 percent of $1,000) of each $1,000 payment and include the remaining $308 in gross income	

(2) In the case of a contract providing for specified annual annuity payments to be made to two persons during their joint lives and the payment of the aggregate of the two individual payments to the survivor for his life, the investment in the contract shall be allocated in accordance with the provisions of subparagraph (1) of this paragraph. For this purpose, the investment in the contract (without regard to the fact that differing amounts may have been contributed by the two annuitants) shall be divided by the expected return determined in accordance with paragraph (e)(4) of §1.72–5. The resulting exclusion ratio shall then be applied to any amounts received as an annuity by either annuitant.

(3) In the case of a contract providing two or more annuity elements, one or more of which provides for payments to be made in a manner described in paragraph (b)(3) of §1.72–2, the investment in the contract shall be allocated to the various annuity elements in the following manner.

(i) If all the annuity elements provide for payments to be made in the manner described in paragraph (b)(3) of §1.72–2, the investment in the contract shall be allocated on the basis of the amounts received by each recipient by apportioning the amount determined to be excludable under that section to each recipient in the same ratio as the total of the amounts received by him in the taxable year bears to the total of the amounts received by all recipients during the same period; and

(ii) If one or more, but not all, of the annuity elements provide for payments to be made in a manner described in paragraph (b)(3) of §1.72–2:

(*a*) With respect to all annuity elements to which that section does not apply, the investment in the contract for all such elements shall be the portion of the investment in the contract as a whole (found in accordance with the provisions of this section) which is properly allocable to all such elements; and

(*b*) With respect to all annuity elements to which paragraph (b)(3) of §1.72–2 does apply, the investment in the contract for all such elements shall be the investment in the contract as a whole (found in accordance with the provisions of this section) as reduced by the portion thereof determined under (*a*) of this subdivision.

For the purpose of determining, pursuant to (*a*) of this subdivision, the portion of the investment in the contract as a whole properly allocable to a particular annuity element, reference shall be made to the present value of such annuity element determined in accordance with paragraph (e)(1)(iii) (*b*) of §1.101–2.

(iii) In the case of a contract to which paragraph (d) of this section applies, this paragraph (b) is applied in the manner prescribed in paragraph (d) and, in particular, paragraph (d)(5)(v) of this section.

(c) *Special rules.* (1) For the special rule for determining the investment in the contract for a surviving annuitant in cases where the prior annuitant of a joint and survivor annuity contract died in 1951, 1952, or 1953, see paragraph (b)(3) of §1.72–5.

(2) For special rules relating to the determination of the investment in the contract where employer contributions are involved, see §1.72–8. See also paragraph (b) of §1.72–16 for a special rule relating to the determination of the premiums or other consideration paid for a contract where an employee is taxable on the premiums paid for life insurance protection that is purchased by and considered to be a distribution from an exempt employees' trust.

(3) For the determination of an adjustment in investment in the contract in cases where a contract contains a refund feature, see §1.72–7.

(4) In the case of "face-amount certificates" described in section 72(1), the amount of consideration paid for purposes of computing the investment in the contract shall include any amount added to the holder's basis by reason of section 1232(a)(3)(E) (relating to basis adjustment for amount of original issue discount ratably included in gross income as interest under section 1232(a)(3)).

(d) *Pre-July 1986 and post-June 1986 investment in the contract.* (1) This paragraph (d) applies to an annuity contract if:

(i) The investment in the contract includes a pre-July 1986 investment in the contract and a post-June 1986 investment in the contract (both as defined in §1.72–6(d)(3));

(ii) The use of a multiple found in Tables I through VIII of §1.72–9 is required to determine the expected return under the contract; and

(iii) The election described in paragraph (d)(6) of this section is made with respect to the contract.

(2) In the case of annuity contract to which this paragraph (d) applies—

(i) All computations required to determine the amount excludable from gross income shall be performed separately with respect to the pre-July 1986 investment in the contract and the post-June 1986 investment in the contract as if each such amount were the entire investment in the contract;

(ii) The multiples in Tables I through IV shall be used for computations involving the pre-July 1986 investment in the contract and the multiples in Tables V through VIII shall be used for computations involving the post-June 1986 investment in the contract; and

(iii) The amount excludable from gross income shall be the sum of the amounts determined under the separate computations required by paragraph (d)(2)(i) of this section.

(3) For purposes of the regulations under section 72, the pre-July 1986 investment in the contract and post-June 1986 investment in the contract are determined in accordance with the following rules:

(i)(A) Except as provided in §1.72–9, if the annuity starting date of the contract occurs before July 1, 1986, the pre-July 1986 investment in the contract is the total investment in the contract as of the annuity starting date;

(B) Except as provided in §1.72–9, if the annuity starting date of the contract occurs after June 30, 1986, and the contract does not provide for a disqualifying form of payment or settlement, the pre-July 1986 investment in the contract is the investment in the contract computed as of June 30, 1986, as if June 30, 1986, had been the later of the annuity starting date of the contract or the date on which an amount is first received thereunder as an annuity;

(C) If the annuity starting date of the contract occurs after June 30, 1986, and the contract provides, at the option of the annuitant or of any other person (including, in the case of an employee's annuity, an option exercisable only by, or with the consent of, the employer), for a disqualifying form of payment or settlement, the pre-July 1986 investment in the contract is zero (*i.e.*, the total investment in the contract is post-June 1986 investment in the contract).

(ii) The post-June 1986 investment in the contract is the amount by which the total investment in the contract as of the annuity starting date exceeds the pre-July 1986 investment in the contract.

(iii) For purposes of paragraph (d)(3)(i) of this section, a disqualifying form of payment or settlement is any form of payment or settlement (whether or not selected) that permits the receipt of amounts under the contract in a form other than a life annuity. For example, each of the following options provides for a disqualifying form of payment or settlement:

(A) An option to receive a lump sum in full discharge of the obligation under the contract.

(B) An option to receive an amount under the contract after June 30, 1986, and before the annuity starting date.

(C) An option to receive an annuity for a period certain.

(D) An option to receive payments under a refund feature (within the meaning of paragraphs (b) and (c) of §1.72–7) that is substantially equivalent to an annuity for a period certain.

(E) An option to receive a temporary life annuity (within the meaning of §1.72–5 (a)(3)) that is substantially equivalent to an annuity for a period certain.

An option to receive alternative forms of life annuity is not a disqualifying option for purposes of paragraph (d)(3)(i) of this section. Thus, if the sole options provided under a contract are a single life annuity and a joint and survivor life annuity, paragraph (d)(3)(i)(C) of this section does not apply to such contract.

(iv) For purposes of paragraph (d)(3)(iii) of this section, a refund feature is substantially equivalent to an annuity for a period certain if its value determined under Table VII of §1.72–9 exceeds 50 percent. Similarly, a temporary life annuity is substantially equivalent to an annuity for a period certain if the multiple determined under Table VIII of §1.72–9 exceeds 50 percent of the maximum duration of the annuity.

(4) In any separate computation under this paragraph (d), only the applicable portion of other amounts (such as the total expected return under the contract, or the total amount guaranteed under the contract as of the annuity starting date) shall be taken into account if the use of the entire amount in such computation is inconsistent with the use in the computation of only a portion of the investment in the contract. For example, such use is generally inconsistent if the computation requires a comparison of the investment in the contract and such other amount for the purpose of using the greater (or lesser) amount or the difference between the two. For purposes of the first sentence of this paragraph (d)(4), the applicable portion is the amount that bears the same ratio to the entire amount as the pre-July 1986, investment in the contract or the post-June 1986 investment in the contract, whichever is applicable, bears to the total investment in the contract as of the annuity starting date.

(5) *Application to particular computations.* (i) In the case of a contract to which this paragraph (d) applies, the exclusion ratio for purposes of §1.72–4 (a) is the sum of the exclusion ratios separately computed in accordance with this paragraph (d). The exclusion ratio with respect to the pre-July 1986 investment in the contract is determined by dividing the pre-July 1986 investment in the contract by the expected return as found under §1.72–5 by applying the appropriate multiples of Tables I through IV of §1.72–9. Similarly, the exclusion ratio with respect to the post-June 1986 investment in the contract is determined by dividing the post-June 1986 investment in the contract by the expected return as found under §1.72–5 by applying the appropriate multiples in Tables V through VIII of §1.72–9.

(ii) The applicability of §1.72–4(d)(2) to a contract to which this paragraph

(d) applies shall be determined separately with respect to the post-June 1986 investment in the contract and the pre-July 1986 investment in the contract and in each such determination only the applicable portion of the total expected return under the contract shall be taken into account. If §1.72–4(d)(2) applies with respect to either such investment in the contract, the separately computed exclusion ratio shall be considered to be the applicable portion of 100 percent.

(iii) If §1.72–4(d)(3) applies to a contract to which this paragraph (d) applies—

(A) The applicable portions (as defined in paragraph (d)(4) of this section) of payments received under the contract for a taxable year shall be separately computed;

(B) The pre-July 1986 investment in the contract and the post-June 1986 investment in the contract shall be separately allocated to the taxable year; and

(C) The separate applicable portions of the payments received under the contract for the taxable year shall be considered to be amounts received as an annuity (for which the exclusion ratio is 100 percent) only to the extent they do not exceed the portions of the corresponding investments in the contract which are properly allocable to that year.

See the example in §1.72–4(d)(3)(v).

(iv) If §1.72–4(e) applies to a contract to which this paragraph (d) applies, the exclusion ratio shall be separately computed with respect to the pre-July 1986 investment in the contract and the post-June 1986 investment in the contract. For purposes of the separate computations under §1.72–4(e)(2)(ii), only the applicable portion of payments received shall be taken into account and the exclusion ratio (100%) shall be applied to the separately computed portion allocated to each participant.

(v) If paragraph (b)(3) of this section applies to a contract to which this paragraph (d) applies, separate allocations are required with respect to the pre-July 1986 investment in the contract and the post-June 1986 investment in the contract. For purposes of the separate computations required to determine the portion of the investment in the contract properly allocable to a particular annuity element, only the applicable portion of the present value of the annuity element determined in accordance with §1.101–2(e)(1)(iii)(b) is taken into account.

(vi) If §1.72–7 applies to a contract to which this paragraph (d) applies, separate computations are required to determine the adjustment to the pre-July 1986 investment in the contract and the post-June 1986 investment in the contract. For purposes of such separate computations, only the applicable portions of the amounts described in §1.72–7 (b)(3)(ii), (c)(1)(ii)(B), (c)(2)(vii)(B), and (d)(1)(ii) are taken into account. Similarly, in the case of computations with respect to the guarantee of a specified amount under §1.72–7(d)(1), only the applicable portion of such amount is taken into account.

(6) This paragraph (d) applies to a contract only if the first taxpayer to receive an amount as an annuity under the contract elects to perform separate computations with respect to the pre-July 1986 investment in the contract and the post-June 1986 investment in the contract as if each such amount were the entire investment in contract. If two or more annuitants receive an amount as an annuity under the contract at the same time (such as under a joint-and-last-survivorship annuity contract), an election by one of the annuitants is treated as an election by each of the annuitants. The election is made by attaching a statement to the first return filed by the taxpayer for the first taxable year in which an amount is received as an annuity under the contract. The statement must indicate that the taxpayer is electing to apply the provisions of paragraph (d) of §1.72–6, and must also contain the name, address, and taxpayer identification number of each annuitant under the contract, and the amount of the pre-July 1986 investment in the contract.

(7) If the investment in the contract includes a post-June 1986 investment in the contract and the election described in paragraph (d)(6) of this section is not made—

(i) The amount excludable from gross income shall be determined without regard to the separate computations described in this paragraph (d); and

(ii) Only the multiples found in Tables V through VIII shall be used in determining the amount excludable from gross income.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6676, 28 FR 10134, Sept. 17, 1963; T.D. 7311, 39 FR 11880, Apr. 1, 1974; T.D. 8115, 51 FR 45700, Dec. 19, 1986; 52 FR 10223, Mar. 31, 1987]

§ 1.72–7 Adjustment in investment where a contract contains a refund feature.

(a) *Definition of a contract containing a refund feature.* A contract to which section 72 applies, contains a refund feature if:

(1) The total amount receivable as an annuity under such contract depends, in whole or in part, on the continuing life of one or more persons,

(2) The contract provides for payments to be made to a beneficiary or the estate of an annuitant on or after the death of the annuitant if a specified amount or a stated number of payments has not been paid to the annuitant or annuitants prior to death, and

(3) Such payments are in the nature of a refund of the consideration paid. See paragraph (c)(1) of § 1.72–11.

(b) *Adjustment of investment for the refund feature in the case of a single life annuity.* Where a single life annuity contract to which section 72 applies contains a refund feature and the special rule of paragraph (d) of this section does not apply, the investment in the contract shall be adjusted in the following manner:

(1) Determine the number of years necessary for the guaranteed amount to be fully paid by dividing the maximum amount guaranteed as of the annuity starting date by the amount to be received annually under the contract to the extent such amount reduces the guaranteed amount. The number of years should be stated in terms of the nearest whole year, considering for this purpose a fraction of one-half or more as an additional whole year.

(2) Consult Table III or VII (whichever is applicable) of § 1.72–9 for the appropriate percentage under the whole number of years found in subparagraph (1) of this paragraph and the age (as of the annuity starting date) and, if applicable, sex of the annuitant.

(3) Multiply the percentage found in subparagraph (2) of this paragraph by whichever of the following is the smaller: (i) The investment in the contract found in accordance with § 1.72–6 or (ii) the total amount guaranteed as of the annuity starting date.

(4) Subtract the amount found in subparagraph (3) of this paragraph from the investment in the contract found in accordance with § 1.72–6.

The resulting amount is the investment in the contract adjusted for the present value of the refund feature without discount for interest and is to be used in determining the exclusion ratio to be applied to the payments received as an annuity. The percentage found in Tables III or VII shall not be adjusted in a manner described in paragraph (a)(2) of § 1.72–5. These principles may be illustrated by the following examples:

Example 1. On January 1, 1954, a husband, age 65, purchased for $21,053, an immediate installment refund annuity payable $100 per month for life. The contract provided that in the event the husband did not live long enough to recover the full purchase price, payments were to be made to his wife until the total payments under the contract equaled the purchase price. The investment in the contract adjusted for the purpose of determining the exclusion ratio is computed in the following manner:

Cost of the annuity contract (investment in the contract, unadjusted)	$21,053
Amount to be received annually	$1,200
Number of years for which payment guaranteed ($21,053 divided by $1,200)	17.5
Rounded to nearest whole number of years	18
Percentage located in Table III for age 65 (age of the annuitant as of the annuity starting date) and 18 (the number of whole years) (percent)	30
Subtract value of the refund feature to the nearest dollar (30 percent of $21,053)	$6,316
Investment in the contract adjusted for the present value of the refund feature without discount for interest	$14,737

Example 2. Assume the same facts as in example (1), except that the total investment in the contract was made after June 30, 1986. The investment in the contract adjusted for the purpose of determining the exclusion ratio is computed as follows:

Cost of the annuity contract (investment in the contract, unadjusted)	$21,053

Amount to be received annually	$1,200
Number of years for which payment guaranteed ($21,053÷$1,200)	17.5
Rounded to nearest whole number of years	18
Percentage in Table VII for age 65 and 18 years (percent)	15
Subtract value of the refund feature to the nearest dollar (15 percent of $21,053)	$3,158
Investment in the contract adjusted for the present value of the refund feature without discount for interest	$17,895

Example 3. Assume the same facts as in example (1), except that the pre-July 1986 investment in the contract is $10,000 and the post-June 1986 investment in the contract is $11,053. If the annuitant makes the election described in §1.72–6(d)(6), separate computations must be performed pursuant to §1.72–6(d) to determine the adjusted investment in the contract. The pre-July 1986 investment in the contract and the post-June 1986 investment in the contract adjusted for the purpose of determining the exclusion ratios are, respectively, $7,000 and $9,395, determined as follows:

Pre-July 1986 investment in the contract (unadjusted)	$10,000
Pre-July 1986 portion of the amount to be received annually ($10,000/$21,053×$1,200)	$570.00
Number of years for which payment guaranteed ($10,000÷$570)	17.50
Rounded to nearest whole number of years	18
Percentage in Table III for age 65 and 18 years (percent)	30
Subtract value of the refund feature to the nearest dollar (30 percent of $10,000)	$3,000
Pre-July 1986 investment in the contract adjusted for the present value of the refund feature without discount for interest	$7,000
Post-June 1986 investment in the contract (unadjusted)	$11,053
Post-June 1986 portion of the amount to be received annually ($11,053/$21,053×$1,200)	$630
Number of years for which payment guaranteed ($11,053÷$630)	17.54
Rounded to nearest whole number of years	18
Percentage in Table VII for age 65 and 18 years (percent)	15
Subtract value of the refund feature to the nearest dollar (15 percent of $11,053)	$1,658
Post-June 1986 investment in the contract adjusted for the present value of the refund feature without discount for interest	$9,395

If, in the above examples, the guaranteed amount had exceeded the investment in the contract (or applicable portion thereof), the percentage found in Table III or VII (whichever is applicable) should have been applied to the lesser of these amounts since any excess of the guaranteed amount over the investment in the contract (as found under §1.72–6) would not have constituted a refund of premiums or other consideration paid. In such a case, however, a different multiple might have been obtained from Table III or VII (whichever is applicable) since the number of years for which payments were guaranteed would have been greater.

(c) *Adjustment of investment for the refund feature in the case of a joint and survivor annuity.* (1) Except as provided in paragraph (c)(2) of this section, if a joint and survivor annuity contract described in paragraph (b) (1), (2) or (6) of §1.72–5 contains a refund feature and the special rule of paragraph (d) of this section does not apply, the investment in the contract shall be adjusted in the following manner:

(i) Find the percentage determined under the following formula:

$$V = \frac{\displaystyle\sum_{t=0}^{N-1} \frac{d_{x+t}}{l_x}\left[\left(N - \tfrac{1}{2} - t\right) - P\left(\frac{T_{y+t+1} - T_{y+t+M+1}}{l_y}\right)\right]}{N}$$

In which:

V = The percentage, rounded to the nearest whole percent,

x = The age at the nearest birthday of the primary annuitant,

y = The age at the nearest birthday of the survivor annuitant,

N = The guaranteed amount divided by the annual annuity payable to the primary annuitant, rounded to the nearest integer,

P = The annual annuity continued to the survivor annuitant divided by the annual annuity payable to the primary annuitant,

$$M = \frac{N - \frac{1}{2} - t,}{P}$$

$$l_x = \text{The number of survivors at age x},\ d = l_x - l_{x+1},\ \text{and}$$

$$T_x = \sum_{s=0}^{\infty} \tfrac{1}{2}\left(l_{x+s} + l_{x+s+1}\right).$$

(ii) Multiply the percentage found in paragraph (c)(1)(i) of this section by the lesser of (A) the investment in the contract found in accordance with §1.72–6, or (B) the total amount guaranteed as of the annuity starting date.

(iii) Subtract the amount found in paragraph (c)(1)(ii) of this section from the investment in the contract found in accordance with §1.72–6.

In the case of a contract providing for payments to be made to two persons in the manner described in paragraph (b)(6) of §1.72–5, this paragraph (c)(1) is applied as though the older person were the primary annuitant and the younger person were the survivor annuitant. For purposes of this paragraph (c)(1), the number of survivors at age$_x$ (l_x) is determined under the following table:

x	lx
5	1000000.
6	999729.
7	999493.
8	999284.
9	999069.
10	998849.
11	998620.
12	998382.
13	998135.
14	997876.
15	997606.
16	997322.
17	997025.
18	996714.
19	996387.
20	996044.
21	995684.
22	995304.
23	994905.
24	994484.
25	994041.
26	993573.
27	993080.
28	992563.
29	992024.
30	991461.
31	990876.
32	990269.
33	989638.
34	988984.
35	988303.
36	987593.
37	986846.
38	986055.
39	985210.
40	984298.
41	983310.
42	982230.
43	981046.
44	979742.
45	978302.
46	976709.
47	974945.
48	972992.
49	970832.
50	968447.
51	966000.
52	963313.
53	960375.
54	957175.
55	953705.
56	949954.
57	945912.
58	941568.
59	936908.
60	931903.
61	926451.
62	920540.
63	914090.
64	907011.
65	899221.
66	890428.
67	880797.
68	870298.
69	858904.
70	846565.
71	832316.
72	816861.
73	800078.
74	781837.
75	762012.
76	740743.
77	717689.
78	692780.
79	665977.
80	637260.
81	607339.
82	575531.
83	541919.
84	506647.
85	469931.

x	lx
86	432459.
87	394138.
88	355393.
89	316712.
90	278663.
91	242020.
92	207150.
93	174602.
94	144828.
95	118151.
96	94871.7
97	74863.6
98	58042.2
99	44176.1
100	32956.4
101	24044.8
102	17104.1
103	11815.5
104	7886.75
105	5054.94
106	3086.95
107	1778.82
108	955.465
109	470.955
110	208.668
111	80.7899
112	26.2340
113	6.69620
114	1.19385
115	.111460

(2) If the multiples in Tables I through IV of § 1.72–9 are used to determine any portion of the expected return under a contract described in paragraph (c)(1) of this section, only the post-June 1986 investment in the contract (if any) shall be adjusted in the manner described in paragraph (c)(1) of this section, and the pre-July 1986 investment in the contract shall, in the case of a contract described in paragraph (b) (1) or (6) of § 1.72–5, be adjusted in the following manner:

(i) Determine the number of years necessary for the guaranteed amount to be fully paid by dividing the maximum amount guaranteed as of the annuity starting date by the amount to be received annually under the contract. The number of years should be stated in terms of the nearest whole year, considering for this purpose a fraction of one-half or more as an additional whole year.

(ii) Consult Table III of § 1.72–9 for the appropriate percentages under the whole number of years found in subdivision (i) of this subparagraph and the age (as of the annuity starting date) and sex of each annuitant. If the annuitants are not of the same sex, substitute for the female annuitant a male annuitant 5 years younger, or for the male annuitant a female annuitant 5 years older, so that Table III will be entered in both cases with the ages of annuitants of the same sex.

(iii) Find the sum of the two percentages found in accordance with subdivision (ii) of this subparagraph.

(iv) To the age of the elder of the two annuitants (as determined under subdivision (ii) of this subparagraph), add the number of years (indicated in the table below) opposite the number of years by which such annuitants' ages differ:

Number of years difference in age (2 male annuitants or 2 female annuitants)	Addition to older age in years
0 to 1, inclusive	9
2 to 3, inclusive	8
4 to 5, inclusive	7
6 to 8, inclusive	6
9 to 11, inclusive	5
12 to 15, inclusive	4
16 to 20, inclusive	3
21 to 27, inclusive	2
28 to 42, inclusive	1
Over 42	0

(v) Consult Table III for the appropriate percentage under the whole number of years found in subdivision (i) of this subparagraph and the age and sex of the elder annuitant as adjusted under subdivision (iv) of this subparagraph.

(vi) Subtract the percentage obtained in subdivision (v) of this subparagraph from the sum of the percentages found under subdivision (iii) of this subparagraph. If the result is less than one, subdivisions (vii) and (viii) of this subparagraph shall be disregarded and no adjustment made to the investment in the contract.

(vii) Multiply the percentage found in subdivision (vi) of this subparagraph by whichever of the following is the smaller: (A) the investment in the contract found in accordance with § 1.72–6 or (B) the total amount guaranteed as of the annuity starting date.

(viii) Subtract the amount found in subdivision (vii) of this subparagraph from the investment in the contract found in accordance with § 1.72–6.

(3) The principles of this paragraph (c) may be illustrated by the following examples:

Example 1. Prior to July 1, 1986, Taxpayer A, a 70-year-old male, purchases a joint and last survivor annuity for $33,050. The contract provides for payments of $100 a month to be paid first to himself for life and then to B, his 40-year-old daughter, if she survives him. The contract further provides that in the event both die before ten years' payments have been made, payments will be continued to C, a beneficiary, or to C's estate, until ten years' payments have been made. If there is no post-June 1986 investment in the contract, the investment in the contract adjusted for the purpose of determining the exclusion ratio is computed in the following manner:

Cost of the annuity contract (investment in the contract unadjusted)	$33,050
Guaranteed amount ($1,200×10)	$12,000
Percentage in Table III for male, age 70 (or female, age 75) for duration of the guarantee (10)	21
Percentage in Table III for female, age 40 (or male, age 35) for duration of the guarantee (10)	2
Sum of percentages obtained	23
Difference in years of age between two males, aged 70 and 35 (or 2 females, aged 75 and 40)	35
Addition, in years, to older age	1
Percentage in Table III for male one year older than A	22
Difference between percentages obtained (23 percent less 22 percent)	1
Value of the refund feature to the nearest dollar (1 percent of $12,000)	$120
Investment in the contract adjusted for present value of the refund feature	$32,930

Example 2. The facts are the same as in example (1), except that the total investment in the contract was made after June 30, 1986, A is 73 years of age, and B is A's 70 year old spouse. The percentage determined under the formula in paragraph (c)(1)(i) of this section is two percent. Thus, the amount determined under paragraph (c)(1)(ii) of this section is $240 (2 percent of $12,000), and the investment in the contract adjusted for the present value of the refund feature is $32,810 ($33,050—$240).

(4) If an annuity described in paragraph (b) of §1.72–5 contains a refund feature and the manner of determining the adjustment to the investment in the contract (or to any part of such investment) is not prescribed or requires use of the formula in paragraph (c)(1)(i) of this section, the Commissioner will determine the amount of the adjustment upon request. The request must contain the date of birth of each annuitant, the guaranteed amount, the annual annuity payable to each annuitant, and the annuity starting date. Send the request to the Commissioner of Internal Revenue, Attention: OP:E:EP:GA, Washington, D.C. 20224.

(d) *Adjustment of investment in the contract where paragraph (b)(3) of §1.72–2 applies to payments.* (1) If paragraph (b)(3) of §1.72–2 applies to payments to be made under a contract and this section also applies because of the provision for a refund feature, an adjustment shall be made to the investment in the contract in accordance with this paragraph before making the computations required by paragraph (d)(3) of §1.72–4 and paragraph (d)(7) of §1.72–5. In the case of the guarantee of a specified amount, the adjustment shall be made by applying the appropriate multiple from Table III or VII (whichever is applicable), as otherwise determined under this section, to the investment in the contract or the guranteed amount, whichever is the lesser. The guarantee period shall be found by dividing the amount guaranteed by the amount determined by placing the payments received during the first taxable year (to guaranteed amount) on an annual basis. Thus, if monthly payments are first received by a taxpayer on a calendar year basis in August, his total payments (to the extent that they reduce the guaranteed amount) for the taxable year would be divided by 5 and multiplied by 12. The guaranteed amount would then be divided by the result of this computation to obtain the guarantee period. If the contract merely guarantees that proceeds from a unit or units of a fund shall be paid for a fixed number of years or the life (or lives) of an annuitant (or annuitants), whichever is the longer, the fixed number of years is the guarantee period. The appropriate percentage in Table III or VII shall be applied to whichever of the following is the smaller: (i) the investment in the contract; or (ii) the product of the payments received in the first taxable year, placed on an annual basis, multiplied by the number of years for which payment of the proceeds of a unit or units is guaranteed.

(2) The principles of this paragraph may be illustrated by the following examples:

Example 1. Taxpayer A, a 50-year-old male purchases for $25,000 a contract which provides for variable monthly payments to be paid to him for his life. The contract also provides that if he should die before receiving payments for fifteen years, payments shall continue according to the original formula to his estate or beneficiary until payments have been made for that period. Beginning with the month of September, A receives payments which total $450 for the first taxable year of receipt. This amount, placed on an annual basis, is $1,350 ($450 divided by 4, or $112.50; $112.50 multiplied by 12, or $1,350). If there is no post-June 1986 investment in the contract, the guaranteed amount is considered to be $20,250 ($1,350×15), and the multiple from Table III (found in the same manner as in paragraph (b) of this section), 9 percent, applied to $20,250 (since this amount is less than the investment in the contract), results in a refund adjustment of $1,822,50. The latter amount, subtracted from the investment in the contract of $25,000, results in an adjusted investment in the contract of $23,177.50. If A dies before receiving payments for 15 years and the remaining payments are made to B, his beneficiary, B shall exclude the entire amount of such payments from his gross income until the amounts so received by B, together with the amount received by A and excludable from A's gross income, equal or exceed $25,000. Any excess and any payments thereafter received by B shall be fully includible in gross income.

Example 2. Assume the same facts as in example (1), except that the total investment in the contract was made after June 30, 1986. The applicable multiple found in Table VII is 3 percent. When this is applied to the guaranteed amount of $20,250, it results in a refund adjustment of $607.50. The adjusted investment in the contract in $24,392.50 ($25,000—$607.50).

(e) *Adjustment of the investment in the contract where more than one annuity element is provided for a single consideration.* In the case of contracts to which paragraph (b) of §1.72–6 applies for the purpose of allocating the investment in the contract to two or more annuity elements which are provided for a single consideration, if one or more of such elements involves a refund feature, the portion of the investment in the contract properly allocable to each such element shall be adjusted for the refund feature before aggregating all the investments in order to obtain the exclusion ratio which is to apply to the contract as a whole.

Example 1. If taxpayer A, an insured 70 years of age, upon maturity of an endowment policy which cost him a net amount of $86,000, elected a dual settlement consisting of (1) monthly payments for his life aggregating $4,146 per year with 10 years' payments certain, and (2) monthly payments for his 60-year-old brother, B, aggregating $2,820 per year with 20 years' payments certain, the exclusion ratio to be used by both A and B if there is no post-June 1986 investment in the contract would be determined in the following manner:

A's expected return (A's payments per year of $4,146 multiplied by his life expectancy from Table 1 of 12.1)	$50,166.60
B's expected return (B's payments per year of $2,820 multiplied by his life expectancy from Table 1 of 18.2)	$51,324.00
Sum of expected returns to be used in determining exclusion ratio	$101,490.60
Percentage of total expected return attributable to A's expectancy of life ($50,166.60÷$101,490.60)	49.4
Percentage of total expected return attributable to B's expectancy of life ($51,324÷$101,490.60)	50.6
Portion of investment in the contract allocable to A's annuity (49.4 percent of $86,000)	$42,484.00
Portion of investment in the contract allocable to B's annuity (50.6 percent of $86,000)	$43,516.00
Value of the refund feature with respect to A's annuity (percentage from Table III for male, age 70, and duration 10, or 21 percent, multiplied by lesser of guaranteed amount and allocable portion of investment in the contract, $41,460)	$8,707.00
A's allocable portion of the investment in the contract adjusted for refund feature ($42,484 less $8,707.00)	$33,777.00
Value of the refund feature with respect to B's annuity (percentage from Table III for male, age 60, and duration 20, or 25 percent, multiplied by lesser of guaranteed amount and allocable portion of investment in the contract, $43,516)	$10,879.00
B's allocable portion of the investment in the contract adjusted for refund feature ($43,516 less $10,879.00)	$32,637.00
Sum of A's and B's allocable portions of the investment in the contract after adjustment for the refund feature	$66,414.00
Exclusion ratio for the contract as a whole (total adjusted investment in the contract, $66,414, divided by the total expected return from above, $101,490.60) (percent)	65.4

Example 2. Assume the same facts as in example (1) except that the total investment in the contract was made after June 30, 1986. The exclusion ratio to be used by both A and B would be 56.9 percent, determined as follows:

A's expected return (A's payments per year of $4,146 multiplied by his life expectancy from Table V of 16.0)	$66,336.00
B's expected return (B's payments per year of $2,820 multiplied by his life expectancy from Table V of 24.2)	$68,244.00

Sum of expected returns to be used in determining exclusion ratio	$134,580.00
Percentage of total expected return attributable to A's expectancy of life ($66,336.00÷$134,580.00)	49.3
Percentage of total expected return attributable to B's expectancy of life ($68,244.00÷$134,580.00)	50.7
Portion of investment in the contract allocable to A's annuity (49.3 percent of $86,000)	$42,398.00
Portion of investment in the contract allocable to B's annuity (50.7 percent of $86,000)	$43,602.00
Value of the refund feature with respect to A's annuity (percentage from Table VII for age 70 and duration 10, or 11 percent, multiplied by lesser of the guaranteed amount and allocable portion of investment in the contract, $41,460)	$4,560.60
A's allocable portion of the investment in the contract adjusted for refund feature ($42,398 less $4,560.60)	$37,837.40
Value of the refund feature with respect to B's annuity (percentage from Table VII for age 60 and duration 20, or 11 percent, multiplied by lesser of guaranteed amount and allocable portion of investment in the contract, $43,602)	$4,796.22
B's allocable portion of the investment in the contract adjusted for refund feature ($43,602 less $4,796.22)	$38,805.78
Sum of A's and B's allocable portions of the investment in the contract after adjustment for the refund feature	$76,643.18
Exclusion ratio for the contract as a whole (total adjusted investment in the contract, $76,643.18, divided by the total expected return from above, $134,580.00) (percent)	56.9

(f) *Adjustment of investment in the contract with respect to contracts subject to §1.72–6(d).* In the case of a contract to which §1.72–6(d) (relating to contracts in which amounts were invested both before July 1, 1986, and after June 30, 1986) applies, this section is applied in the manner prescribed in §1.72–6(d) and, in particular, §1.72–6(d)(5)(vi).

[T.D. 6500, 25 FR 11402, Nov. 26, 1960; 25 FR 14021, Dec. 21, 1960, as amended by T.D. 8115, 51 FR 45702, Dec. 19, 1986]

§1.72–8 Effect of certain employer contributions with respect to premiums or other consideration paid or contributed by an employee.

(a) *Contributions in the nature of compensation*—(1) *Amounts includible in gross income of employee under subtitle A of the Code or prior income tax laws.* Section 72(f) provides that for the purposes of section 72 (c), (d), and (e), amounts contributed by an employer for the benefit of an employee or his beneficiaries shall constitute consideration paid or contributed by the employee to the extent that such amounts were includible in the gross income of the employee under subtitle A of the Code or prior income tax laws. Amounts to which this paragraph applies include, for example, contributions made by an employer to or under a trust or plan which fails to qualify under the provisions of section 401(a), provided that the employee's rights to such contributions are nonforfeitable at the time the contributions are made. See sections 402(b) and 403(c) and the regulations thereunder. This subparagraph also applies to premiums paid by an employer (other than premiums paid on behalf of an owner-employee) for life insurance protection for an employee if such premiums are includible in the gross income of the employee when paid. See §1.72–16. However, such premiums shall only be considered as premiums and other consideration paid by the employee with respect to any benefits attributable to the contract providing the life insurance protection. See §1.72–16.

(2) *Amounts not includible in gross income of employee at time contributed if paid directly to employee at that time.* Except as provided in subparagraph (3) of this paragraph, section 72(f) provides that for the purposes of section 72 (c), (d), and (e), amounts contributed by an employer for the benefit of an employee or his beneficiaries shall constitute consideration paid or contributed by the employee to the extent that such amounts would not have been includible in the gross income of the employee at the time contributed had they been paid directly to the employee at that time. Amounts to which this subparagraph applies include, for example, contributions made by an employer after December 31, 1950, and before January 1, 1963, if made on account of foreign services rendered by an employee during a period in which the employee qualified as a bona fide resident of a foreign country under section 911(a) of the Internal Revenue Code of 1954, or under section 116(a) of the Internal Revenue Code of 1939. In such a case, it would be immaterial whether such contributions were made under a qualified plan or otherwise. See

subparagraph (4) of this paragraph for rules governing the determination of the amount of employer foreign service contributions to which this subparagraph applies. On the other hand, if contributions are made by an employer to a qualified plan at a time when compensation paid directly to the employee concerned with respect to the same services rendered would have been includible in the gross income of the employee, such as in the case of an employee of a State government where contributions are made in 1955 with respect to services rendered by the employee prior to the year 1939, this subparagraph does not apply to such contributions.

(3) *Limitation*—(i) *In general*. Except as provided in subdivision (ii) of this subparagraph, the provisions of subparagraph (2) of this paragraph shall not apply to amounts which were contributed by the employer after December 31, 1962, and which would not have been includible in the gross income of the employee by reason of the application of section 911, if such amounts had been paid directly to the employee at the time of contribution. Employer contributions attributable to foreign services performed by the employee after December 31, 1962, do not constitute, for purposes of section 72 (c), (d), and (e), consideration paid or contributed by the employee.

(ii) *Exception*. The provisions of subdivision (i) of this subparagraph shall not apply to amounts which were contributed by the employer to provide pension or annuity credits (determined in accordance with the provisions of subparagraph (4) of this paragraph) to the extent such credits are—

(*a*) Attributable to foreign services performed before January 1, 1963, with respect to which the employee qualified for the benefits of section 911(a) (or corresponding provisions of prior revenue laws), and

(*b*) Provided pursuant to pension or annuity plan provisions in existence on March 12, 1962, and on that date applicable to such services.

Amounts described in this subdivision constitute, for purposes of section 72 (c), (d), and (e), consideration paid or contributed by the employee even though such amounts are contributed by the employer after December 31, 1962.

(4) *Determination of employer foreign service contributions which constitute consideration paid or contributed by employee*. For purposes of subparagraphs (2) and (3)(ii) of this paragraph, employer foreign service contributions which constitute, for purposes of section 72 (c), (d), and (e), consideration paid or contributed by the employee shall be determined as follows:

(i) *Treatment of identifiable contributions*. If, under the terms of the pension or annuity plan under which employer contributions were made, such contributions may be identified as—

(*a*) Attributable to foreign services performed before January 1, 1963, with respect to which the employee qualified for the benefits of section 911(a) (or corresponding provisions of prior revenue laws), and

(*b*) Made under pension or annuity plan provisions in existence on March 12, 1962, which were applicable to the services referred to in (*a*) of this subdivision on that date,

the amount of employer contributions so identified shall be considered paid or contributed by the employee.

(ii) *Alternative rule for unidentifiable contributions*. If employer contributions may not be identified in the manner described in subdivision (i) of this subparagraph, the amount of employer contributions attributable to foreign services performed before January 1, 1963, and considered paid or contributed by the employee shall be determined on the basis of an estimated allocation which is reasonable and consistent with the circumstances and the provisions of the pension or annuity plan under which such contributions are made. For example, if an employee's benefits under a pension or annuity plan, which is unchanged after March 12, 1962, are determined with respect to his basic compensation during his entire period of credited service, the amount of employer contributions considered paid or contributed by the employee shall be an amount which bears the same ratio to total employer contributions for such employee under the pension or annuity plan as his basic compensation attributable to foreign services performed before January

1, 1963, with respect to which he qualified for the benefits of section 911(a) (or corresponding provisions of prior revenue laws) bears to his total basic compensation. On the other hand, if an employee's benefits under a pension or annuity plan, which is unchanged after March 12, 1962, are determined with respect to his basic compensation during his final five years of credited service, the amount of employer contributions considered paid or contributed by the employee shall be an amount which bears the same ratio to total employer contributions for such employee as his number of years of credited service before January 1, 1963, with respect to which he qualified for the benefits of section 911(a) (or corresponding provisions of prior revenue laws) bears to his total number of years of credited service.

(5) *Amounts not includible in gross income of employee under subtitle A of the Code or prior income tax laws.* Amounts contributed by an employer which were not includible in the gross income of the employee under Subtitle A of the Code or prior income tax laws, but which would have been includible therein had they been paid directly to the employee, do not constitute consideration paid or contributed by the employee for the purposes of section 72. For example, contributions made by an employer under a qualified employees' trust or plan, which contributions would have been includible in the gross income of the employee had such contributions been paid to him directly as compensation, do not constitute consideration paid or contributed by the employee. Accordingly, the aggregate amount of premiums or other consideration paid or contributed by an employee, insofar as compensatory employer contributions are concerned, consists solely of the (i) sum of all amounts actually contributed by the employee, plus (ii) contributions in the nature of compensation which are deemed to be paid or contributed by the employee under this paragraph.

(b) *Contributions in the nature of death benefits.* In the case of an employee's beneficiary, the aggregate amount of premiums or other consideration paid or deemed to be paid or contributed by the employee shall also include:

(1) Amounts (other than amounts paid as an annuity) to the extent such amounts are excludable from the beneficiary's gross income as a death benefit under section 101(b), and

(2) Any amount or amounts of death benefits which are treated as additional consideration contributed by the employee under section 101(b)(2)(D) and the regulations thereunder, or which were excludable from the beneficiary's gross income as a death benefit under section 22(b)(1)(B) of the Internal Revenue Code of 1939 and the regulations thereunder.

Accordingly, in the case of an employee's beneficiary, any such amount shall be added to any amount or amounts deemed paid or contributed by the employee under paragraph (a)(1) of this section and to any amounts actually contributed by the employee for the purpose of finding the aggregate amount of premiums or other consideration paid or contributed by the employee.

(c) *Amounts ''made available'' to an employee or his beneficiary.* Any amount which, although not actually paid, is made available to and includable in the gross income of an employee or his beneficiary under the rules of sections 402 and 403 and the regulations thereunder, shall be considered an amount contributed by the employee and shall be aggregated with amounts, if any, to which paragraphs (a) and (b) of this section apply for the purpose of determining the aggregate amount of premiums or other consideration paid by the employee.

(d) *Amounts includable in gross income of employee when his rights under annuity contract change to nonforfeitable rights.* Any amount which, by reason of section 403(d) and after the application of paragraph (b) of §1.403 (b)–1, is required to be included in an employee's gross income for the year when his rights under an annuity contract change from forfeitable to nonforfeitable rights shall be considered an amount contributed by the employee and shall be aggregated with amounts, if any, to which paragraphs (a), (b), and (c) of this section apply for the purpose of determining the aggregate amount of premiums or other consideration paid or contributed by the employee for such annuity contract. In other words, if, under section 403(d), an employee of an organization exempt from tax under section 501(a) or 521(a) is required to include an amount in gross income by reason of his rights under an annuity contract changing from forfeitable to nonforfeitable rights, such amount, to the extent it is not excludable from gross income under paragraph (b) of § 1.403 (b)–1, shall be considered an amount contributed by such employee for the annuity contract.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6665, 28 FR 7245, July 16, 1963; T.D. 6783, 29 FR 18356, Dec. 24, 1964]

§ 1.72–9 Tables.

The following tables are to be used in connection with computations under section 72 and the regulations thereunder. Tables I, II, IIA, III, and IV are to be used if the investment in the contract does not include a post-June 1986 investment in the contract (as defined in § 1.72–6(d)(3)). Tables V, VI, VIA, VII, and VIII are to be used if the investment in the contract includes a post-June 1986 investment in the contract (as defined in § 1.72–6(d)(3)).

In the case of a contract under which amounts are received as an annuity after June 30, 1986, a taxpayer receiving such amounts may elect to treat the entire investment in the contract as post-June 1986 investment in the contract and thus apply Tables V through VIII. A taxpayer may make the election for any taxable year in which such amounts are received by attaching to the taxpayer's return for such taxable year a statement that the taxpayer is electing under § 1.72–9 to treat the entire investment in the contract as post-June 1986 investment in the contract. The statement must contain the taxpayer's name, address, and taxpayer identification number. The election is irrevocable and applies with respect to all amounts that the taxpayer receives as an annuity under the contract in the taxable year for which the election is made or in any subsequent taxable year. (Note that for purposes of the examples in §§ 1.72–4 through 1.72–11 the election described in this section is disregarded (*i.e.*, it assumed that the taxpayer does not make an election under this section).) See also § 1.72–6(d)(3) for rules treating the entire investment in a contract as post-June 1986 investment in a contract if the annuity starting date of the contract is after June 30, 1986, and the contract provides for a disqualifying form of payment or settlement, such as an option to receive a lump sum in full discharge of the obligation under the contract. In addition, see § 1.72–6(d) for special rules concerning the tables to be used and the separate computations required if the investment in the contract includes both a pre-July 1986 investment in the contract and a post-June 1986 investment in the contract and the election described in § 1.72–6(d)(6) is made with respect to the contract.

TABLE I—ORDINARY LIFE ANNUITIES—ONE LIFE—EXPECTED RETURN MULTIPLES

Ages		Multiples
Male	Female	
6	11	65.0
7	12	64.1
8	13	63.2
9	14	62.3
10	15	61.4
11	16	60.4
12	17	59.5
13	18	58.6
14	19	57.7
15	20	56.7
16	21	55.8
17	22	54.9
18	23	53.9
19	24	53.0
20	25	52.1
21	26	51.1
22	27	50.2
23	28	49.3
24	29	48.3
25	30	47.4
26	31	46.5
27	32	45.6
28	33	44.6
29	34	43.7
30	35	42.8
31	36	41.9
32	37	41.0
33	38	40.0
34	39	39.1
35	40	38.2
36	41	37.3
37	42	36.5
38	43	35.6
39	44	34.7
40	45	33.8
41	46	33.0
42	47	32.1
43	48	31.2

TABLE I—ORDINARY LIFE ANNUITIES—ONE LIFE—EXPECTED RETURN MULTIPLES—Continued

Ages		Multiples
Male	Female	
44	49	30.4
45	50	29.6
46	51	28.7
47	52	27.9
48	53	27.1
49	54	26.3
50	55	25.5
51	56	24.7
52	57	24.0
53	58	23.2
54	59	22.4
55	60	21.7
56	61	21.0
57	62	20.3
58	63	19.6
59	64	18.9
60	65	18.2
61	66	17.5
62	67	16.9
63	68	16.2
64	69	15.6
65	70	15.0
66	71	14.4
67	72	13.8
68	73	13.2
69	74	12.6
70	75	12.1
71	76	11.6
72	77	11.0
73	78	10.5
74	79	10.1
75	80	9.6
76	81	9.1
77	82	8.7

TABLE I—ORDINARY LIFE ANNUITIES—ONE LIFE—EXPECTED RETURN MULTIPLES—Continued

Ages		Multiples
Male	Female	
78	83	8.3
79	84	7.8
80	85	7.5
81	86	7.1
82	87	6.7
83	88	6.3
84	89	6.0
85	90	5.7
86	91	5.4
87	92	5.1
88	93	4.8
89	94	4.5
90	95	4.2
91	96	4.0
92	97	3.7
93	98	3.5
94	99	3.3
95	100	3.1
96	101	2.9
97	102	2.7
98	103	2.5
99	104	2.3
100	105	2.1
101	106	1.9
102	107	1.7
103	108	1.5
104	109	1.3
105	110	1.2
106	111	1.0
107	112	.8
108	113	.7
109	114	.6
110	115	.5
111	116	0

TABLE II—ORDINARY JOINT LIFE AND LAST SURVIVOR ANNUITIES—TWO LIVES—EXPECTED RETURN MULTIPLES

Male	Female	Ages														
		Male 6	7	8	9	10	11	12	13	14	15	16	17	18	19	20
		Female 11	12	13	14	15	16	17	18	19	20	21	22	23	24	25
6	11	73.5	73.0	72.6	72.2	71.8	71.4	71.0	70.7	70.4	70.0	69.7	69.5	69.2	68.9	68.7
7	12	73.0	72.6	72.1	71.7	71.3	70.9	70.5	70.1	69.8	69.4	69.1	68.8	68.5	68.3	68.0
8	13	72.6	72.1	71.6	71.2	70.8	70.4	70.0	69.6	69.2	68.9	68.5	68.2	67.9	67.6	67.3
9	14	72.2	71.7	71.2	70.7	70.3	69.9	69.4	69.0	68.7	68.3	67.9	67.6	67.3	67.0	66.7
10	15	71.8	71.3	70.8	70.3	69.8	69.4	68.9	68.5	68.1	67.7	67.4	67.0	66.7	66.4	66.1
11	16	71.4	70.9	70.4	69.9	69.4	68.9	68.5	68.0	67.6	67.2	66.8	66.5	66.1	65.8	65.4
12	17	71.0	70.5	70.0	69.4	68.9	68.5	68.0	67.5	67.1	66.7	66.3	65.9	65.5	65.2	64.8
13	18	70.7	70.1	69.6	69.0	68.5	68.0	67.5	67.1	66.6	66.2	65.8	65.4	65.0	64.6	64.2
14	19	70.4	69.8	69.2	68.7	68.1	67.6	67.1	66.6	66.1	65.7	65.3	64.8	64.4	64.0	63.7
15	20	70.0	69.4	68.9	68.3	67.7	67.2	66.7	66.2	65.7	65.2	64.8	64.3	63.9	63.5	63.1
16	21	69.7	69.1	68.5	67.9	67.4	66.8	66.3	65.8	65.3	64.8	64.3	63.8	63.4	63.0	62.6
17	22	69.5	68.8	68.2	67.6	67.0	66.5	65.9	65.4	64.8	64.3	63.8	63.4	62.9	62.5	62.0
18	23	69.2	68.5	67.9	67.3	66.7	66.1	65.5	65.0	64.4	63.9	63.4	62.9	62.4	62.0	61.5
19	24	68.9	68.3	67.6	67.0	66.4	65.8	65.2	64.6	64.0	63.5	63.0	62.5	62.0	61.5	61.0
20	25	68.7	68.0	67.3	66.7	66.1	65.4	64.8	64.2	63.7	63.1	62.6	62.0	61.5	61.0	60.6

Male	Female	Ages														
		Male 21	22	23	24	25	26	27	28	29	30	31	32	33	34	
		Female 26	27	28	29	30	31	32	33	34	35	36	37	38	39	
6	11	68.4	68.2	68.0	67.8	67.6	67.5	67.3	67.1	67.0	66.8	66.7	66.6	66.5	66.4	
7	12	67.8	67.5	67.3	67.1	66.9	66.7	66.5	66.4	66.2	66.1	65.9	65.8	65.7	65.6	
8	13	67.1	66.8	66.6	66.4	66.2	66.0	65.8	65.6	65.4	65.3	65.1	65.0	64.9	64.7	
9	14	66.4	66.2	65.9	65.7	65.4	65.2	65.0	64.8	64.7	64.5	64.3	64.2	64.1	63.9	
10	15	65.8	65.5	65.2	65.0	64.7	64.5	64.3	64.1	63.9	63.7	63.6	63.4	63.3	63.1	
11	16	65.1	64.8	64.6	64.3	64.1	63.8	63.6	63.4	63.2	63.0	62.8	62.6	62.5	62.3	
12	17	64.5	64.2	63.9	63.6	63.4	63.1	62.9	62.7	62.4	62.2	62.0	61.9	61.7	61.5	
13	18	63.9	63.6	63.3	63.0	62.7	62.4	62.2	61.9	61.7	61.5	61.3	61.1	60.9	60.8	
14	19	63.3	63.0	62.7	62.3	62.0	61.8	61.5	61.2	61.0	60.8	60.6	60.4	60.2	60.0	
15	20	62.7	62.4	62.0	61.7	61.4	61.1	60.8	60.6	60.3	60.1	59.8	59.6	59.4	59.2	
16	21	62.2	61.8	61.4	61.1	60.8	60.5	60.2	59.9	59.6	59.4	59.1	58.9	58.7	58.5	
17	22	61.6	61.2	60.9	60.5	60.2	59.8	59.5	59.2	58.9	58.7	58.4	58.2	57.9	57.7	
18	23	61.1	60.7	60.3	59.9	59.6	59.2	58.9	58.6	58.3	58.0	57.7	57.5	57.2	57.0	
19	24	60.6	60.2	59.7	59.4	59.0	58.6	58.3	57.9	57.6	57.3	57.0	56.8	56.5	56.3	
20	25	60.1	59.6	59.2	58.8	58.4	58.0	57.7	57.3	57.0	56.7	56.4	56.1	55.8	55.6	
21	26	59.6	59.1	58.7	58.3	57.9	57.5	57.1	56.7	56.4	56.0	55.7	55.4	55.1	54.9	

Male	Female	Ages													
		Male 21	22	23	24	25	26	27	28	29	30	31	32	33	34
		Female 26	27	28	29	30	31	32	33	34	35	36	37	38	39
22	27	59.1	58.7	58.2	57.7	57.3	56.9	56.5	56.1	55.8	55.4	55.1	54.8	54.5	54.2
23	28	58.7	58.2	57.7	57.2	56.8	56.4	55.9	55.5	55.2	54.8	54.4	54.1	53.8	53.5
24	29	58.3	57.7	57.2	56.8	56.3	55.8	55.4	55.0	54.6	54.2	53.8	53.5	53.2	52.8
25	30	57.9	57.3	56.8	56.3	55.8	55.3	54.9	54.4	54.0	53.6	53.2	52.9	52.5	52.2
26	31	57.5	56.9	56.4	55.8	55.3	54.8	54.4	53.9	53.5	53.1	52.7	52.3	51.9	51.6
27	32	57.1	56.5	55.9	55.4	54.9	54.4	53.9	53.4	53.0	52.5	52.1	51.7	51.3	50.9
28	33	56.7	56.1	55.5	55.0	54.4	53.9	53.4	52.9	52.4	52.0	51.6	51.1	50.7	50.3
29	34	56.4	55.8	55.2	54.6	54.0	53.5	53.0	52.4	52.0	51.5	51.0	50.6	50.2	49.3
30	35	56.0	55.4	54.8	54.2	53.6	53.1	52.5	52.0	51.5	51.0	50.5	50.1	49.6	49.2
31	36	55.7	55.1	54.4	53.8	53.2	52.7	52.1	51.6	51.0	50.5	50.0	49.5	49.1	48.7
32	37	55.4	54.8	54.1	53.5	52.9	52.3	51.7	51.1	50.6	50.1	49.5	49.1	48.6	48.1
33	38	55.1	54.5	53.8	53.2	52.5	51.9	51.3	50.7	50.2	49.6	49.1	48.6	48.1	47.6
34	39	54.9	54.2	53.5	52.8	52.2	51.6	50.9	50.3	49.8	49.2	48.7	48.1	47.6	47.1

Male	Female	Ages													
		Male 35	36	37	38	39	40	41	42	43	44	45	46	47	48	49
		Female 40	41	42	43	44	45	46	47	48	49	50	51	52	53	54
6	11	66.3	66.2	66.1	66.0	65.9	65.9	65.8	65.7	65.7	65.6	65.6	65.5	65.5	65.5	65.4
7	12	65.4	65.3	65.3	65.2	65.1	65.0	64.9	64.9	64.8	64.8	64.7	64.7	64.6	64.6	64.5
8	13	64.6	64.5	64.4	64.3	64.2	64.2	64.1	64.0	64.0	63.9	63.8	63.8	63.7	63.7	63.7
9	14	63.8	63.7	63.6	63.5	63.4	63.3	63.2	63.2	63.1	63.0	63.0	62.9	62.9	62.8	62.8
10	15	63.0	62.9	62.8	62.7	62.6	62.5	62.4	62.3	62.2	62.2	62.1	62.0	62.0	61.9	61.9
11	16	62.2	62.1	61.9	61.8	61.7	61.6	61.5	61.4	61.4	61.3	61.2	61.2	61.1	61.0	61.0
12	17	61.4	61.3	61.1	61.0	60.9	60.8	60.7	60.6	60.5	60.4	60.4	60.3	60.2	60.2	60.1
13	18	60.6	60.5	60.3	60.2	60.1	60.0	59.9	59.8	59.7	59.6	59.5	59.4	59.4	59.3	59.2
14	19	59.8	59.7	59.5	59.4	59.3	59.1	59.0	58.9	58.8	58.7	58.6	58.6	58.5	58.4	58.4
15	20	59.0	58.9	58.7	58.6	58.4	58.3	58.2	58.1	58.0	57.9	57.8	57.7	57.6	57.6	57.5
16	21	58.3	58.1	57.9	57.8	57.6	57.5	57.4	57.2	57.1	57.0	56.9	56.8	56.8	56.7	56.6
17	22	57.5	57.3	57.2	57.0	56.8	56.7	56.6	56.4	56.3	56.2	56.1	56.0	55.9	55.8	55.7
18	23	56.8	56.6	56.4	56.2	56.0	55.9	55.7	55.6	55.5	55.4	55.2	55.1	55.1	55.0	54.9
19	24	56.0	55.8	55.6	55.4	55.3	55.1	54.9	54.8	54.7	54.5	54.4	54.3	54.2	54.1	54.0
20	25	55.3	55.1	54.9	54.7	54.5	54.3	54.1	54.0	53.8	53.7	53.6	53.5	53.4	53.3	53.2
21	26	54.6	54.4	54.1	53.9	53.7	53.5	53.4	53.2	53.0	52.9	52.8	52.6	52.5	52.4	52.3
22	27	53.9	53.6	53.4	53.2	53.0	52.8	52.6	52.4	52.2	52.1	51.9	51.8	51.7	51.6	51.5
23	28	53.2	52.9	52.7	52.5	52.2	52.0	51.8	51.6	51.5	51.3	51.1	51.0	50.9	50.7	50.6
24	29	52.5	52.3	52.0	51.7	51.5	51.3	51.1	50.9	50.7	50.5	50.3	50.2	50.0	49.9	49.8
25	30	51.9	51.6	51.3	51.0	50.8	50.5	50.3	50.1	49.9	49.7	49.6	49.4	49.2	49.1	49.0

26	31	51.2	50.9	50.6	50.3	50.1	49.8	49.6	49.4	49.2	49.0	48.8	48.6	48.4	48.3	48.1
27	32	50.6	50.3	50.0	49.7	49.4	49.1	48.9	48.6	48.4	48.2	48.0	47.8	47.6	47.5	47.3
28	33	50.0	49.6	49.3	49.0	48.7	48.4	48.2	47.9	47.7	47.5	47.2	47.1	46.9	46.7	46.5
29	34	49.4	49.0	48.7	48.3	48.0	47.7	47.5	47.2	47.0	46.7	46.5	46.3	46.1	45.9	45.7
30	35	48.8	48.4	48.1	47.7	47.4	47.1	46.8	46.5	46.2	46.0	45.8	45.5	45.3	45.2	45.0
31	36	48.2	47.8	47.5	47.1	46.8	46.4	46.1	45.8	45.6	45.3	45.0	44.8	44.6	44.4	44.2
32	37	47.7	47.3	46.9	46.5	46.1	45.8	45.5	45.2	44.9	44.6	44.3	44.1	43.9	43.7	43.4
33	38	47.2	46.7	46.3	45.9	45.5	45.2	44.8	44.5	44.2	43.9	43.7	43.4	43.2	42.9	42.7
34	39	46.7	46.2	45.8	45.4	45.0	44.6	44.2	43.9	43.6	43.3	43.0	42.7	42.5	42.2	42.0

Male	Female	Ages													
		Male 50	51	52	53	54	55	56	57	58	59	60	61	62	63
		Female 55	56	57	58	59	60	61	62	63	64	65	66	67	68
6	11	65.4	65.4	65.3	65.3	65.3	65.3	65.3	65.2	65.2	65.2	65.2	65.2	65.2	65.2
7	12	64.5	64.5	64.4	64.4	64.4	64.4	64.3	64.3	64.3	64.3	64.3	64.3	64.3	64.2
8	13	63.6	63.6	63.5	63.5	63.5	63.5	63.4	63.4	63.4	63.4	63.4	63.4	63.3	63.3
9	14	62.7	62.7	62.7	62.6	62.6	62.6	62.5	62.5	62.5	62.5	62.5	62.4	62.4	62.4
10	15	61.8	61.8	61.8	61.7	61.7	61.7	61.6	61.6	61.6	61.6	61.6	61.5	61.5	61.5
11	16	61.0	60.9	60.9	60.8	60.8	60.8	60.7	60.7	60.7	60.7	60.6	60.6	60.6	60.6
12	17	60.1	60.0	60.0	59.9	59.9	59.9	59.8	59.8	59.8	59.8	59.7	59.7	59.7	59.7
13	18	59.2	59.1	59.1	59.0	59.0	59.0	58.9	58.9	58.9	58.9	58.8	58.8	58.8	58.8
14	19	58.3	58.2	58.2	58.2	58.1	58.1	58.0	58.0	58.0	57.9	57.9	57.9	57.9	57.9
15	20	57.4	57.4	57.3	57.3	57.2	57.2	57.1	57.1	57.1	57.0	57.0	57.0	57.0	56.9
16	21	56.5	56.5	56.4	56.4	56.3	56.3	56.2	56.2	56.2	56.1	56.1	56.1	56.1	56.0
17	22	55.7	55.6	55.5	55.5	55.4	55.4	55.3	55.3	55.3	55.2	55.2	55.2	55.1	55.1
18	23	54.8	54.7	54.7	54.6	54.6	54.5	54.5	54.4	54.4	54.3	54.3	54.3	54.2	54.2
19	24	53.9	53.9	53.8	53.7	53.7	53.6	53.6	53.5	53.5	53.4	53.4	53.4	53.3	53.3
20	25	53.1	53.0	52.9	52.8	52.8	52.7	52.7	52.6	52.6	52.5	52.5	52.4	52.4	52.4
21	26	52.2	52.1	52.0	52.0	51.9	51.8	51.8	51.7	51.7	51.6	51.6	51.5	51.5	51.5
22	27	51.4	51.3	51.2	51.1	51.0	51.0	50.9	50.8	50.8	50.7	50.7	50.6	50.6	50.6
23	28	50.5	50.4	50.3	50.2	50.2	50.1	50.0	50.0	49.9	49.8	49.8	49.7	49.7	49.7
24	29	49.7	49.6	49.5	49.4	49.3	49.2	49.1	49.1	49.0	49.0	48.9	48.9	48.8	48.8
25	30	48.8	48.7	48.6	48.5	48.4	48.3	48.3	48.2	48.1	48.1	48.0	48.0	47.9	47.9
26	31	48.0	47.9	47.8	47.7	47.6	47.5	47.4	47.3	47.3	47.2	47.1	47.1	47.0	47.0
27	32	47.2	47.1	46.9	46.8	46.7	46.6	46.5	46.5	46.4	46.3	46.2	46.2	46.1	46.1
28	33	46.4	46.3	46.1	46.0	45.9	45.8	45.7	45.6	45.5	45.4	45.4	45.3	45.2	45.2
29	34	45.6	45.4	45.3	45.2	45.1	44.9	44.8	44.7	44.7	44.6	44.5	44.4	44.4	44.3
30	35	44.8	44.6	44.5	44.4	44.2	44.1	44.0	43.9	43.8	43.7	43.6	43.6	43.5	43.4
31	36	44.0	43.9	43.7	43.6	43.4	43.3	43.2	43.1	43.0	42.9	42.8	42.7	42.6	42.0
32	37	43.3	43.1	42.9	42.8	42.6	42.5	42.4	42.2	42.1	42.0	41.9	41.9	41.8	41.7

Male	Female	Ages													
		Male 50	51	52	53	54	55	56	57	58	59	60	61	62	63
		Female 55	56	57	58	59	60	61	62	63	64	65	66	67	68
33	38	42.5	42.3	42.1	42.0	41.8	41.7	41.5	41.4	41.3	41.2	41.1	41.0	40.9	40.8
34	39	41.8	41.6	41.4	41.2	41.0	40.9	40.7	40.6	40.5	40.4	40.3	40.2	40.1	40.0

Male	Female	Ages														
		Male 64	65	66	67	68	69	70	71	72	73	74	75	76	77	78
		Female 69	70	71	72	73	74	75	76	77	78	79	80	81	82	83
6	11	65.1	65.1	65.1	65.1	65.1	65.1	65.1	65.1	65.1	65.1	65.1	65.1	65.1	65.1	65.1
7	12	64.2	64.2	64.2	64.2	64.2	64.2	64.2	64.2	64.2	64.2	64.2	64.2	64.2	64.1	64.1
8	13	63.3	63.3	63.3	63.3	63.3	63.3	63.3	63.3	63.3	63.2	63.2	63.2	63.2	63.2	63.2
9	14	62.4	62.4	62.4	62.4	62.4	62.4	62.3	62.3	62.3	62.3	62.3	62.3	62.3	62.3	62.3
10	15	61.5	61.5	61.5	61.5	61.4	61.4	61.4	61.4	61.4	61.4	61.4	61.4	61.4	61.4	61.4
11	16	60.6	60.6	60.6	60.5	60.5	60.5	60.5	60.5	60.5	60.5	60.5	60.5	60.5	60.5	60.5
12	17	59.7	59.6	59.6	59.6	59.6	59.6	59.6	59.6	59.6	59.6	59.6	59.6	59.6	59.5	59.5
13	18	58.8	58.7	58.7	58.7	58.7	58.7	58.7	58.7	58.7	58.7	58.6	58.6	58.6	58.6	58.6
14	19	57.8	57.8	57.8	57.8	57.8	57.8	57.8	57.7	57.7	57.7	57.7	57.7	57.7	57.7	57.7
15	20	56.9	56.9	56.9	56.9	56.9	56.8	56.8	56.8	56.8	56.8	56.8	56.8	56.8	56.8	56.8
16	21	56.0	56.0	56.0	56.0	55.9	55.9	55.9	55.9	55.9	55.9	55.9	55.9	55.9	55.9	55.8
17	22	55.1	55.1	55.1	55.0	55.0	55.0	55.0	55.0	55.0	55.0	55.0	54.9	54.9	54.9	54.9
18	23	54.2	54.2	54.1	54.1	54.1	54.1	54.1	54.1	54.0	54.0	54.0	54.0	54.0	54.0	54.0
19	24	53.3	53.2	53.2	53.2	53.2	53.2	53.2	53.1	53.1	53.1	53.1	53.1	53.1	53.1	53.1
20	25	52.4	52.3	52.3	52.3	52.3	52.2	52.2	52.2	52.2	52.2	52.2	52.2	52.2	52.1	52.1
21	26	51.4	51.4	51.4	51.4	51.3	51.3	51.3	51.3	51.3	51.3	51.3	51.2	51.2	51.2	51.2
22	27	50.5	50.5	50.5	50.5	50.4	50.4	50.4	50.4	50.4	50.3	50.3	50.3	50.3	50.3	50.3
23	28	49.6	49.6	49.6	49.5	49.5	49.5	49.5	49.5	49.4	49.4	49.4	49.4	49.4	49.4	49.4
24	29	48.7	48.7	48.7	48.6	48.6	48.6	48.6	48.5	48.5	48.5	48.5	48.5	48.5	48.4	48.4
25	30	47.8	47.8	47.8	47.7	47.7	47.7	47.6	47.6	47.6	47.6	47.6	47.5	47.5	47.5	47.5
26	31	46.9	46.9	46.8	46.8	46.8	46.8	46.7	46.7	46.7	46.7	46.6	46.6	46.6	46.6	46.6
27	32	46.0	46.0	45.9	45.9	45.9	45.8	45.8	45.8	45.8	45.7	45.7	45.7	45.7	45.7	45.7
28	33	45.1	45.1	45.1	45.0	45.0	44.9	44.9	44.9	44.9	44.8	44.8	44.8	44.8	44.8	44.8
29	34	44.3	44.2	44.2	44.1	44.1	44.0	44.0	44.0	44.0	43.9	43.9	43.9	43.9	43.9	43.8
30	35	43.4	43.3	43.3	43.2	43.2	43.1	43.1	43.1	43.1	43.0	43.0	43.0	43.0	42.9	42.9
31	36	42.5	42.4	42.4	42.3	42.3	42.3	42.2	42.2	42.2	42.1	42.1	42.1	42.1	42.0	42.0
32	37	41.6	41.6	41.5	41.5	41.4	41.4	41.3	41.3	41.3	41.2	41.2	41.2	41.2	41.1	41.1
33	38	40.8	40.7	40.7	40.6	40.5	40.5	40.5	40.4	40.4	40.3	40.3	40.3	40.3	40.2	40.2
34	39	39.9	39.9	39.8	39.7	39.7	39.6	39.6	39.5	39.5	39.5	39.4	39.4	39.4	39.3	39.3

Male	Female	Ages													
		Male 79	80	81	82	83	84	85	86	87	88	89	90	91	92
		Female 84	85	86	87	88	89	90	91	92	93	94	95	96	97
6	11	65.1	65.1	65.1	65.1	65.1	65.1	65.1	65.1	65.1	65.0	65.0	65.0	65.0	65.0
7	12	64.1	64.1	64.1	64.1	64.1	64.1	64.1	64.1	64.1	64.1	64.1	64.1	64.1	64.1
8	13	63.2	63.2	63.2	63.2	63.2	63.2	63.2	63.2	63.2	63.2	63.2	63.2	63.2	63.2
9	14	62.3	62.3	62.3	62.3	62.3	62.3	62.3	62.3	62.3	62.3	62.3	62.3	62.3	62.3
10	15	61.4	61.4	61.4	61.4	61.4	61.4	61.4	61.4	61.4	61.4	61.4	61.4	61.4	61.4
11	16	60.5	60.5	60.5	60.5	60.5	60.5	60.4	60.4	60.4	60.4	60.4	60.4	60.4	60.4
12	17	59.5	59.5	59.5	59.5	59.5	59.5	59.5	59.5	59.5	59.5	59.5	59.5	59.5	59.5
13	18	58.6	58.6	58.6	58.6	58.6	58.6	58.6	58.6	58.6	58.6	58.6	58.6	58.6	58.6
14	19	57.7	57.7	57.7	57.7	57.7	57.7	57.7	57.7	57.7	57.7	57.7	57.7	57.7	57.7
15	20	56.8	56.8	56.8	56.8	56.8	56.8	56.7	56.7	56.7	56.7	56.7	56.7	56.7	56.7
16	21	55.8	55.8	55.8	55.8	55.8	55.8	55.8	55.8	55.8	55.8	55.8	55.8	55.8	55.8
17	22	54.9	54.9	54.9	54.9	54.9	54.9	54.9	54.9	54.9	54.9	54.9	54.9	54.9	54.9
18	23	54.0	54.0	54.0	54.0	54.0	54.0	54.0	54.0	54.0	54.0	54.0	54.0	54.0	53.9
19	24	53.1	53.1	53.1	53.0	53.0	53.0	53.0	53.0	53.0	53.0	53.0	53.0	53.0	53.0
20	25	52.1	52.1	52.1	52.1	52.1	52.1	52.1	52.1	52.1	52.1	52.1	52.1	52.1	52.1
21	26	51.2	51.2	51.2	51.2	51.2	51.2	51.2	51.2	51.2	51.2	51.2	51.2	51.2	51.2
22	27	50.3	50.3	50.3	50.3	50.3	50.2	50.2	50.2	50.2	50.2	50.2	50.2	50.2	50.2
23	28	49.4	49.3	49.3	49.3	49.3	49.3	49.3	49.3	49.3	49.3	49.3	49.3	49.3	49.3
24	29	48.4	48.4	48.4	48.4	48.4	48.4	48.4	48.4	48.4	48.4	48.4	48.4	48.4	48.4
25	30	47.5	47.5	47.5	47.5	47.5	47.5	47.5	47.5	47.4	47.4	47.4	47.4	47.4	47.4
26	31	46.6	46.6	46.6	46.6	46.5	46.5	46.5	46.5	46.5	46.5	46.5	46.5	46.5	46.5
27	32	45.7	45.6	45.6	45.6	45.6	45.6	45.6	45.6	45.6	45.6	45.6	45.6	45.6	45.6
28	33	44.7	44.7	44.7	44.7	44.7	44.7	44.7	44.7	44.7	44.7	44.7	44.7	44.7	44.7
29	34	43.8	43.8	43.8	43.8	43.8	43.8	43.8	43.8	43.8	43.7	43.7	43.7	43.7	43.7
30	35	42.9	42.9	42.9	42.9	42.9	42.9	42.8	42.8	42.8	42.8	42.8	42.8	42.8	42.8
31	36	42.0	42.0	42.0	42.0	42.0	41.9	41.9	41.9	41.9	41.9	41.9	41.9	41.9	41.9
32	37	41.1	41.1	41.1	41.1	41.0	41.0	41.0	41.0	41.0	41.0	41.0	41.0	41.0	41.0
33	38	40.2	40.2	40.2	40.2	40.1	40.1	40.1	40.1	40.1	40.1	40.1	40.1	40.1	40.1
34	39	39.3	39.3	39.3	39.3	39.2	39.2	39.2	39.2	39.2	39.2	39.2	39.2	39.2	39.2

Male	Female	Ages															
		Male 93	94	95	96	97	98	99	100	101	102	103	104	105	106	107	108
		Female 98	99	100	101	102	103	104	105	106	107	108	109	110	111	112	113
6	11	65.0	65.0	65.0	65.0	65.0	65.0	65.0	65.0	65.0	65.0	65.0	65.0	65.0	65.0	65.0	65.0
7	12	64.1	64.1	64.1	64.1	64.1	64.1	64.1	64.1	64.1	64.1	64.1	64.1	64.1	64.1	64.1	64.1
8	13	63.2	63.2	63.2	63.2	63.2	63.2	63.2	63.2	63.2	63.2	63.2	63.2	63.2	63.2	63.2	63.2
9	14	62.3	62.3	62.3	62.3	62.3	62.3	62.3	62.3	62.3	62.3	62.3	62.3	62.3	62.3	62.3	62.3

Male	Female	Ages															
		Male 93	94	95	96	97	98	99	100	101	102	103	104	105	106	107	108
		Female 98	99	100	101	102	103	104	105	106	107	108	109	110	111	112	113
10	15	61.4	61.4	61.4	61.4	61.4	61.4	61.4	61.4	61.4	61.4	61.4	61.4	61.4	61.4	61.4	61.4
11	16	60.4	60.4	60.4	60.4	60.4	60.4	60.4	60.4	60.4	60.4	60.4	60.4	60.4	60.4	60.4	60.4
12	17	59.5	59.5	59.5	59.5	59.5	59.5	59.5	59.5	59.5	59.5	59.5	59.5	59.5	59.5	59.5	59.5
13	18	58.6	58.6	58.6	58.6	58.6	58.6	58.6	58.6	58.6	58.6	58.6	58.6	58.6	58.6	58.6	58.6
14	19	57.7	57.7	57.7	57.7	57.7	57.7	57.7	57.7	57.7	57.7	57.7	57.7	57.7	57.7	57.7	57.7
15	20	56.7	56.7	56.7	56.7	56.7	56.7	56.7	56.7	56.7	56.7	56.7	56.7	56.7	56.7	56.7	56.7
16	21	55.8	55.8	55.8	55.8	55.8	55.8	55.8	55.8	55.8	55.8	55.8	55.8	55.8	55.8	55.8	55.8
17	22	54.9	54.9	54.9	54.9	54.9	54.9	54.9	54.9	54.9	54.9	54.9	54.9	54.9	54.9	54.9	54.9
18	23	53.9	53.9	53.9	53.9	53.9	53.9	53.9	53.9	53.9	53.9	53.9	53.9	53.9	53.9	53.9	53.9
19	24	53.0	53.0	53.0	53.0	53.0	53.0	53.0	53.0	53.0	53.0	53.0	53.0	53.0	53.0	53.0	53.0
20	25	52.1	52.1	52.1	52.1	52.1	52.1	52.1	52.1	52.1	52.1	52.1	52.1	52.1	52.1	52.1	52.1
21	26	51.2	51.2	51.2	51.2	51.2	51.2	51.1	51.1	51.1	51.1	51.1	51.1	51.1	51.1	51.1	51.1
22	27	50.2	50.2	50.2	50.2	50.2	50.2	50.2	50.2	50.2	50.2	50.2	50.2	50.2	50.2	50.2	50.2
23	28	49.3	49.3	49.3	49.3	49.3	49.3	49.3	49.3	49.3	49.3	49.3	49.3	49.3	49.3	49.3	49.3
24	29	48.4	48.4	48.4	48.4	48.4	48.4	48.4	48.4	48.4	48.4	48.4	48.4	48.4	48.4	48.3	48.3
25	30	47.4	47.4	47.4	47.4	47.4	47.4	47.4	47.4	47.4	47.4	47.4	47.4	47.4	47.4	47.4	47.4
26	31	46.5	46.5	46.5	46.5	46.5	46.5	46.5	46.5	46.5	46.5	46.5	46.5	46.5	46.5	46.5	46.5
27	32	45.6	45.6	45.6	45.6	45.6	45.6	45.6	45.6	45.6	45.6	45.6	45.6	45.6	45.6	45.6	45.6
28	33	44.7	44.6	44.6	44.6	44.6	44.6	44.6	44.6	44.6	44.6	44.6	44.6	44.6	44.6	44.6	44.6
29	34	43.7	43.7	43.7	43.7	43.7	43.7	43.7	43.7	43.7	43.7	43.7	43.7	43.7	43.7	43.7	43.7
30	35	42.8	42.8	42.8	42.8	42.8	42.8	42.8	42.8	42.8	42.8	42.8	42.8	42.8	42.8	42.8	42.8
31	36	41.9	41.9	41.9	41.9	41.9	41.9	41.9	41.9	41.9	41.9	41.9	41.9	41.9	41.9	41.9	41.9
32	37	41.0	41.0	41.0	41.0	41.0	41.0	41.0	41.0	41.0	41.0	41.0	41.0	41.0	41.0	41.0	41.0
33	38	40.1	40.1	40.1	40.1	40.1	40.1	40.1	40.1	40.1	40.1	40.1	40.1	40.1	40.1	40.1	40.0
34	39	39.2	39.2	39.2	39.2	39.2	39.2	39.2	39.2	39.2	39.2	39.2	39.1	39.1	39.1	39.1	39.1

Male	Female	Ages												
		Male 35	36	37	38	39	40	41	42	43	44	45	46	47
		Female 40	41	42	43	44	45	46	47	48	49	50	51	52
35	40	46.2	45.7	45.3	44.8	44.4	44.0	43.6	43.3	43.0	42.6	42.3	42.0	41.8
36	41	45.7	45.2	44.8	44.3	43.9	43.5	43.1	42.7	42.3	42.0	41.7	41.4	41.1
37	42	45.3	44.8	44.3	43.8	43.4	42.9	42.5	42.1	41.8	41.4	41.1	40.7	40.4
38	43	44.8	44.3	43.8	43.3	42.9	42.4	42.0	41.6	41.2	40.8	40.5	40.1	39.8
39	44	44.4	43.9	43.4	42.9	42.4	41.9	41.5	41.0	40.6	40.2	39.9	39.5	39.2
40	45	44.0	43.5	42.9	42.4	41.9	41.4	41.0	40.5	40.1	39.7	39.3	38.9	38.6
41	46	43.6	43.1	42.5	42.0	41.5	41.0	40.5	40.0	39.6	39.2	38.8	38.4	38.0

42	47	43.3	42.7	42.1	41.6	41.0	40.5	40.0	39.6	39.1	38.7	38.2	37.8	37.5
43	48	43.0	42.3	41.8	41.2	40.6	40.1	39.6	39.1	38.6	38.2	37.7	37.3	36.9
44	49	42.6	42.0	41.4	40.8	40.2	39.7	39.2	38.7	38.2	37.7	37.2	36.8	36.4
45	50	42.3	41.7	41.1	40.5	39.9	39.3	38.8	38.2	37.7	37.2	36.8	36.3	35.9
46	51	42.0	41.4	40.7	40.1	39.5	38.9	38.4	37.8	37.3	36.8	36.3	35.9	35.4
47	52	41.8	41.1	40.4	39.8	39.2	38.6	38.0	37.5	36.9	36.4	35.9	35.4	35.0

Male	Female	Ages												
		Male 48	49	50	51	52	53	54	55	56	57	58	59	60
		Female 53	54	55	56	57	58	59	60	61	62	63	64	65
35	40	41.5	41.3	41.0	40.8	40.6	40.4	40.3	40.1	40.0	39.8	39.7	39.6	39.5
36	41	40.8	40.6	40.3	40.1	39.9	39.7	39.5	39.3	39.2	39.0	38.9	38.8	38.6
37	42	40.2	39.9	39.6	39.4	39.2	39.0	38.8	38.6	38.4	38.3	38.1	38.0	37.9
38	43	39.5	39.2	39.0	38.7	38.5	38.3	38.1	37.9	37.7	37.5	37.3	37.2	37.1
39	44	38.9	38.6	38.3	38.0	37.8	37.6	37.3	37.1	36.9	36.8	36.6	36.4	36.3
40	45	38.3	38.0	37.7	37.4	37.1	36.9	36.6	36.4	36.2	36.0	35.9	35.7	35.5
41	46	37.7	37.3	37.0	36.7	36.5	36.2	36.0	35.7	35.5	35.3	35.1	35.0	34.8
42	47	37.1	36.8	36.4	36.1	35.8	35.6	35.3	35.1	34.8	34.6	34.4	34.2	34.1
43	48	36.5	36.2	35.8	35.5	35.2	34.9	34.7	34.4	34.2	33.9	33.7	33.5	33.3
44	49	36.0	35.6	35.3	34.9	34.6	34.3	34.0	33.8	33.5	33.3	33.0	32.8	32.6
45	50	35.5	35.1	34.7	34.4	34.0	33.7	33.4	33.1	32.9	32.6	32.4	32.2	31.9
46	51	35.0	34.6	34.2	33.8	33.5	33.1	32.8	32.5	32.2	32.0	31.7	31.5	31.3
47	52	34.5	34.1	33.7	33.3	32.9	32.6	32.2	31.9	31.6	31.4	31.1	30.9	30.6
48	53	34.0	33.6	33.2	32.8	32.4	32.0	31.7	31.4	31.1	30.8	30.5	30.2	30.0
49	54	33.6	33.1	32.7	32.3	31.9	31.5	31.2	30.8	30.5	30.2	29.9	29.6	29.4
50	55	33.2	32.7	32.3	31.8	31.4	31.0	30.6	30.3	29.9	29.6	29.3	29.0	28.8
51	56	32.8	32.3	31.8	31.4	30.9	30.5	30.1	29.8	29.4	29.1	28.8	28.5	28.2
52	57	32.4	31.9	31.4	30.9	30.5	30.1	29.7	29.3	28.9	28.6	28.2	27.9	27.6
53	58	32.0	31.5	31.0	30.5	30.1	29.6	29.2	28.8	28.4	28.1	27.7	27.4	27.1
54	59	31.7	31.2	30.6	30.1	29.7	29.2	28.8	28.3	27.9	27.6	27.2	26.9	26.5
55	60	31.4	30.8	30.3	29.8	29.3	28.8	28.3	27.9	27.5	27.1	26.7	26.4	26.0
56	61	31.1	30.5	29.9	29.4	28.9	28.4	27.9	27.5	27.1	26.7	26.3	25.9	25.5
57	62	30.8	30.2	29.6	29.1	28.6	28.1	27.6	27.1	26.7	26.2	25.8	25.4	25.1
58	63	30.5	29.9	29.3	28.8	28.2	27.7	27.2	26.7	26.3	25.8	25.4	25.0	24.6
59	64	30.2	29.6	29.0	28.5	27.9	27.4	26.9	26.4	25.9	25.4	25.0	24.6	24.2
60	65	30.0	29.4	28.8	28.2	27.6	27.1	26.5	26.0	25.5	25.1	24.6	24.2	23.8

Male	Female	Ages												
		Male 61	62	63	64	65	66	67	68	69	70	71	72	73
		Female 66	67	68	69	70	71	72	73	74	75	76	77	78
35	40	39.4	39.3	39.2	39.1	39.0	38.9	38.9	38.8	38.8	38.7	38.7	38.6	38.6
36	41	38.5	38.4	38.3	38.2	38.2	38.1	38.0	38.0	37.9	37.9	37.8	37.8	37.7
37	42	37.7	37.6	37.5	37.4	37.3	37.3	37.2	37.1	37.1	37.0	36.9	36.9	36.9
38	43	36.9	36.8	36.7	36.6	36.5	36.4	36.4	36.3	36.2	36.2	36.1	36.0	36.0
39	44	36.2	36.0	35.9	35.8	35.7	35.6	35.5	35.5	35.4	35.3	35.3	35.2	35.2
40	45	35.4	35.3	35.1	35.0	34.9	34.8	34.7	34.6	34.6	34.5	34.4	34.4	34.3
41	46	34.6	34.5	34.4	34.2	34.1	34.0	33.9	33.8	33.8	33.7	33.6	33.5	33.5
42	47	33.9	33.7	33.6	33.5	33.4	33.2	33.1	33.0	33.0	32.9	32.8	32.7	32.7
43	48	33.2	33.0	32.9	32.7	32.6	32.5	32.4	32.3	32.2	32.1	32.0	31.9	31.9
44	49	32.5	32.3	32.1	32.0	31.8	31.7	31.6	31.5	31.4	31.3	31.2	31.1	31.1
45	50	31.8	31.6	31.4	31.3	31.1	31.0	30.8	30.7	30.6	30.5	30.4	30.4	30.3
46	51	31.1	30.9	30.7	30.5	30.4	30.2	30.1	30.0	29.9	29.8	29.7	29.6	29.5
47	52	30.4	30.2	30.0	29.8	29.7	29.5	29.4	29.3	29.1	29.0	28.9	28.8	28.7
48	53	29.8	29.5	29.3	29.2	29.0	28.8	28.7	28.5	28.4	28.3	28.2	28.1	28.0
49	54	29.1	28.9	28.7	28.5	28.3	28.1	28.0	27.8	27.7	27.6	27.5	27.4	27.3
50	55	28.5	28.3	28.1	27.8	27.6	27.5	27.3	27.1	27.0	26.9	26.7	26.6	26.5
51	56	27.9	27.7	27.4	27.2	27.0	26.8	26.6	26.5	26.3	26.2	26.0	25.9	25.8
52	57	27.3	27.1	26.8	26.6	26.4	26.2	26.0	25.8	25.7	25.5	25.4	25.2	25.1
53	58	26.8	26.5	26.2	26.0	25.8	25.6	25.4	25.2	25.0	24.8	24.7	24.6	24.4
54	59	26.2	25.9	25.7	25.4	25.2	25.0	24.7	24.6	24.4	24.2	24.0	23.9	23.8
55	60	25.7	25.4	25.1	24.9	24.6	24.4	24.1	23.9	23.8	23.6	23.4	23.3	23.1
56	61	25.2	24.9	24.6	24.3	24.1	23.8	23.6	23.4	23.2	23.0	22.8	22.6	22.5
57	62	24.7	24.4	24.1	23.8	23.5	23.3	23.0	22.8	22.6	22.4	22.2	22.0	21.9
58	63	24.3	23.9	23.6	23.3	23.0	22.7	22.5	22.2	22.0	21.8	21.6	21.4	21.3
59	64	23.8	23.5	23.1	22.8	22.5	22.2	21.9	21.7	21.5	21.2	21.0	20.9	20.7
60	65	23.4	23.0	22.7	22.3	22.0	21.7	21.4	21.2	20.9	20.7	20.5	20.3	20.1
61	66	23.0	22.6	22.2	21.9	21.6	21.3	21.0	20.7	20.4	20.2	20.0	19.8	19.6
62	67	22.6	22.2	21.8	21.5	21.1	20.8	20.5	20.2	19.9	19.7	19.5	19.2	19.0
63	68	22.2	21.8	21.4	21.1	20.7	20.4	20.1	19.8	19.5	19.2	19.0	18.7	18.5
64	69	21.9	21.5	21.1	20.7	20.3	20.0	19.6	19.3	19.0	18.7	18.5	18.2	18.0
65	70	21.6	21.1	20.7	20.3	19.9	19.6	19.2	18.9	18.6	18.3	18.0	17.8	17.5
66	71	21.3	20.8	20.4	20.0	19.6	19.2	18.8	18.5	18.2	17.9	17.6	17.3	17.1
67	72	21.0	20.5	20.1	19.6	19.2	18.8	18.5	18.1	17.8	17.5	17.2	16.9	16.7
68	73	20.7	20.2	19.8	19.3	18.9	18.5	18.1	17.8	17.4	17.1	16.8	16.5	16.2
69	74	20.4	19.9	19.5	19.0	18.6	18.2	17.8	17.4	17.1	16.7	16.4	16.1	15.8
70	75	20.2	19.7	19.2	18.7	18.3	17.9	17.5	17.1	16.7	16.4	16.1	15.8	15.5
71	76	20.0	19.5	19.0	18.5	18.0	17.6	17.2	16.8	16.4	16.1	15.7	15.4	15.1
72	77	19.8	19.2	18.7	18.2	17.8	17.3	16.9	16.5	16.1	15.8	15.4	15.1	14.8

73	78	19.6	19.0	18.5	18.0	17.5	17.1	16.7	16.2	15.8	15.5	15.1	14.8	14.4

Male	Female	Ages											
		Male 74	75	76	77	78	79	80	81	82	83	84	85
		Female 79	80	81	82	83	84	85	86	87	88	89	90
35	40	38.6	38.5	38.5	38.5	38.4	38.4	38.4	38.4	38.4	38.4	38.3	38.3
36	41	37.7	37.6	37.6	37.6	37.6	27.5	37.5	37.5	37.5	37.5	37.5	37.4
37	42	36.8	36.8	36.7	36.7	36.7	36.7	36.6	36.6	36.6	36.6	36.6	36.6
38	43	36.0	35.9	35.9	35.9	35.8	35.8	35.8	35.8	35.7	35.7	35.7	35.7
39	44	35.1	35.1	35.0	35.0	35.0	34.9	34.9	34.9	34.9	34.8	34.8	34.8
40	45	34.3	34.2	34.2	34.1	34.1	34.1	34.1	34.0	34.0	34.0	34.0	34.0
41	46	33.4	33.4	33.3	33.3	33.3	33.2	33.2	33.2	33.2	33.1	33.1	33.1
42	47	32.6	32.6	32.5	32.5	32.4	32.4	32.4	32.3	32.3	32.3	32.3	32.3
43	48	31.8	31.8	31.7	31.7	31.6	31.6	31.5	31.5	31.5	31.5	31.4	31.4
44	49	31.0	30.9	30.9	30.8	30.8	30.8	30.7	30.7	30.7	30.6	30.6	30.6
45	50	30.2	30.1	30.1	30.0	30.0	29.9	29.9	29.9	29.8	29.8	29.8	29.8
46	51	29.4	29.4	29.3	29.2	29.2	29.2	29.1	29.1	29.0	29.0	29.0	28.9
47	52	28.7	28.6	28.5	28.5	28.4	28.4	28.3	28.3	28.2	28.2	28.2	28.1
48	53	27.9	27.8	27.8	27.7	27.6	27.6	27.5	27.5	27.5	27.4	27.4	27.4
49	54	27.2	27.1	27.0	26.9	26.9	26.8	26.8	26.7	26.7	26.6	26.6	26.6
50	55	26.4	26.3	26.3	26.2	26.1	26.1	26.0	26.0	25.9	25.9	25.8	25.8
51	56	25.7	25.6	25.5	25.5	25.4	25.3	25.3	25.2	25.2	25.1	25.1	25.0
52	57	25.0	24.9	24.8	24.7	24.7	24.6	24.5	24.5	24.4	24.4	24.3	24.3
53	58	24.3	24.2	24.1	24.0	23.9	23.9	23.8	23.7	23.7	23.6	23.6	23.5
54	59	23.6	23.5	23.4	23.3	23.2	23.2	23.1	23.0	23.0	22.9	22.9	22.8
55	60	23.0	22.9	22.8	22.7	22.6	22.5	22.4	22.3	22.3	22.2	22.2	22.1
56	61	22.3	22.2	22.1	22.0	21.9	21.8	21.7	21.6	21.6	21.5	21.5	21.4
57	62	21.7	21.6	21.5	21.3	21.2	21.1	21.1	21.0	20.9	20.8	20.8	20.7
58	63	21.1	21.0	20.8	20.7	20.6	20.5	20.4	20.3	20.2	20.2	20.1	20.0
59	64	20.5	20.4	20.2	20.1	20.0	19.9	19.8	19.7	19.6	19.5	19.4	19.4
60	65	19.9	19.8	19.6	19.5	19.4	19.3	19.1	19.0	19.0	18.9	18.8	18.7
61	66	19.4	19.2	19.1	18.9	18.8	18.7	18.5	18.4	18.3	18.3	18.2	18.1
62	67	18.8	18.7	18.5	18.3	18.2	18.1	18.0	17.8	17.7	17.7	17.6	17.5
63	68	18.3	18.1	18.0	17.8	17.6	17.5	17.4	17.3	17.2	17.1	17.0	16.9
64	69	17.8	17.6	17.4	17.3	17.1	17.0	16.8	16.7	16.6	16.5	16.4	16.3
65	70	17.3	17.1	16.9	16.7	16.6	16.4	16.3	16.2	16.0	15.9	15.8	15.8
66	71	16.9	16.6	16.4	16.3	16.1	15.9	15.8	15.6	15.5	15.4	15.3	15.2
67	72	16.4	16.2	16.0	15.8	15.6	15.4	15.3	15.1	15.0	14.9	14.8	14.7
68	73	16.0	15.7	15.5	15.3	15.1	15.0	14.8	14.6	14.5	14.4	14.3	14.2
69	74	15.6	15.3	15.1	14.9	14.7	14.5	14.3	14.2	14.0	13.9	13.8	13.7
70	75	15.2	14.9	14.7	14.5	14.3	14.1	13.9	13.7	13.6	13.4	13.3	13.2

Male	Female	Ages											
		Male 74	75	76	77	78	79	80	81	82	83	84	85
		Female 79	80	81	82	83	84	85	86	87	88	89	90
71	76	14.8	14.5	14.3	14.1	13.8	13.6	13.5	13.3	13.1	13.0	12.8	12.7
72	77	14.5	14.2	13.9	13.7	13.5	13.2	13.0	12.9	12.7	12.5	12.4	12.3
73	78	14.1	13.8	13.6	13.3	13.1	12.9	12.7	12.5	12.3	12.1	12.0	11.8
74	79	13.8	13.5	13.2	13.0	12.7	12.5	12.3	12.1	11.9	11.7	11.6	11.4
75	80	13.5	13.2	12.9	12.6	12.4	12.2	11.9	11.7	11.5	11.4	11.2	11.0
76	81	13.2	12.9	12.6	12.3	12.1	11.8	11.6	11.4	11.2	11.0	10.8	10.7
77	82	13.0	12.6	12.3	12.1	11.8	11.5	11.3	11.1	10.8	10.7	10.5	10.3
78	83	12.7	12.4	12.1	11.8	11.5	11.2	11.0	10.7	10.5	10.3	10.1	10.0
79	84	12.5	12.2	11.8	11.5	11.2	11.0	10.7	10.5	10.2	10.0	9.8	9.6
80	85	12.3	11.9	11.6	11.3	11.0	10.7	10.4	10.2	10.0	9.7	9.5	9.3
81	86	12.1	11.7	11.4	11.1	10.7	10.5	10.2	9.9	9.7	9.5	9.3	9.1
82	87	11.9	11.5	11.2	10.8	10.5	10.2	10.0	9.7	9.4	9.2	9.0	8.8
83	88	11.7	11.4	11.0	10.7	10.3	10.0	9.7	9.5	9.2	9.0	8.7	8.5
84	89	11.6	11.2	10.8	10.5	10.1	9.8	9.5	9.3	9.0	8.7	8.5	8.3
85	90	11.4	11.0	10.7	10.3	10.0	9.6	9.3	9.1	8.8	8.5	8.3	8.1

Male	Female	Ages											
		Male 86	87	88	89	90	91	92	93	94	95	96	97
		Female 91	92	93	94	95	96	97	98	99	100	101	102
35	40	38.3	38.3	38.3	38.3	38.3	38.3	38.3	38.3	38.3	38.3	38.3	38.3
36	41	37.4	37.4	37.4	37.4	37.4	37.4	37.4	37.4	37.4	37.4	37.4	37.4
37	42	36.5	36.5	36.5	36.5	36.5	36.5	36.5	36.5	36.5	36.5	36.5	36.5
38	43	35.7	35.7	35.6	35.6	35.6	35.6	35.6	35.6	35.6	35.6	35.6	35.6
39	44	34.8	34.8	34.8	34.8	34.8	34.8	34.7	34.7	34.7	34.7	34.7	34.7
40	45	33.9	33.9	33.9	33.9	33.9	33.9	33.9	33.9	33.9	33.9	33.9	33.9
41	46	33.1	33.1	33.1	33.0	33.0	33.0	33.0	33.0	33.0	33.0	33.0	33.0
42	47	32.2	32.2	32.2	32.2	32.2	32.2	32.2	32.2	32.2	32.1	32.1	32.1
43	48	31.4	31.4	31.4	31.3	31.3	31.3	31.3	31.3	31.3	31.3	31.3	31.3
44	49	30.6	30.5	30.5	30.5	30.5	30.5	30.5	30.5	30.5	30.5	30.5	30.4
45	50	29.7	29.7	29.7	29.7	29.7	29.7	29.7	29.6	29.6	29.6	29.6	29.6
46	51	28.9	28.9	28.9	28.9	28.9	28.8	28.8	28.8	28.8	28.8	28.8	28.8
47	52	28.1	28.1	28.1	28.1	28.0	28.0	28.0	28.0	28.0	28.0	28.0	28.0
48	53	27.3	27.3	27.3	27.3	27.2	27.2	27.2	27.2	27.2	27.2	27.2	27.2
49	54	26.5	26.5	26.5	26.5	26.5	26.4	26.4	26.4	26.4	26.4	26.4	26.4
50	55	25.8	25.7	25.7	25.7	25.7	25.7	25.6	25.6	25.6	25.6	25.6	25.6
51	56	25.0	25.0	24.9	24.9	24.9	24.9	24.9	24.9	24.8	24.8	24.8	24.8

52	57	24.3	24.2	24.2	24.2	24.1	24.1	24.1	24.1	24.1	24.1	24.1	24.0
53	58	23.5	23.5	23.4	23.4	23.4	23.4	23.4	23.3	23.3	23.3	23.3	23.3
54	59	22.8	22.7	22.7	22.7	22.7	22.6	22.6	22.6	22.6	22.6	22.6	22.5
55	60	22.1	22.0	22.0	22.0	21.9	21.9	21.9	21.9	21.8	21.8	21.8	21.8
56	61	21.4	21.3	21.3	21.3	21.2	21.2	21.2	21.1	21.1	21.1	21.1	21.1
57	62	20.7	20.6	20.6	20.6	20.5	20.5	20.5	20.4	20.4	20.4	20.4	20.4
58	63	20.0	19.9	19.9	19.9	19.8	19.8	19.8	19.8	19.7	19.7	19.7	19.7
59	64	19.3	19.3	19.2	19.2	19.2	19.1	19.1	19.1	19.0	19.0	19.0	19.0

Male	Female	Ages										
		Male 98	99	100	101	102	103	104	105	106	107	108
		Female 103	104	105	106	107	108	109	110	111	112	113
35	40	38.3	38.3	38.3	38.3	38.3	38.3	38.2	38.2	38.2	38.2	38.2
36	41	37.4	37.4	37.4	37.4	37.4	37.4	37.4	37.4	37.4	37.4	37.3
37	42	36.5	36.5	36.5	36.5	36.5	36.5	36.5	36.5	36.5	36.5	36.5
38	43	35.6	35.6	35.6	35.6	35.6	35.6	35.6	35.6	35.6	35.6	35.6
39	44	34.7	34.7	34.7	34.7	34.7	34.7	34.7	34.7	34.7	34.7	34.7
40	45	33.9	33.8	33.8	33.8	33.8	33.8	33.8	33.8	33.8	33.8	33.8
41	46	33.0	33.0	33.0	33.0	33.0	33.0	33.0	33.0	33.0	33.0	33.0
42	47	32.1	32.1	32.1	32.1	32.1	32.1	32.1	32.1	32.1	32.1	32.1
43	48	31.3	31.3	31.3	31.3	31.3	31.3	31.3	31.3	31.3	31.3	31.3
44	49	30.4	30.4	30.4	30.4	30.4	30.4	30.4	30.4	30.4	30.4	30.4
45	50	29.6	29.6	29.6	29.6	29.6	29.6	29.6	29.6	29.6	29.6	29.6
46	51	28.8	28.8	28.8	28.8	28.8	28.8	28.8	28.8	28.8	28.8	28.7
47	52	28.0	28.0	28.0	28.0	28.0	28.0	28.0	27.9	27.9	27.9	27.9
48	53	27.2	27.2	27.2	27.2	27.2	27.1	27.1	27.1	27.1	27.1	27.1
49	54	26.4	26.4	26.4	26.4	26.4	26.3	26.3	26.3	26.3	26.3	26.3
50	55	25.6	25.6	25.6	25.6	25.6	25.6	25.6	25.6	25.5	25.5	25.5
51	56	24.8	24.8	24.8	24.8	24.8	24.8	24.8	24.8	24.8	24.8	24.7
52	57	24.0	24.0	24.0	24.0	24.0	24.0	24.0	24.0	24.0	24.0	24.0
53	58	23.3	23.3	23.3	23.3	23.3	23.3	23.2	23.2	23.2	23.2	23.2
54	59	22.5	22.5	22.5	22.5	22.5	22.5	22.5	22.5	22.5	22.5	22.5
55	60	21.8	21.8	21.8	21.8	21.8	21.8	21.8	21.8	21.8	21.7	21.7
56	61	21.1	21.1	21.1	21.1	21.1	21.0	21.0	21.0	21.0	21.0	21.0
57	62	20.4	20.4	20.4	20.3	20.3	20.3	20.3	20.3	20.3	20.3	20.3
58	63	19.7	19.7	19.7	19.6	19.6	19.6	19.6	19.6	19.6	19.6	19.6
59	64	19.0	19.0	19.0	19.0	19.0	18.9	18.9	18.9	18.9	18.9	18.9

Male	Female	Ages											
		Male 86	87	88	89	90	91	92	93	94	95	96	97
		Female 91	92	93	94	95	96	97	98	99	100	101	102
60	65	18.7	18.6	18.6	18.5	18.5	18.5	18.4	18.4	18.4	18.4	18.3	18.3
61	66	18.1	18.0	17.9	17.9	17.9	17.8	17.8	17.8	17.7	17.7	17.7	17.7
62	67	17.4	17.4	17.3	17.3	17.2	17.2	17.1	17.1	17.1	17.1	17.0	17.0
63	68	16.8	16.8	16.7	16.7	16.6	16.6	16.5	16.5	16.5	16.4	16.4	16.4
64	69	16.2	16.2	16.1	16.1	16.0	16.0	15.9	15.9	15.9	15.8	15.8	15.8
65	70	15.7	15.6	15.5	15.5	15.4	15.4	15.3	15.3	15.3	15.2	15.2	15.2
66	71	15.1	15.0	15.0	14.9	14.8	14.8	14.7	14.7	14.7	14.6	14.6	14.6
67	72	14.6	14.5	14.4	14.4	14.3	14.2	14.2	14.1	14.1	14.1	14.1	14.0
68	73	14.1	14.0	13.9	13.8	13.8	13.7	13.6	13.6	13.6	13.5	13.5	13.5
69	74	13.6	13.5	13.4	13.3	13.2	13.2	13.1	13.1	13.0	13.0	13.0	12.9
70	75	13.1	13.0	12.9	12.8	12.7	12.7	12.6	12.5	12.5	12.5	12.4	12.4
71	76	12.6	12.5	12.4	12.3	12.2	12.2	12.1	12.1	12.0	12.0	11.9	11.9
72	77	12.1	12.0	11.9	11.8	11.8	11.7	11.6	11.6	11.5	11.5	11.4	11.4
73	78	11.7	11.6	11.5	11.4	11.3	11.2	11.2	11.1	11.0	11.0	11.0	10.9
74	79	11.3	11.2	11.1	11.0	10.9	10.8	10.7	10.7	10.6	10.6	10.5	10.5
75	80	10.9	10.8	10.7	10.5	10.5	10.4	10.3	10.2	10.2	10.1	10.1	10.0
76	81	10.5	10.4	10.3	10.2	10.1	10.0	9.9	9.8	9.7	9.7	9.7	9.6
77	82	10.2	10.0	9.9	9.8	9.7	9.6	9.5	9.4	9.3	9.3	9.2	9.2
78	83	9.8	9.7	9.5	9.4	9.3	9.2	9.1	9.0	9.0	8.9	8.9	8.8
79	84	9.5	9.3	9.2	9.2	8.9	8.8	8.8	8.7	8.6	8.5	8.5	8.4
80	85	9.2	9.0	8.9	8.7	8.6	8.5	8.4	8.3	8.3	8.2	8.1	8.1
81	86	8.9	8.7	8.6	8.4	8.3	8.2	8.1	8.0	7.9	7.9	7.8	7.7
82	87	8.6	8.4	8.3	8.1	8.0	7.9	7.8	7.7	7.6	7.5	7.5	7.4
83	88	8.3	8.2	8.0	7.9	7.7	7.6	7.5	7.4	7.3	7.2	7.2	7.1
84	89	8.1	7.9	7.8	7.6	7.5	7.3	7.2	7.1	7.0	7.0	6.9	6.8

Male	Female	Ages										
		Male 98	99	100	101	102	103	104	105	106	107	108
		Female 103	104	105	106	107	108	109	110	111	112	113
60	65	18.3	18.3	18.3	18.3	18.3	18.3	18.3	18.2	18.2	18.2	18.2
61	66	17.7	17.7	17.6	17.6	17.6	17.6	17.6	17.6	17.6	17.6	17.5
62	67	17.0	17.0	17.0	17.0	17.0	17.0	16.9	16.9	16.9	16.9	16.9
63	68	16.4	16.4	16.4	16.3	16.3	16.3	16.3	16.3	16.3	16.3	16.2
64	69	15.8	15.8	15.7	15.7	15.7	15.7	15.7	15.7	15.7	15.7	15.6
65	70	15.2	15.2	15.1	15.1	15.1	15.1	15.1	15.1	15.1	15.0	15.0
66	71	14.6	14.6	14.5	14.5	14.5	14.5	14.5	14.5	14.5	14.4	14.4
67	72	14.0	14.0	14.0	14.0	13.9	13.9	13.9	13.9	13.9	13.9	13.8

68	73	13.5	13.4	13.4	13.4	13.4	13.4	13.3	13.3	13.3	13.3	13.2
69	74	12.9	12.9	12.9	12.8	12.8	12.8	12.8	12.8	12.8	12.7	12.7
70	75	12.4	12.4	12.3	12.3	12.3	12.3	12.3	12.2	12.2	12.2	12.1
71	76	11.9	11.9	11.8	11.8	11.8	11.8	11.7	11.7	11.7	11.7	11.6
72	77	11.4	11.4	11.3	11.3	11.3	11.3	11.2	11.2	11.2	11.2	11.1
73	78	10.9	10.9	10.9	10.8	10.8	10.8	10.7	10.7	10.7	10.7	10.6
74	79	10.5	10.4	10.4	10.4	10.3	10.3	10.3	10.3	10.2	10.2	10.1
75	80	10.0	10.0	9.9	9.9	9.9	9.8	9.8	9.8	9.8	9.7	
76	81	9.6	9.5	9.5	9.5	9.4	9.4	9.4	9.4	9.3	9.3	
77	82	9.2	9.1	9.1	9.1	9.0	9.0	9.0	8.9	8.9	8.9	
78	83	8.8	8.7	8.7	8.7	8.6	8.6	8.5	8.5	8.5	8.4	
79	84	8.4	8.4	8.3	8.3	8.2	8.2	8.2	8.1	8.1	8.0	
80	85	8.0	8.0	7.9	7.9	7.9	7.8	7.8	7.7	7.7	7.6	
81	86	7.7	7.6	7.6	7.6	7.5	7.5	7.4	7.4	7.3	7.3	
82	87	7.4	7.3	7.3	7.2	7.2	7.1	7.1	7.0	7.0	6.9	
83	88	7.1	7.0	6.9	6.9	6.8	6.8	6.7	6.7	6.7	6.6	
84	89	6.8	6.7	6.6	6.6	6.5	6.5	6.4	6.4	6.3	....	....

Male	Female	Ages										
		Male 86	87	88	89	90	91	92	93	94	95	96
		Female 91	92	93	94	95	96	97	98	99	100	101
85	90	7.9	7.7	7.5	7.4	7.2	7.1	7.0	6.9	6.8	6.7	6.6
86	91	7.7	7.5	7.3	7.1	7.0	6.8	6.7	6.6	6.5	6.4	6.4
87	92	7.5	7.3	7.1	6.9	6.8	6.6	6.5	6.4	6.3	6.2	6.1
88	93	7.3	7.1	6.9	6.7	6.6	6.4	6.3	6.2	6.1	6.0	5.9
89	94	7.1	6.9	6.7	6.5	6.4	6.2	6.1	6.0	5.9	5.8	5.7
90	95	7.0	6.8	6.6	6.4	6.2	6.1	5.9	5.8	5.7	5.6	5.5
91	96	6.8	6.6	6.4	6.2	6.1	5.9	5.8	5.7	5.5	5.4	5.3
92	97	6.7	6.5	6.3	6.1	5.9	5.8	5.6	5.5	5.4	5.3	5.2
93	98	6.6	6.4	6.2	6.0	5.8	5.7	5.5	5.4	5.2	5.1	5.0
94	99	6.5	6.3	6.1	5.9	5.7	5.5	5.4	5.2	5.1	5.0	4.9
95	100	6.4	6.2	6.0	5.8	5.6	5.4	5.3	5.1	5.0	4.9	4.7
96	101	6.4	6.1	5.9	5.7	5.5	5.3	5.2	5.0	4.9	4.7	4.6
97	102	6.3	6.1	5.8	5.6	5.4	5.2	5.1	4.9	4.8	4.6	4.5
98	103	6.2	6.0	5.8	5.5	5.3	5.1	5.0	4.8	4.7	4.5	4.4
99	104	6.2	5.9	5.7	5.5	5.2	5.1	4.9	4.7	4.6	4.4	4.3

Male	Female	Ages: Male 97 / Female 102	98 / 103	99 / 104	100 / 105	101 / 106	102 / 107	103 / 108	104 / 109	105 / 110	106 / 111
85	90	6.6	6.5	6.4	6.4	6.3	6.2	6.2	6.1	6.1	6.0
86	91	6.3	6.2	6.2	6.1	6.0	6.0	5.9	5.9	5.8	5.7
87	92	6.1	6.0	5.9	5.8	5.8	5.7	5.6	5.6	5.5	5.4
88	93	5.8	5.8	5.7	5.6	5.5	5.5	5.4	5.3	5.3	5.1
89	94	5.6	5.5	5.5	5.4	5.3	5.2	5.2	5.1	5.0	
90	95	5.4	5.3	5.2	5.2	5.1	5.0	4.9	4.9	4.8	
91	96	5.2	5.1	5.1	5.0	4.9	4.8	4.7	4.6	4.5	
92	97	5.1	5.0	4.9	4.8	4.7	4.6	4.5	4.4		
93	98	4.9	4.8	4.7	4.6	4.5	4.4	4.3	4.2		
94	99	4.8	4.7	4.6	4.5	4.4	4.3	4.1			
95	100	4.6	4.5	4.4	4.3	4.2	4.1	4.0			
96	101	4.5	4.4	4.3	4.2	4.1	3.9				
97	102	4.4	4.3	4.1	4.0	3.9	3.7				
98	103	4.3	4.1	4.0	3.9	3.7					
99	104	4.1	4.0	3.9	3.7	....	....	....	....	....	....

TABLE IIA—ANNUITIES FOR JOINT LIFE ONLY—TWO LIVES—EXPECTED RETURN MULTIPLES

Male	Female	Ages: Male 6 / Female 11	7 / 12	8 / 13	9 / 14	10 / 15	11 / 16	12 / 17	13 / 18	14 / 19	15 / 20	16 / 21	17 / 22	18 / 23	19 / 24	20 / 25
6	11	56.6	56.1	55.7	55.1	54.6	54.1	53.5	52.9	52.3	51.7	51.1	50.5	49.8	49.1	48.4
7	12	56.1	55.7	55.2	54.7	54.2	53.7	53.1	52.6	52.0	51.4	50.8	50.2	49.5	48.9	48.2
8	13	55.7	55.2	54.8	54.3	53.8	53.3	52.8	52.2	51.6	51.1	50.5	49.9	49.2	48.6	47.9
9	14	55.1	54.7	54.3	53.8	53.3	52.9	52.3	51.8	51.3	50.7	50.1	49.5	48.9	48.3	47.7
10	15	54.6	54.2	53.8	53.3	52.9	52.4	51.9	51.4	50.9	50.3	49.8	49.2	48.6	48.0	47.4
11	16	54.1	53.7	53.3	52.9	52.4	52.0	51.5	51.0	50.5	50.0	49.4	48.8	48.3	47.7	47.1
12	17	53.5	53.1	52.8	52.3	51.9	51.5	51.0	50.6	50.1	49.6	49.0	48.5	47.9	47.3	46.7
13	18	52.9	52.6	52.2	51.8	51.4	51.0	50.6	50.1	49.6	49.1	48.6	48.1	47.5	47.0	46.4
14	19	52.3	52.0	51.6	51.3	50.9	50.5	50.1	49.6	49.2	48.7	48.2	47.7	47.2	46.6	46.1
15	20	51.7	51.4	51.1	50.7	50.3	50.0	49.6	49.1	48.7	48.2	47.8	47.3	46.8	46.2	45.7
16	21	51.1	50.8	50.5	50.1	49.8	49.4	49.0	48.6	48.2	47.8	47.3	46.8	46.3	45.8	45.3
17	22	50.5	50.2	49.9	49.5	49.2	48.8	48.5	48.1	47.7	47.3	46.8	46.4	45.9	45.4	44.9
18	23	49.8	49.5	49.2	48.9	48.6	48.3	47.9	47.5	47.2	46.8	46.3	45.9	45.4	45.0	44.5
19	24	49.1	48.9	48.6	48.3	48.0	47.7	47.3	47.0	46.6	46.2	45.8	45.4	45.0	44.5	44.0
20	25	48.4	48.2	47.9	47.7	47.4	47.1	46.7	46.4	46.1	45.7	45.3	44.9	44.5	44.0	43.6

Male	Female	Ages: Male 21 / Female 26	22 / 27	23 / 28	24 / 29	25 / 30	26 / 31	27 / 32	28 / 33	29 / 34	30 / 35	31 / 36	32 / 37	33 / 38	34 / 39
6	11	47.7	47.0	46.3	45.6	44.8	44.1	43.3	42.5	41.8	41.0	40.2	39.4	38.6	37.8
7	12	47.5	46.8	46.1	45.4	44.6	43.9	43.2	42.4	41.6	40.9	40.1	39.3	38.5	37.7
8	13	47.3	46.6	45.9	45.2	44.5	43.7	43.0	42.2	41.5	40.7	39.9	39.2	38.4	37.6
9	14	47.0	46.3	45.6	45.0	44.2	43.5	42.8	42.1	41.3	40.6	39.8	39.0	38.3	37.5
10	15	46.7	46.1	45.4	44.7	44.0	43.3	42.6	41.9	41.1	40.4	39.7	38.9	38.1	37.4
11	16	46.4	45.8	45.1	44.5	43.8	43.1	42.4	41.7	41.0	40.2	39.5	38.8	38.0	37.2
12	17	46.1	45.5	44.9	44.2	43.6	42.9	42.2	41.5	40.8	40.1	39.3	38.6	37.9	37.1
13	18	45.8	45.2	44.6	43.9	43.3	42.6	42.0	41.3	40.6	39.9	39.2	38.4	37.7	37.0
14	19	45.5	44.9	44.3	43.7	43.0	42.4	41.7	41.0	40.4	39.7	39.0	38.3	37.5	36.8
15	20	45.1	44.6	44.0	43.4	42.7	42.1	41.5	40.8	40.1	39.5	38.8	38.1	37.4	36.6
16	21	44.8	44.2	43.6	43.0	42.4	41.8	41.2	40.5	39.9	39.2	38.6	37.9	37.2	36.5
17	22	44.4	43.8	43.3	42.7	42.1	41.5	40.9	40.3	39.6	39.0	38.3	37.7	37.0	36.3
18	23	44.0	43.5	42.9	42.4	41.8	41.2	40.6	40.0	39.4	38.7	38.1	37.4	36.8	36.1
19	24	43.6	43.1	42.5	42.0	41.4	40.9	40.3	39.7	39.1	38.5	37.8	37.2	36.5	35.9
20	25	43.1	42.6	42.1	41.6	41.1	40.5	40.0	39.4	38.8	38.2	37.6	36.9	36.3	35.7
21	26	42.7	42.2	41.7	41.2	40.7	40.2	39.6	39.1	38.5	37.9	37.3	36.7	36.1	35.4
22	27	42.2	41.8	41.3	40.8	40.3	39.8	39.3	38.7	38.2	37.6	37.0	36.4	35.8	35.2
23	28	41.7	41.3	40.8	40.4	39.9	39.4	38.9	38.4	37.8	37.3	36.7	36.1	35.5	34.9
24	29	41.2	40.8	40.4	39.9	39.5	39.0	38.5	38.0	37.5	36.9	36.4	35.8	35.2	34.6
25	30	40.7	40.3	39.9	39.5	39.0	38.6	38.1	37.6	37.1	36.6	36.0	35.5	34.9	34.4
26	31	40.2	39.8	39.4	39.0	38.6	38.1	37.7	37.2	36.7	36.2	35.7	35.2	34.6	34.1
27	32	39.6	39.3	38.9	38.5	38.1	37.7	37.2	36.8	36.3	35.8	35.3	34.8	34.3	33.7
28	33	39.1	38.7	38.4	38.0	37.6	37.2	36.8	36.3	35.9	35.4	34.9	34.5	33.9	33.4
29	34	38.5	38.2	37.8	37.5	37.1	36.7	36.3	35.9	35.5	35.0	34.6	34.1	33.6	33.1
30	35	37.9	37.6	37.3	36.9	36.6	36.2	35.8	35.4	35.0	34.6	34.1	33.7	33.2	32.7
31	36	37.3	37.0	36.7	36.4	36.0	35.7	35.3	34.9	34.6	34.1	33.7	33.3	32.8	32.3
32	37	36.7	36.4	36.1	35.8	35.5	35.2	34.8	34.5	34.1	33.7	33.3	32.9	32.4	32.0
33	38	36.1	35.8	35.5	35.2	34.9	34.6	34.3	33.9	33.6	33.2	32.8	32.4	32.0	31.6
34	39	35.4	35.2	34.9	34.6	34.4	34.1	33.7	33.4	33.1	32.7	32.3	32.0	31.6	31.1

Male	Female	Ages: Male 35 / Female 40	36 / 41	37 / 42	38 / 43	39 / 44	40 / 45	41 / 46	42 / 47	43 / 48	44 / 49	45 / 50	46 / 51	47 / 52	48 / 53	49 / 54
6	11	37.0	36.2	35.4	34.6	33.8	33.0	32.2	31.4	30.6	29.8	29.0	28.2	27.5	26.7	25.9
7	12	36.9	36.1	35.3	34.5	33.7	32.9	32.1	31.3	30.5	29.8	29.0	28.2	27.4	26.7	25.9
8	13	36.8	36.0	35.2	34.4	33.7	32.9	32.1	31.3	30.5	29.7	28.9	28.2	27.4	26.6	25.9
9	14	36.7	35.9	35.1	34.4	33.6	32.8	32.0	31.2	30.4	29.7	28.9	28.1	27.3	26.6	25.8

Male	Female	Ages														
		Male 35	36	37	38	39	40	41	42	43	44	45	46	47	48	49
		Female 40	41	42	43	44	45	46	47	48	49	50	51	52	53	54
10	15	36.6	35.8	35.1	34.3	33.5	32.7	31.9	31.2	30.4	29.6	28.8	28.1	27.3	26.5	25.8
11	16	36.5	35.7	34.9	34.2	33.4	32.6	31.9	31.1	30.3	29.5	28.8	28.0	27.3	26.5	25.7
12	17	36.4	35.6	34.8	34.1	33.3	32.5	31.8	31.0	30.2	29.5	28.7	28.0	27.2	26.4	25.7
13	18	36.2	35.5	34.7	34.0	33.2	32.4	31.7	30.9	30.2	29.4	28.7	27.9	27.1	26.4	25.7
14	19	36.1	35.3	34.6	33.8	33.1	32.3	31.6	30.8	30.1	29.3	28.6	27.8	27.1	26.3	25.6
15	20	35.9	35.2	34.5	33.7	33.0	32.2	31.5	30.7	30.0	29.3	28.5	27.8	27.0	26.3	25.6
16	21	35.8	35.0	34.3	33.6	32.9	32.1	31.4	30.6	29.9	29.2	28.4	27.7	27.0	26.2	25.5
17	22	35.6	34.9	34.2	33.4	32.7	32.0	31.3	30.5	29.8	29.1	28.3	27.6	26.9	26.2	25.4
18	23	35.4	34.7	34.0	33.3	32.6	31.9	31.2	30.4	29.7	29.0	28.3	27.5	26.8	26.1	25.4
19	24	35.2	34.5	33.8	33.1	32.4	31.7	31.0	30.3	29.6	28.9	28.2	27.4	26.7	26.0	25.3
20	25	35.0	34.3	33.7	33.0	32.3	31.6	30.9	30.2	29.5	28.8	28.1	27.3	26.6	25.9	25.2
21	26	34.8	34.1	33.5	32.8	32.1	31.4	30.7	30.0	29.3	28.6	27.9	27.2	26.5	25.8	25.1
22	27	34.5	33.9	33.3	32.6	31.9	31.3	30.6	29.9	29.2	28.5	27.8	27.1	26.4	25.7	25.1
23	28	34.3	33.7	33.0	32.4	31.7	31.1	30.4	29.7	29.1	28.4	27.7	27.0	26.3	25.6	25.0
24	29	34.0	33.4	32.8	32.2	31.5	30.9	30.2	29.6	28.9	28.2	27.6	26.9	26.2	25.5	24.9
25	30	33.8	33.2	32.6	32.0	31.3	30.7	30.1	29.4	28.8	28.1	27.4	26.8	26.1	25.4	24.8
26	31	33.5	32.9	32.3	31.7	31.1	30.5	29.9	29.2	28.6	27.9	27.3	26.6	26.0	25.3	24.6
27	32	33.2	32.6	32.1	31.5	30.9	30.3	29.6	29.0	28.4	27.8	27.1	26.5	25.8	25.2	24.5
28	33	32.9	32.3	31.8	31.2	30.6	30.0	29.4	28.8	28.2	27.6	27.0	26.3	25.7	25.0	24.4
29	34	32.6	32.0	31.5	30.9	30.4	29.8	29.2	28.6	28.0	27.4	26.8	26.2	25.5	24.9	24.3
30	35	32.2	31.7	31.2	30.6	30.1	29.5	29.0	28.4	27.8	27.2	26.6	26.0	25.4	24.7	24.1
31	36	31.9	31.4	30.9	30.3	29.8	29.3	28.7	28.1	27.6	27.0	26.4	25.8	25.2	24.6	24.0
32	37	31.5	31.0	30.5	30.0	29.5	29.0	28.4	27.9	27.3	26.8	26.2	25.6	25.0	24.4	23.8
33	38	31.1	30.7	30.2	29.7	29.2	28.7	28.2	27.6	27.1	26.5	26.0	25.4	24.8	24.2	23.6
34	39	30.7	30.3	29.8	29.3	28.9	28.4	27.9	27.3	26.8	26.3	25.7	25.2	24.6	24.0	23.5

Male	Female	Ages														
		Male 50	51	52	53	54	55	56	57	58	59	60	61	62	63	
		Female 55	56	57	58	59	60	61	62	63	64	65	66	67	68	
6	11	25.2	24.4	23.7	22.9	22.2	21.5	20.8	20.1	19.4	18.7	18.0	17.4	16.7	16.1	
7	12	25.1	24.4	23.6	22.9	22.2	21.5	20.8	20.1	19.4	18.7	18.0	17.4	16.7	16.1	
8	13	25.1	24.4	23.6	22.9	22.2	21.4	20.7	20.0	19.4	18.7	18.0	17.4	16.7	16.1	
9	14	25.1	24.3	23.6	22.9	22.1	21.4	20.7	20.0	19.3	18.7	18.0	17.3	16.7	16.1	
10	15	25.0	24.3	23.6	22.8	22.1	21.4	20.7	20.0	19.3	18.6	18.0	17.3	16.7	16.1	
11	16	25.0	24.3	23.5	22.8	22.1	21.4	20.7	20.0	19.3	18.6	18.0	17.3	16.7	16.1	
12	17	25.0	24.2	23.5	22.8	22.1	21.4	20.7	20.0	19.3	18.6	18.0	17.3	16.7	16.0	

13	18	24.9	24.2	23.5	22.7	22.0	21.3	20.6	19.9	19.3	18.6	17.9	17.3	16.7	16.0
14	19	24.9	24.1	23.4	22.7	22.0	21.3	20.6	19.9	19.2	18.6	17.9	17.3	16.6	16.0
15	20	24.8	24.1	23.4	22.7	22.0	21.3	20.6	19.9	19.2	18.5	17.9	17.3	16.6	16.0
16	21	24.8	24.0	23.3	22.6	21.9	21.2	20.5	19.9	19.2	18.5	17.9	17.2	16.6	16.0
17	22	24.7	24.0	23.3	22.6	21.9	21.2	20.5	19.8	19.2	18.5	17.8	17.2	16.6	16.0
18	23	24.7	23.9	23.2	22.5	21.8	21.1	20.5	19.8	19.1	18.5	17.8	17.2	16.6	15.9
19	24	24.6	23.9	23.2	22.5	21.8	21.1	20.4	19.8	19.1	18.4	17.8	17.2	16.5	15.9
20	25	24.5	23.8	23.1	22.4	21.7	21.1	20.4	19.7	19.1	18.4	17.8	17.1	16.5	15.9
21	26	24.4	23.7	23.1	22.4	21.7	21.0	20.3	19.7	19.0	18.4	17.7	17.1	16.5	15.9
22	27	24.4	23.7	23.0	22.3	21.6	21.0	20.3	19.6	19.0	18.3	17.7	17.1	16.5	15.9
23	28	24.3	23.6	22.9	22.2	21.6	20.9	20.2	19.6	18.9	18.3	17.7	17.0	16.4	15.8
24	29	24.2	23.5	22.8	22.2	21.5	20.8	20.2	19.5	18.9	18.3	17.6	17.0	16.4	15.8
25	30	24.1	23.4	22.8	22.1	21.4	20.8	20.1	19.5	18.8	18.2	17.6	17.0	16.4	15.8
26	31	24.0	23.3	22.7	22.0	21.4	20.7	20.1	19.4	18.8	18.2	17.5	16.9	16.3	15.7
27	32	23.9	23.2	22.6	21.9	21.3	20.6	20.0	19.4	18.7	18.1	17.5	16.9	16.3	15.7
28	33	23.8	23.1	22.5	21.8	21.2	20.6	19.9	19.3	18.7	18.1	17.4	16.8	16.2	15.6
29	34	23.6	23.0	22.4	21.7	21.1	20.5	19.8	19.2	18.6	18.0	17.4	16.8	16.2	15.6
30	35	23.5	22.9	22.3	21.6	21.0	20.4	19.8	19.1	18.5	17.9	17.3	16.7	16.1	15.6
31	36	23.4	22.7	22.1	21.5	20.9	20.3	19.7	19.1	18.5	17.9	17.3	16.7	16.1	15.5
32	37	23.2	22.6	22.0	21.4	20.8	20.2	19.6	19.0	18.4	17.8	17.2	16.6	16.0	15.5
33	38	23.1	22.5	21.9	21.3	20.7	20.1	19.5	18.9	18.3	17.7	17.1	16.5	16.0	15.4
34	39	22.9	22.3	21.7	21.1	20.5	20.0	19.4	18.8	18.2	17.6	17.0	16.5	15.9	15.3

Male	Female	Ages														
		Male 64	65	66	67	68	69	70	71	72	73	74	75	76	77	78
		Female 69	70	71	72	73	74	75	76	77	78	79	80	81	82	83
6	11	15.5	14.9	14.3	13.7	13.1	12.6	12.0	11.5	11.0	10.5	10.0	9.6	9.1	8.7	8.2
7	12	15.5	14.9	14.3	13.7	13.1	12.6	12.0	11.5	11.0	10.5	10.0	9.6	9.1	8.7	8.2
8	13	15.5	14.9	14.3	13.7	13.1	12.6	12.0	11.5	11.0	10.5	10.0	9.6	9.1	8.7	8.2
9	14	15.5	14.9	14.3	13.7	13.1	12.6	12.0	11.5	11.0	10.5	10.0	9.5	9.1	8.7	8.2
10	15	15.4	14.8	14.3	13.7	13.1	12.6	12.0	11.5	11.0	10.5	10.0	9.5	9.1	8.7	8.2
11	16	15.4	14.8	14.2	13.7	13.1	12.6	12.0	11.5	11.0	10.5	10.0	9.5	9.1	8.7	8.2
12	17	15.4	14.8	14.2	13.7	13.1	12.5	12.0	11.5	11.0	10.5	10.0	9.5	9.1	8.6	8.2
13	18	15.4	14.8	14.2	13.6	13.1	12.5	12.0	11.5	11.0	10.5	10.0	9.5	9.1	8.6	8.2
14	19	15.4	14.8	14.2	13.6	13.1	12.5	12.0	11.5	11.0	10.5	10.0	9.5	9.1	8.6	8.2
15	20	15.4	14.8	14.2	13.6	13.1	12.5	12.0	11.5	11.0	10.5	10.0	9.5	9.1	8.6	8.2
16	21	15.4	14.8	14.2	13.6	13.1	12.5	12.0	11.5	11.0	10.5	10.0	9.5	9.1	8.6	8.2
17	22	15.4	14.8	14.2	13.6	13.0	12.5	12.0	11.5	10.9	10.5	10.0	9.5	9.1	8.6	8.2
18	23	15.3	14.7	14.2	13.6	13.0	12.5	12.0	11.4	10.9	10.4	10.0	9.5	9.1	8.6	8.2
19	24	15.3	14.7	14.1	13.6	13.0	12.5	12.0	11.4	10.9	10.4	10.0	9.5	9.1	8.6	8.2
20	25	15.3	14.7	14.1	13.6	13.0	12.5	11.9	11.4	10.9	10.4	10.0	9.5	9.0	8.6	8.2

Male	Female	Ages														
		Male 64	65	66	67	68	69	70	71	72	73	74	75	76	77	78
		Female 69	70	71	72	73	74	75	76	77	78	79	80	81	82	83
21	26	15.3	14.7	14.1	13.5	13.0	12.5	11.9	11.4	10.9	10.4	9.9	9.5	9.0	8.6	8.2
22	27	15.3	14.7	14.1	13.5	13.0	12.4	11.9	11.4	10.9	10.4	9.9	9.5	9.0	8.6	8.2
23	28	15.2	14.6	14.1	13.5	13.0	12.4	11.9	11.4	10.9	10.4	9.9	9.5	9.0	8.6	8.2
24	29	15.2	14.6	14.0	13.5	12.9	12.4	11.9	11.4	10.9	10.4	9.9	9.5	9.0	8.6	8.2
25	30	15.2	14.6	14.0	13.5	12.9	12.4	11.9	11.4	10.9	10.4	9.9	9.5	9.0	8.6	8.2
26	31	15.1	14.6	14.0	13.4	12.9	12.4	11.9	11.3	10.8	10.4	9.9	9.4	9.0	8.6	8.2
27	32	15.1	14.5	14.0	13.4	12.9	12.4	11.8	11.3	10.8	10.4	9.9	9.4	9.0	8.6	8.2
28	33	15.1	14.5	13.9	13.4	12.9	12.3	11.8	11.3	10.8	10.3	9.9	9.4	9.0	8.6	8.1
29	34	15.0	14.5	13.9	13.4	12.8	12.3	11.8	11.3	10.8	10.3	9.9	9.4	9.0	8.5	8.1
30	35	15.0	14.4	13.9	13.3	12.8	12.3	11.8	11.3	10.8	10.3	9.8	9.4	9.0	8.5	8.1
31	36	14.9	14.4	13.8	13.3	12.8	12.2	11.7	11.2	10.8	10.3	9.8	9.4	8.9	8.5	8.1
32	37	14.9	14.3	13.8	13.3	12.7	12.2	11.7	11.2	10.7	10.3	9.8	9.4	8.9	8.5	8.1
33	38	14.8	14.3	13.8	13.2	12.7	12.2	11.7	11.2	10.7	10.2	9.8	9.3	8.9	8.5	8.1
34	39	14.8	14.2	13.7	13.2	12.7	12.2	11.7	11.2	10.7	10.2	9.8	9.3	8.9	8.5	8.1

Male	Female	Ages														
		Male 79	80	81	82	83	84	85	86	87	88	89	90	91	92	93
		Female 84	85	86	87	88	89	90	91	92	93	94	95	96	97	98
6	11	7.8	7.4	7.1	6.7	6.3	6.0	5.7	5.4	5.1	4.8	4.5	4.2	4.0	3.7	3.5
7	12	7.8	7.4	7.1	6.7	6.3	6.0	5.7	5.4	5.1	4.8	4.5	4.2	4.0	3.7	3.5
8	13	7.8	7.4	7.0	6.7	6.3	6.0	5.7	5.4	5.1	4.8	4.5	4.2	4.0	3.7	3.5
9	14	7.8	7.4	7.0	6.7	6.3	6.0	5.7	5.4	5.1	4.8	4.5	4.2	4.0	3.7	3.5
10	15	7.8	7.4	7.0	6.7	6.3	6.0	5.7	5.4	5.1	4.8	4.5	4.2	4.0	3.7	3.5
11	16	7.8	7.4	7.0	6.7	6.3	6.0	5.7	5.4	5.1	4.8	4.5	4.2	4.0	3.7	3.5
12	17	7.8	7.4	7.0	6.7	6.3	6.0	5.7	5.4	5.1	4.8	4.5	4.2	4.0	3.7	3.5
13	18	7.8	7.4	7.0	6.7	6.3	6.0	5.7	5.3	5.1	4.8	4.5	4.2	4.0	3.7	3.5
14	19	7.8	7.4	7.0	6.7	6.3	6.0	5.7	5.3	5.0	4.8	4.5	4.2	4.0	3.7	3.5
15	20	7.8	7.4	7.0	6.7	6.3	6.0	5.7	5.3	5.0	4.8	4.5	4.2	4.0	3.7	3.5
16	21	7.8	7.4	7.0	6.7	6.3	6.0	5.7	5.3	5.0	4.8	4.5	4.2	4.0	3.7	3.5
17	22	7.8	7.4	7.0	6.7	6.3	6.0	5.7	5.3	5.0	4.8	4.5	4.2	4.0	3.7	3.5
18	23	7.8	7.4	7.0	6.7	6.3	6.0	5.7	5.3	5.0	4.8	4.5	4.2	4.0	3.7	3.5
19	24	7.8	7.4	7.0	6.7	6.3	6.0	5.7	5.3	5.0	4.8	4.5	4.2	4.0	3.7	3.5
20	25	7.8	7.4	7.0	6.7	6.3	6.0	5.6	5.3	5.0	4.8	4.5	4.2	4.0	3.7	3.5
21	26	7.8	7.4	7.0	6.7	6.3	6.0	5.6	5.3	5.0	4.8	4.5	4.2	4.0	3.7	3.5
22	27	7.8	7.4	7.0	6.7	6.3	6.0	5.6	5.3	5.0	4.8	4.5	4.2	4.0	3.7	3.5
23	28	7.8	7.4	7.0	6.6	6.3	6.0	5.6	5.3	5.0	4.8	4.5	4.2	4.0	3.7	3.5

24	29	7.8	7.4	7.0	6.6	6.3	6.0	5.6	5.3	5.0	4.7	4.5	4.2	4.0	3.7	3.5
25	30	7.8	7.4	7.0	6.6	6.3	6.0	5.6	5.3	5.0	4.7	4.5	4.2	4.0	3.7	3.5
26	31	7.8	7.4	7.0	6.6	6.3	6.0	5.6	5.3	5.0	4.7	4.5	4.2	4.0	3.7	3.5
27	32	7.7	7.4	7.0	6.6	6.3	5.9	5.6	5.3	5.0	4.7	4.5	4.2	4.0	3.7	3.5
28	33	7.7	7.4	7.0	6.6	6.3	5.9	5.6	5.3	5.0	4.7	4.5	4.2	4.0	3.7	3.5
29	34	7.7	7.3	7.0	6.6	6.3	5.9	5.6	5.3	5.0	4.7	4.5	4.2	4.0	3.7	3.5
30	35	7.7	7.3	7.0	6.6	6.3	5.9	5.6	5.3	5.0	4.7	4.5	4.2	4.0	3.7	3.5
31	36	7.7	7.3	7.0	6.6	6.3	5.9	5.6	5.3	5.0	4.7	4.5	4.2	4.0	3.7	3.5
32	37	7.7	7.3	7.0	6.6	6.3	5.9	5.6	5.3	5.0	4.7	4.5	4.2	4.0	3.7	3.5
33	38	7.7	7.3	6.9	6.6	6.2	5.9	5.6	5.3	5.0	4.7	4.5	4.2	3.9	3.7	3.5
34	39	7.7	7.3	6.9	6.6	6.2	5.9	5.6	5.3	5.0	4.7	4.4	4.2	3.9	3.7	3.5

Male	Female	Ages														
		Male 94	95	96	97	98	99	100	101	102	103	104	105	106	107	108
		Female 99	100	101	102	103	104	105	106	107	108	109	110	111	112	113
6	11	3.3	3.1	2.9	2.7	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.2	1.0	0.8	0.7
7	12	3.3	3.1	2.9	2.7	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.2	1.0	0.8	0.7
8	13	3.3	3.1	2.9	2.7	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.2	1.0	0.8	0.7
9	14	3.3	3.1	2.9	2.7	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.2	1.0	0.8	0.7
10	15	3.3	3.1	2.9	2.7	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.2	1.0	0.8	0.7
11	16	3.3	3.1	2.9	2.7	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.2	1.0	0.8	0.7
12	17	3.3	3.1	2.9	2.7	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.2	1.0	0.8	0.7
13	18	3.3	3.1	2.9	2.7	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.2	1.0	0.8	0.7
14	19	3.3	3.1	2.9	2.7	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.2	1.0	0.8	0.7
15	20	3.3	3.1	2.9	2.7	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.2	1.0	0.8	0.7
16	21	3.3	3.1	2.9	2.7	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.2	1.0	0.8	0.7
17	22	3.3	3.1	2.9	2.7	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.2	1.0	0.8	0.7
18	23	3.3	3.1	2.9	2.7	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.2	1.0	0.8	0.7
19	24	3.3	3.1	2.9	2.7	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.2	1.0	0.8	0.7
20	25	3.3	3.1	2.9	2.7	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.2	1.0	0.8	0.7
21	26	3.3	3.1	2.9	2.7	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.2	1.0	0.8	0.7
22	27	3.3	3.1	2.9	2.7	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.2	1.0	0.8	0.7
23	28	3.3	3.1	2.9	2.7	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.2	1.0	0.8	0.7
24	29	3.3	3.1	2.9	2.7	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.2	1.0	0.8	0.7
25	30	3.3	3.1	2.9	2.7	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.2	1.0	0.8	0.7
26	31	3.3	3.1	2.9	2.7	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.2	1.0	0.8	0.7
27	32	3.3	3.1	2.9	2.7	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.2	1.0	0.8	0.7
28	33	3.3	3.1	2.9	2.7	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.2	1.0	0.8	0.7
29	34	3.3	3.1	2.9	2.7	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.2	1.0	0.8	0.7
30	35	3.3	3.1	2.9	2.7	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.2	1.0	0.8	0.7

Male	Female	Ages														
		Male 94	95	96	97	98	99	100	101	102	103	104	105	106	107	108
		Female 99	100	101	102	103	104	105	106	107	108	109	110	111	112	113
31	36	3.3	3.1	2.9	2.7	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.2	1.0	0.8	0.7
32	37	3.3	3.1	2.9	2.7	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.2	1.0	0.8	0.7
33	38	3.3	3.1	2.9	2.7	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.2	1.0	0.8	0.7
34	39	3.3	3.1	2.9	2.7	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.2	1.0	0.8	0.7

Male	Female	Ages												
		Male 35	36	37	38	39	40	41	42	43	44	45	46	47
		Female 40	41	42	43	44	45	46	47	48	49	50	51	52
35	40	30.3	29.9	29.4	29.0	28.5	28.0	27.5	27.0	26.5	26.0	25.5	24.9	24.4
36	41	29.9	29.5	29.0	28.6	28.2	27.7	27.2	26.7	26.2	25.7	25.2	24.7	24.2
37	42	29.4	29.0	28.6	28.2	27.8	27.3	26.9	26.4	25.9	25.5	25.0	24.4	23.9
38	43	29.0	28.6	28.2	27.8	27.4	27.0	26.5	26.1	25.6	25.2	24.7	24.2	23.7
39	44	28.5	28.2	27.8	27.4	27.0	26.6	26.2	25.8	25.3	24.8	24.4	23.9	23.4
40	45	28.0	27.7	27.3	27.0	26.6	26.2	25.8	25.4	25.0	24.5	24.1	23.6	23.1
41	46	27.5	27.2	26.9	26.5	26.2	25.8	25.4	25.0	24.6	24.2	23.8	23.3	22.9
42	47	27.0	26.7	26.4	26.1	25.8	25.4	25.0	24.6	24.2	23.8	23.4	23.0	22.6
43	48	26.5	26.2	25.9	25.6	25.3	25.0	24.6	24.2	23.9	23.5	23.1	22.7	22.2
44	49	26.0	25.7	25.5	25.2	24.8	24.5	24.2	23.8	23.5	23.1	22.7	22.3	21.9
45	50	25.5	25.2	25.0	24.7	24.4	24.1	23.8	23.4	23.1	22.7	22.4	22.0	21.6
46	51	24.9	24.7	24.4	24.2	23.9	23.6	23.3	23.0	22.7	22.3	22.0	21.6	21.2
47	52	24.4	24.2	23.9	23.7	23.4	23.1	22.9	22.6	22.2	21.9	21.6	21.2	20.9

Male	Female	Ages												
		Male 48	49	50	51	52	53	54	55	56	57	58	59	60
		Female 53	54	55	56	57	58	59	60	61	62	63	64	65
35	40	23.8	23.3	22.7	22.1	21.6	21.0	20.4	19.8	19.3	18.7	18.1	17.5	17.0
36	41	23.6	23.1	22.5	22.0	21.4	20.8	20.3	19.7	19.1	18.6	18.0	17.4	16.9
37	42	23.4	22.9	22.3	21.8	21.2	20.7	20.1	19.6	19.0	18.4	17.9	17.3	16.8
38	43	23.2	22.6	22.1	21.6	21.1	20.5	20.0	19.4	18.9	18.3	17.8	17.2	16.7
39	44	22.9	22.4	21.9	21.4	20.9	20.3	19.8	19.3	18.7	18.2	17.7	17.1	16.6
40	45	22.7	22.2	21.7	21.2	20.7	20.1	19.6	19.1	18.6	18.0	17.5	17.0	16.5
41	46	22.4	21.9	21.4	20.9	20.4	19.9	19.4	18.9	18.4	17.9	17.4	16.9	16.3
42	47	22.1	21.6	21.2	20.7	20.2	19.7	19.2	18.7	18.2	17.7	17.2	16.7	16.2
43	48	21.8	21.4	20.9	20.5	20.0	19.5	19.0	18.6	18.1	17.6	17.1	16.6	16.1
44	49	21.5	21.1	20.6	20.2	19.8	19.3	18.8	18.4	17.9	17.4	16.9	16.4	15.9
45	50	21.2	20.8	20.4	19.9	19.5	19.1	18.6	18.1	17.7	17.2	16.7	16.3	15.8

46	51	20.9	20.5	20.1	19.7	19.2	18.8	18.4	17.9	17.5	17.0	16.6	16.1	15.6
47	52	20.5	20.1	19.8	19.4	19.0	18.5	18.1	17.7	17.3	16.8	16.4	15.9	15.5
48	53	20.2	19.8	19.4	19.1	18.7	18.3	17.9	17.5	17.0	16.6	16.2	15.7	15.3
49	54	19.8	19.5	19.1	18.8	18.4	18.0	17.6	17.2	16.8	16.4	16.0	15.5	15.1
50	55	19.4	19.1	18.8	18.4	18.1	17.7	17.3	16.9	16.6	16.2	15.8	15.3	14.9
51	56	19.1	18.8	18.4	18.1	17.8	17.4	17.0	16.7	16.3	15.9	15.5	15.1	14.7
52	57	18.7	18.4	18.1	17.8	17.4	17.1	16.8	16.4	16.0	15.7	15.3	14.9	14.5
53	58	18.3	18.0	17.7	17.4	17.1	16.8	16.4	16.1	15.8	15.4	15.1	14.7	14.3
54	59	17.9	17.6	17.3	17.0	16.8	16.4	16.1	15.8	15.5	15.1	14.8	14.4	14.1
55	60	17.5	17.2	16.9	16.7	16.4	16.1	15.8	15.5	15.2	14.9	14.5	14.2	13.9
56	61	17.0	16.8	16.6	16.3	16.0	15.8	15.5	15.2	14.9	14.6	14.3	13.9	13.6
57	62	16.6	16.4	16.2	15.9	15.7	15.4	15.1	14.9	14.6	14.3	14.0	13.7	13.4
58	63	16.2	16.0	15.8	15.5	15.3	15.1	14.8	14.5	14.3	14.0	13.7	13.4	13.1
59	64	15.7	15.5	15.3	15.1	14.9	14.7	14.4	14.2	13.9	13.7	13.4	13.1	12.8
60	65	15.3	15.1	14.9	14.7	14.5	14.3	14.1	13.9	13.6	13.4	13.1	12.8	12.6

Male	Female	Ages												
		Male 61	62	63	64	65	66	67	68	69	70	71	72	73
		Female 66	67	68	69	70	71	72	73	74	74	76	77	78
35	40	16.4	15.8	15.3	14.7	14.2	13.7	13.1	12.6	12.1	11.6	11.1	10.7	10.2
36	41	16.3	15.8	15.2	14.7	14.1	13.6	13.1	12.6	12.1	11.6	11.1	10.6	10.2
37	42	16.2	15.7	15.1	14.6	14.1	13.6	13.0	12.5	12.0	11.5	11.1	10.6	10.1
38	43	16.1	15.6	15.1	14.5	14.0	13.5	13.0	12.5	12.0	11.5	11.0	10.6	10.1
39	44	16.0	15.5	15.0	14.5	13.9	13.4	12.9	12.4	11.9	11.5	11.0	10.5	10.1
40	45	15.9	15.4	14.9	14.4	13.9	13.4	12.9	12.4	11.9	11.4	11.0	10.5	10.0
41	46	15.8	15.3	14.8	14.3	13.8	13.3	12.8	12.3	11.8	11.4	10.9	10.5	10.0
42	47	15.7	15.2	14.7	14.2	13.7	13.2	12.7	12.3	11.8	11.3	10.9	10.4	10.0
43	48	15.6	15.1	14.6	14.1	13.6	13.1	12.7	12.2	11.7	11.3	10.8	10.4	9.9
44	49	15.5	15.0	14.5	14.0	13.5	13.1	12.6	12.1	11.7	11.2	10.8	10.3	9.9
45	50	15.3	14.8	14.4	13.9	13.4	13.0	12.5	12.0	11.6	11.1	10.7	10.3	9.8
46	51	15.2	14.7	14.2	13.8	13.3	12.9	12.4	12.0	11.5	11.1	10.6	10.2	9.8
47	52	15.0	14.6	14.1	13.7	13.2	12.8	12.3	11.9	11.4	11.0	10.6	10.1	9.7
48	53	14.9	14.4	14.0	13.5	13.1	12.6	12.2	11.8	11.3	10.9	10.5	10.1	9.7
49	54	14.7	14.3	13.8	13.4	13.0	12.5	12.1	11.7	11.3	10.8	10.4	10.0	9.6
50	55	14.5	14.1	13.7	13.3	12.8	12.4	12.0	11.6	11.2	10.7	10.3	9.9	9.5
51	56	14.3	13.9	13.5	13.1	12.7	12.3	11.9	11.5	11.1	10.7	10.3	9.9	9.5
52	57	14.1	13.7	13.3	12.9	12.5	12.1	11.7	11.3	10.9	10.6	10.2	9.8	9.4
53	58	13.9	13.6	13.2	12.8	12.4	12.0	11.6	11.2	10.8	10.5	10.1	9.7	9.3
54	59	13.7	13.4	13.0	12.6	12.2	11.9	11.5	11.1	10.7	10.3	10.0	9.6	9.2
55	60	13.5	13.2	12.8	12.4	12.1	11.7	11.3	11.0	10.6	10.2	9.9	9.5	9.1

Male	Female	Ages												
		Male 61	62	63	64	65	66	67	68	69	70	71	72	73
		Female 66	67	68	69	70	71	72	73	74	74	76	77	78
56	61	13.3	12.9	12.6	12.2	11.9	11.5	11.2	10.8	10.5	10.1	9.8	9.4	9.0
57	62	13.0	12.7	12.4	12.1	11.7	11.4	11.0	10.7	10.3	10.0	9.6	9.3	8.9
58	63	12.8	12.5	12.2	11.8	11.5	11.2	10.9	10.5	10.2	9.8	9.5	9.2	8.8
59	64	12.6	12.3	11.9	11.6	11.3	11.0	10.7	10.4	10.0	9.7	9.4	9.1	8.7
60	65	12.3	12.0	11.7	11.4	11.1	10.8	10.5	10.2	9.9	9.6	9.3	8.9	8.6
61	66	12.0	11.8	11.5	11.2	10.9	10.6	10.3	10.0	9.7	9.4	9.1	8.8	8.5
62	67	11.8	11.5	11.2	11.0	10.7	10.4	10.1	9.8	9.6	9.3	9.0	8.7	8.4
63	68	11.5	11.2	11.0	10.7	10.5	10.2	9.9	9.7	9.4	9.1	8.8	8.5	8.2
64	69	11.2	11.0	10.7	10.5	10.2	10.0	9.7	9.5	9.2	8.9	8.7	8.4	8.1
65	70	10.9	10.7	10.5	10.2	10.0	9.8	9.5	9.3	9.0	8.8	8.5	8.2	8.0
66	71	10.6	10.4	10.2	10.0	9.8	9.5	9.3	9.1	8.8	8.6	8.3	8.1	7.8
67	72	10.3	10.1	9.9	9.7	9.5	9.3	9.1	8.9	8.6	8.4	8.1	7.9	7.7
68	73	10.0	9.8	9.7	9.5	9.3	9.1	8.9	8.6	8.4	8.2	8.0	7.7	7.5
69	74	9.7	9.6	9.4	9.2	9.0	8.8	8.6	8.4	8.2	8.0	7.8	7.6	7.3
70	75	9.4	9.3	9.1	8.9	8.8	8.6	8.4	8.2	8.0	7.8	7.6	7.4	7.2
71	76	9.1	9.0	8.8	8.7	8.5	8.3	8.1	8.0	7.8	7.6	7.4	7.2	7.0
72	77	8.8	8.7	8.5	8.4	8.2	8.1	7.9	7.7	7.6	7.4	7.2	7.0	6.8
73	78	8.5	8.4	8.2	8.1	8.0	7.8	7.7	7.5	7.3	7.2	7.0	6.8	6.7

Male	Female	Ages												
		Male 74	75	76	77	78	79	80	81	82	83	84	85	86
		Female 79	80	81	82	83	84	85	86	87	88	89	90	91
35	40	9.7	9.3	8.9	8.5	8.1	7.7	7.3	6.9	6.6	6.2	5.9	5.6	5.3
36	41	9.7	9.3	8.9	8.4	8.0	7.7	7.3	6.9	6.6	6.2	5.9	5.6	5.3
37	42	9.7	9.3	8.8	8.4	8.0	7.6	7.3	6.9	6.5	6.2	5.9	5.6	5.3
38	43	9.7	9.2	8.8	8.4	8.0	7.6	7.2	6.9	6.5	6.2	5.9	5.6	5.3
39	44	9.6	9.2	8.8	8.4	8.0	7.6	7.2	6.9	6.5	6.2	5.9	5.6	5.3
40	45	9.6	9.2	8.8	8.4	8.0	7.6	7.2	6.9	6.5	6.2	5.9	5.5	5.2
41	46	9.6	9.2	8.7	8.3	7.9	7.6	7.2	6.8	6.5	6.2	5.8	5.5	5.2
42	47	9.5	9.1	8.7	8.3	7.9	7.5	7.2	6.8	6.5	6.2	5.8	5.5	5.2
43	48	9.5	9.1	8.7	8.3	7.9	7.5	7.2	6.8	6.5	6.1	5.8	5.5	5.2
44	49	9.5	9.0	8.6	8.2	7.9	7.5	7.1	6.8	6.4	6.1	5.8	5.5	5.2
45	50	9.4	9.0	8.6	8.2	7.8	7.5	7.1	6.8	6.4	6.1	5.8	5.5	5.2
46	51	9.4	9.0	8.6	8.2	7.8	7.4	7.1	6.7	6.4	6.1	5.8	5.5	5.2
47	52	9.3	8.9	8.5	8.1	7.8	7.4	7.1	6.7	6.4	6.1	5.8	5.5	5.2
48	53	9.3	8.9	8.5	8.1	7.7	7.4	7.0	6.7	6.4	6.0	5.7	5.4	5.1
49	54	9.2	8.8	8.4	8.1	7.7	7.3	7.0	6.7	6.3	6.0	5.7	5.4	5.1
50	55	9.1	8.8	8.4	8.0	7.7	7.3	7.0	6.6	6.3	6.0	5.7	5.4	5.1

51	56	9.1	8.7	8.3	8.0	7.6	7.3	6.9	6.6	6.3	6.0	5.7	5.4	5.1
52	57	9.0	8.6	8.3	7.9	7.6	7.2	6.9	6.6	6.2	5.9	5.6	5.4	5.1
53	58	8.9	8.6	8.2	7.9	7.5	7.2	6.9	6.5	6.2	5.9	5.6	5.3	5.1
54	59	8.9	8.5	8.2	7.8	7.5	7.1	6.8	6.5	6.2	5.9	5.6	5.3	5.0
55	60	8.8	8.4	8.1	7.7	7.4	7.1	6.8	6.4	6.1	5.8	5.6	5.3	5.0
56	61	8.7	8.4	8.0	7.7	7.3	7.0	6.7	6.4	6.1	5.8	5.5	5.3	5.0
57	62	8.6	8.3	7.9	7.6	7.3	7.0	6.7	6.4	6.1	5.8	5.5	5.2	5.0
58	63	8.5	8.2	7.9	7.5	7.2	6.9	6.6	6.3	6.0	5.7	5.5	5.2	4.9
59	64	8.4	8.1	7.8	7.5	7.1	6.8	6.5	6.3	6.0	5.7	5.4	5.2	4.9
60	65	8.3	8.0	7.7	7.4	7.1	6.8	6.5	6.2	5.9	5.6	5.4	5.1	4.9
61	66	8.2	7.9	7.6	7.3	7.0	6.7	6.4	6.1	5.9	5.6	5.3	5.1	4.8
62	67	8.1	7.8	7.5	7.2	6.9	6.6	6.4	6.1	5.8	5.5	5.3	5.0	4.8
63	68	8.0	7.7	7.4	7.1	6.8	6.6	6.3	6.0	5.7	5.5	5.2	5.0	4.7
64	69	7.8	7.6	7.3	7.0	6.7	6.5	6.2	5.9	5.7	5.4	5.2	4.9	4.7
65	70	7.7	7.4	7.2	6.9	6.6	6.4	6.1	5.9	5.6	5.4	5.1	4.9	4.7
66	71	7.6	7.3	7.1	6.8	6.5	6.3	6.0	5.8	5.5	5.3	5.1	4.8	4.6
67	72	7.4	7.2	6.9	6.7	6.4	6.2	6.0	5.7	5.5	5.2	5.0	4.8	4.6
68	73	7.3	7.0	6.8	6.6	6.3	6.1	5.9	5.6	5.4	5.2	4.9	4.7	4.5
69	74	7.1	6.9	6.7	6.4	6.2	6.0	5.8	5.5	5.3	5.1	4.9	4.7	4.5
70	75	7.0	6.8	6.5	6.3	6.1	5.9	5.7	5.4	5.2	5.0	4.8	4.6	4.4
71	76	6.8	6.6	6.4	6.2	6.0	5.8	5.6	5.3	5.1	4.9	4.7	4.5	4.3
72	77	6.6	6.4	6.3	6.1	5.9	5.7	5.5	5.3	5.0	4.9	4.7	4.5	4.3
73	78	6.5	6.3	6.1	5.9	5.7	5.5	5.3	5.1	5.0	4.8	4.6	4.4	4.2
74	79	6.3	6.1	6.0	5.8	5.6	5.4	5.2	5.0	4.9	4.7	4.5	4.3	4.1
75	80	6.1	6.0	5.8	5.6	5.5	5.3	5.1	4.9	4.8	4.6	4.4	4.2	4.1
76	81	6.0	5.8	5.6	5.5	5.3	5.2	5.0	4.8	4.7	4.5	4.3	4.1	4.0
77	82	5.8	5.6	5.5	5.3	5.2	5.0	4.9	4.7	4.5	4.4	4.2	4.1	3.9
78	83	5.6	5.5	5.3	5.2	5.0	4.9	4.7	4.6	4.4	4.3	4.1	4.0	3.8
79	84	5.4	5.3	5.2	5.0	4.9	4.7	4.6	4.5	4.3	4.2	4.0	3.9	3.7
80	85	5.2	5.1	5.0	4.9	4.7	4.6	4.5	4.3	4.2	4.1	3.9	3.8	3.6
81	86	5.0	4.9	4.8	4.7	4.6	4.5	4.3	4.2	4.1	3.9	3.8	3.7	3.6
82	87	4.9	4.8	4.7	4.5	4.4	4.3	4.2	4.1	4.0	3.8	3.7	3.6	3.5
83	88	4.7	4.6	4.5	4.4	4.3	4.2	4.1	3.9	3.8	3.7	3.6	3.5	3.4
84	89	4.5	4.4	4.3	4.2	4.1	4.0	3.9	3.8	3.7	3.6	3.5	3.4	3.3
85	90	4.3	4.2	4.1	4.1	4.0	3.9	3.8	3.7	3.6	3.5	3.4	3.3	3.2
86	91	4.1	4.1	4.0	3.9	3.8	3.7	3.6	3.6	3.5	3.4	3.3	3.2	3.1

Male	Female	Ages										
		Male 87	88	89	90	91	92	93	94	95	96	97
		Female 92	93	94	95	96	97	98	99	100	101	102
35	40	5.0	4.7	4.4	4.2	3.9	3.7	3.5	3.3	3.1	2.9	2.7

Male	Female	Ages: Male 87 / Female 92	88 / 93	89 / 94	90 / 95	91 / 96	92 / 97	93 / 98	94 / 99	95 / 100	96 / 101	97 / 102
36	41	5.0	4.7	4.4	4.2	3.9	3.7	3.5	3.3	3.1	2.9	2.7
37	42	5.0	4.7	4.4	4.2	3.9	3.7	3.5	3.3	3.1	2.9	2.7
38	43	5.0	4.7	4.4	4.2	3.9	3.7	3.5	3.3	3.1	2.8	2.6
39	44	5.0	4.7	4.4	4.2	3.9	3.7	3.5	3.3	3.0	2.8	2.6
40	45	5.0	4.7	4.4	4.2	3.9	3.7	3.5	3.3	3.0	2.8	2.6
41	46	5.0	4.7	4.4	4.2	3.9	3.7	3.5	3.2	3.0	2.8	2.6
42	47	4.9	4.7	4.4	4.2	3.9	3.7	3.5	3.2	3.0	2.8	2.6
43	48	4.9	4.7	4.4	4.1	3.9	3.7	3.5	3.2	3.0	2.8	2.6
44	49	4.9	4.7	4.4	4.1	3.9	3.7	3.4	3.2	3.0	2.8	2.6
45	50	4.9	4.6	4.4	4.1	3.9	3.7	3.4	3.2	3.0	2.8	2.6
46	51	4.9	4.6	4.4	4.1	3.9	3.7	3.4	3.2	3.0	2.8	2.6
47	52	4.9	4.6	4.4	4.1	3.9	3.7	3.4	3.2	3.0	2.8	2.6
48	53	4.9	4.6	4.4	4.1	3.9	3.6	3.4	3.2	3.0	2.8	2.6
49	54	4.9	4.6	4.3	4.1	3.9	3.6	3.4	3.2	3.0	2.8	2.6
50	55	4.8	4.6	4.3	4.1	3.9	3.6	3.4	3.2	3.0	2.8	2.6
51	56	4.8	4.6	4.3	4.1	3.8	3.6	3.4	3.2	3.0	2.8	2.6
52	57	4.8	4.5	4.3	4.1	3.8	3.6	3.4	3.2	3.0	2.8	2.6
53	58	4.8	4.5	4.3	4.0	3.8	3.6	3.4	3.2	3.0	2.8	2.6
54	59	4.8	4.5	4.3	4.0	3.8	3.6	3.4	3.2	3.0	2.8	2.6
55	60	4.7	4.5	4.3	4.0	3.8	3.6	3.4	3.2	3.0	2.8	2.6
56	61	4.7	4.5	4.2	4.0	3.8	3.6	3.3	3.1	2.9	2.8	2.6
57	62	4.7	4.5	4.2	4.0	3.8	3.5	3.3	3.1	2.9	2.7	2.6
58	63	4.7	4.4	4.2	4.0	3.7	3.5	3.3	3.1	2.9	2.7	2.5
59	64	4.6	4.4	4.2	3.9	3.7	3.5	3.3	3.1	2.9	2.7	2.5

Male	Female	Ages: Male 98 / Female 103	99 / 104	100 / 105	101 / 106	102 / 107	103 / 108	104 / 109	105 / 110	106 / 111	107 / 112	108 / 113
35	40	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.2	1.0	0.8	0.7
36	41	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.2	1.0	0.8	0.7
37	42	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.1	1.0	0.8	0.7
38	43	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.1	1.0	0.8	0.7
39	44	2.4	2.3	2.1	1.9	1.7	1.5	1.3	1.1	1.0	0.8	0.7
40	45	2.4	2.2	2.1	1.9	1.7	1.5	1.3	1.1	1.0	0.8	0.7
41	46	2.4	2.2	2.1	1.9	1.7	1.5	1.3	1.1	1.0	0.8	0.7
42	47	2.4	2.2	2.0	1.9	1.7	1.5	1.3	1.1	1.0	0.8	0.7
43	48	2.4	2.2	2.0	1.9	1.7	1.5	1.3	1.1	1.0	0.8	0.7

44	49	2.4	2.2	2.0	1.9	1.7	1.5	1.3	1.1	1.0	0.8	0.7
45	50	2.4	2.2	2.0	1.8	1.7	1.5	1.3	1.1	1.0	0.8	0.7
46	51	2.4	2.2	2.0	1.8	1.7	1.5	1.3	1.1	1.0	0.8	0.7
47	52	2.4	2.2	2.0	1.8	1.7	1.5	1.3	1.1	1.0	0.8	0.7
48	53	2.4	2.2	2.0	1.8	1.7	1.5	1.3	1.1	1.0	0.8	0.7
49	54	2.4	2.2	2.0	1.8	1.7	1.5	1.3	1.1	1.0	0.8	0.7
50	55	2.4	2.2	2.0	1.8	1.6	1.5	1.3	1.1	1.0	0.8	0.7
51	56	2.4	2.2	2.0	1.8	1.6	1.5	1.3	1.1	1.0	0.8	0.7
52	57	2.4	2.2	2.0	1.8	1.6	1.5	1.3	1.1	1.0	0.8	0.7
53	58	2.4	2.2	2.0	1.8	1.6	1.5	1.3	1.1	1.0	0.8	0.7
54	59	2.4	2.2	2.0	1.8	1.6	1.5	1.3	1.1	1.0	0.8	0.7
55	60	2.4	2.2	2.0	1.8	1.6	1.4	1.3	1.1	1.0	0.8	0.7
56	61	2.4	2.2	2.0	1.8	1.6	1.4	1.3	1.1	1.0	0.8	0.7
57	62	2.4	2.2	2.0	1.8	1.6	1.4	1.3	1.1	0.9	0.8	0.7
58	63	2.4	2.2	2.0	1.8	1.6	1.4	1.3	1.1	0.9	0.8	0.7
59	64	2.3	2.2	2.0	1.8	1.6	1.4	1.3	1.1	0.9	0.8	0.7

Male	Female	Ages										
		Male 87	88	89	90	91	92	93	94	95	96	97
		Female 92	93	94	95	96	97	98	99	100	101	102
60	65	4.6	4.4	4.1	3.9	3.7	3.5	3.3	3.1	2.9	2.7	2.5
61	66	4.6	4.3	4.1	3.9	3.7	3.5	3.3	3.1	2.9	2.7	2.5
62	67	4.5	4.3	4.1	3.9	3.7	3.5	3.3	3.1	2.9	2.7	2.5
63	68	4.5	4.3	4.1	3.8	3.6	3.4	3.2	3.0	2.9	2.7	2.5
64	69	4.5	4.2	4.0	3.8	3.6	3.4	3.2	3.0	2.8	2.7	2.5
65	70	4.4	4.2	4.0	3.8	3.6	3.4	3.2	3.0	2.8	2.6	2.5
66	71	4.4	4.2	4.0	3.8	3.6	3.4	3.2	3.0	2.8	2.6	2.4
67	72	4.3	4.1	3.9	3.7	3.5	3.3	3.1	3.0	2.8	2.6	2.4
68	73	4.3	4.1	3.9	3.7	3.5	3.3	3.1	2.9	2.8	2.6	2.4
69	74	4.2	4.0	3.8	3.6	3.5	3.3	3.1	2.9	2.7	2.6	2.4
70	75	4.2	4.0	3.8	3.6	3.4	3.2	3.1	2.9	2.7	2.5	2.4
71	76	4.1	3.9	3.8	3.6	3.4	3.2	3.0	2.9	2.7	2.5	2.3
72	77	4.1	3.9	3.7	3.5	3.3	3.2	3.0	2.8	2.7	2.5	2.3
73	78	4.0	3.8	3.7	3.5	3.3	3.1	3.0	2.8	2.6	2.5	2.3
74	79	3.9	3.8	3.6	3.4	3.3	3.1	2.9	2.8	2.6	2.4	2.3
75	80	3.9	3.7	3.5	3.4	3.2	3.0	2.9	2.7	2.6	2.4	2.2
76	81	3.8	3.6	3.5	3.3	3.2	3.0	2.8	2.7	2.5	2.4	2.2
77	82	3.7	3.6	3.4	3.3	3.1	3.0	2.8	2.6	2.5	2.3	2.2
78	83	3.7	3.5	3.4	3.2	3.1	2.9	2.7	2.6	2.4	2.3	2.1
79	84	3.6	3.4	3.3	3.1	3.0	2.8	2.7	2.5	2.4	2.2	2.1

Male	Female	Ages										
		Male 87	88	89	90	91	92	93	94	95	96	97
		Female 92	93	94	95	96	97	98	99	100	101	102
80	85	3.5	3.4	3.2	3.1	2.9	2.8	2.6	2.5	2.3	2.2	2.0
81	86	3.4	3.3	3.1	3.0	2.9	2.7	2.6	2.4	2.3	2.1	2.0
82	87	3.3	3.2	3.1	2.9	2.8	2.7	2.5	2.4	2.2	2.1	2.0
83	88	3.2	3.1	3.0	2.9	2.7	2.6	2.5	2.3	2.2	2.0	1.9
84	89	3.1	3.0	2.9	2.8	2.7	2.5	2.4	2.3	2.1	2.0	1.9

Male	Female	Ages										
		Male 98	99	100	101	102	103	104	105	106	107	108
		Female 103	104	105	106	107	108	109	110	111	112	113
60	65	2.3	2.1	2.0	1.8	1.6	1.4	1.3	1.1	0.9	0.8	0.7
61	66	2.3	2.1	2.0	1.8	1.6	1.4	1.2	1.1	0.9	0.8	0.7
62	67	2.3	2.1	1.9	1.8	1.6	1.4	1.2	1.1	0.9	0.8	0.7
63	68	2.3	2.1	1.9	1.7	1.6	1.4	1.2	1.1	0.9	0.8	0.7
64	69	2.3	2.1	1.9	1.7	1.6	1.4	1.2	1.1	0.9	0.8	0.7
65	70	2.3	2.1	1.9	1.7	1.6	1.4	1.2	1.1	0.9	0.8	0.7
66	71	2.3	2.1	1.9	1.7	1.5	1.4	1.2	1.1	0.9	0.8	0.7
67	72	2.2	2.1	1.9	1.7	1.5	1.4	1.2	1.0	0.9	0.7	0.7
68	73	2.2	2.0	1.9	1.7	1.5	1.4	1.2	1.0	0.9	0.7	0.7
69	74	2.2	2.0	1.8	1.7	1.5	1.3	1.2	1.0	0.9	0.7	0.6
70	75	2.2	2.0	1.8	1.7	1.5	1.3	1.2	1.0	0.9	0.7	0.6
71	76	2.2	2.0	1.8	1.6	1.5	1.3	1.2	1.0	0.9	0.7	0.6
72	77	2.1	2.0	1.8	1.6	1.5	1.3	1.1	1.0	0.8	0.7	0.6
73	78	2.1	1.9	1.8	1.6	1.4	1.3	1.1	1.0	0.8	0.7	0.6
74	79	2.1	1.9	1.7	1.6	1.4	1.3	1.1	1.0	0.8	0.7	0.6
75	80	2.1	1.9	1.7	1.6	1.4	1.3	1.1	1.0	0.8	0.7	
76	81	2.0	1.9	1.7	1.5	1.4	1.2	1.1	0.9	0.8	0.7	
77	82	2.0	1.8	1.7	1.5	1.4	1.2	1.1	0.9	0.8	0.7	
78	83	2.0	1.8	1.6	1.5	1.3	1.2	1.0	0.9	0.8	0.7	
79	84	1.9	1.8	1.6	1.5	1.3	1.2	1.0	0.9	0.8	0.7	
80	85	1.9	1.7	1.6	1.4	1.3	1.1	1.0	0.9	0.7	0.7	
81	86	1.8	1.7	1.5	1.4	1.3	1.1	1.0	0.8	0.7	0.6	
82	87	1.8	1.7	1.5	1.4	1.2	1.1	1.0	0.8	0.7	0.6	
83	88	1.8	1.6	1.5	1.3	1.2	1.1	0.9	0.8	0.7	0.6	
84	89	1.7	1.6	1.4	1.3	1.2	1.0	0.9	0.8	0.7	....	....

Male	Female	Ages									
		Male 87	88	89	90	91	92	93	94	95	96
		Female 92	93	94	95	96	97	98	99	100	101
85	90	3.1	2.9	2.8	2.7	2.6	2.5	2.3	2.2	2.1	1.9
86	91	3.0	2.8	2.7	2.6	2.5	2.4	2.3	2.1	2.0	1.9
87	92	2.9	2.8	2.6	2.5	2.4	2.3	2.2	2.1	1.9	1.8
88	93	2.8	2.7	2.6	2.4	2.3	2.2	2.1	2.0	1.9	1.7
89	94	2.6	2.6	2.5	2.4	2.2	2.1	2.0	1.9	1.8	1.7
90	95	2.5	2.4	2.4	2.3	2.2	2.0	1.9	1.8	1.7	1.6
91	96	2.4	2.3	2.2	2.2	2.1	2.0	1.9	1.7	1.6	1.5
92	97	2.3	2.2	2.1	2.0	2.0	1.9	1.8	1.7	1.6	1.5
93	98	2.2	2.1	2.0	1.9	1.9	1.8	1.7	1.6	1.5	1.4
94	99	2.1	2.0	1.9	1.8	1.7	1.7	1.6	1.5	1.4	1.3
95	100	1.9	1.9	1.8	1.7	1.6	1.6	1.5	1.4	1.3	1.2
96	101	1.8	1.7	1.7	1.6	1.5	1.5	1.4	1.3	1.2	1.1
97	102	1.7	1.6	1.6	1.5	1.4	1.4	1.3	1.2	1.1	1.1
98	103	1.6	1.5	1.4	1.4	1.3	1.3	1.2	1.1	1.0	1.0
99	104	1.4	1.4	1.3	1.3	1.2	1.1	1.1	1.0	1.0	0.9

Male	Female	Ages									
		Male 97	98	99	100	101	102	103	104	105	106
		Female 102	103	104	105	106	107	108	109	110	111
85	90	1.8	1.7	1.5	1.4	1.3	1.1	1.0	0.9	0.8	0.7
86	91	1.7	1.6	1.5	1.3	1.2	1.1	1.0	0.8	0.7	0.7
87	92	1.7	1.6	1.4	1.3	1.2	1.1	0.9	0.8	0.7	0.6
88	93	1.6	1.5	1.4	1.3	1.1	1.0	0.9	0.8	0.7	0.6
89	94	1.6	1.4	1.3	1.2	1.1	1.0	0.9	0.7	0.7	
90	95	1.5	1.4	1.3	1.2	1.0	0.9	0.8	0.7	0.6	
91	96	1.4	1.3	1.2	1.1	1.0	0.9	0.8	0.7	0.6	
92	97	1.4	1.3	1.1	1.0	0.9	0.8	0.7	0.7		
93	98	1.3	1.2	1.1	1.0	0.9	0.8	0.7	0.6		
94	99	1.2	1.1	1.0	0.9	0.8	0.7	0.7			
95	100	1.1	1.0	1.0	0.9	0.8	0.7	0.6			
96	101	1.1	1.0	0.9	0.8	0.7	0.7				
97	102	1.0	0.9	0.8	0.7	0.7	0.6				
98	103	0.9	0.8	0.7	0.7	0.6					
99	104	0.8	0.7	0.7	0.6	....	....	....	....	....	....

TABLE III—PERCENT VALUE OF REFUND FEATURE

Ages		Duration of guaranteed amount—[Years]												
Male	Female	1	2	3	4	5	6	7	8	9	10	11	12	13
6	11									1	1	1	1	1
7	12									1	1	1	1	1
8	13								1	1	1	1	1	1
9	14								1	1	1	1	1	1
10	15								1	1	1	1	1	1
11	16								1	1	1	1	1	1
12	17								1	1	1	1	1	1
13	18								1	1	1	1	1	1
14	19								1	1	1	1	1	1
15	20								1	1	1	1	1	1
16	21								1	1	1	1	1	1
17	22								1	1	1	1	1	1
18	23								1	1	1	1	1	1
19	24								1	1	1	1	1	1
20	25								1	1	1	1	1	1
21	26								1	1	1	1	1	1
22	27							1	1	1	1	1	1	1
23	28							1	1	1	1	1	1	1
24	29							1	1	1	1	1	1	1
25	30							1	1	1	1	1	1	1
26	31						1	1	1	1	1	1	1	1
27	32						1	1	1	1	1	1	1	1
28	33						1	1	1	1	1	1	1	1
29	34						1	1	1	1	1	1	1	2
30	35					1	1	1	1	1	1	1	2	2
31	36					1	1	1	1	1	1	1	2	2
32	37					1	1	1	1	1	1	2	2	2
33	38				1	1	1	1	1	1	1	2	2	2
34	39				1	1	1	1	1	1	2	2	2	2
35	40				1	1	1	1	1	2	2	2	2	2
36	41				1	1	1	1	1	2	2	2	2	3
37	42			1	1	1	1	1	2	2	2	2	3	3
38	43			1	1	1	1	1	2	2	2	2	3	3
39	44			1	1	1	1	2	2	2	2	3	3	3
40	45			1	1	1	1	2	2	2	3	3	3	4
41	46			1	1	1	1	2	2	2	3	3	3	4
42	47			1	1	1	2	2	2	3	3	3	4	4

43	48	....	1	1	1	1	2	2	2	3	3	4	4	4
44	49	....	1	1	1	1	2	2	3	3	3	4	4	5
45	50	....	1	1	1	2	2	2	3	3	4	4	5	5
46	51	....	1	1	1	2	2	3	3	3	4	4	5	5
47	52	....	1	1	1	2	2	3	3	4	4	5	5	6
48	53	....	1	1	2	2	2	3	3	4	5	5	6	6
49	54	....	1	1	2	2	3	3	4	4	5	5	6	7
50	55	....	1	1	2	2	3	3	4	5	5	6	7	7
51	56	....	1	1	2	3	3	4	4	5	6	6	7	8
52	57	1	1	2	2	3	3	4	5	5	6	7	8	8
53	58	1	1	2	2	3	4	4	5	6	7	7	8	9
54	59	1	1	2	2	3	4	5	5	6	7	8	9	10
55	60	1	1	2	3	3	4	5	6	7	8	8	9	10
56	61	1	1	2	3	4	4	5	6	7	8	9	10	11
57	62	1	1	2	3	4	5	6	7	8	9	10	11	12
58	63	1	2	2	3	4	5	6	7	8	9	10	12	13
59	64	1	2	3	4	5	6	7	8	9	10	11	12	14
60	65	1	2	3	4	5	6	7	8	10	11	12	13	15
61	66	1	2	3	4	5	6	8	9	10	12	13	14	16
62	67	1	2	3	4	6	7	8	10	11	12	14	15	17
63	68	1	2	4	5	6	7	9	10	12	13	15	16	18
64	69	1	3	4	5	7	8	9	11	13	14	16	17	19
65	70	1	3	4	6	7	9	10	12	13	15	17	19	20
66	71	1	3	4	6	8	9	11	13	14	16	18	20	22
67	72	2	3	5	6	8	10	12	14	15	17	19	21	23
68	73	2	3	5	7	9	11	13	14	16	18	21	23	25
69	74	2	4	6	7	9	11	13	16	18	20	22	24	26
70	75	2	4	6	8	10	12	14	17	19	21	23	26	28
71	76	2	4	6	9	11	13	15	18	20	22	25	27	29
72	77	2	5	7	9	12	14	16	19	21	24	26	29	31
73	78	2	5	7	10	12	15	18	20	23	25	28	30	33
74	79	3	5	8	11	13	16	19	22	24	27	30	32	35
75	80	3	6	8	11	14	17	20	23	26	29	31	34	37
76	81	3	6	9	12	15	18	21	24	27	30	33	36	39
77	82	3	7	10	13	16	20	23	26	29	32	35	38	41
78	83	4	7	11	14	17	21	24	28	31	34	37	40	43
79	84	4	8	11	15	19	22	26	29	33	36	39	42	45
80	85	4	8	12	16	20	24	27	31	34	38	41	44	47
81	86	4	9	13	17	21	25	29	33	36	40	43	46	49
82	87	5	9	14	18	23	27	31	35	38	42	45	48	51
83	88	5	10	15	19	24	28	33	37	40	44	47	50	53
84	89	5	11	16	21	26	30	34	38	42	46	49	52	55

TABLE III—PERCENT VALUE OF REFUND FEATURE—Continued

Ages		Duration of guaranteed amount—[Years]												
Male	Female	1	2	3	4	5	6	7	8	9	10	11	12	13
85	90	6	11	17	22	27	32	36	41	44	48	51	55	57

Ages		Duration of guaranteed amount—[Years]												
Male	Female	14	15	16	17	18	19	20	21	22	23	24	25	26
6	11	1	1	1	1	1	1	1	1	1	1	2	2	2
7	12	1	1	1	1	1	1	1	1	1	1	2	2	2
8	13	1	1	1	1	1	1	1	1	1	1	2	2	2
9	14	1	1	1	1	1	1	1	1	1	1	2	2	2
10	15	1	1	1	1	1	1	1	1	1	2	2	2	2
11	16	1	1	1	1	1	1	1	1	1	2	2	2	2
12	17	1	1	1	1	1	1	1	1	1	2	2	2	2
13	18	1	1	1	1	1	1	1	1	2	2	2	2	2
14	19	1	1	1	1	1	1	1	1	2	2	2	2	2
15	20	1	1	1	1	1	1	1	1	2	2	2	2	2
16	21	1	1	1	1	1	1	1	2	2	2	2	2	2
17	22	1	1	1	1	1	1	1	2	2	2	2	2	2
18	23	1	1	1	1	1	1	2	2	2	2	2	2	2
19	24	1	1	1	1	1	2	2	2	2	2	2	2	2
20	25	1	1	1	1	1	2	2	2	2	2	2	2	3
21	26	1	1	1	1	2	2	2	2	2	2	2	3	3
22	27	1	1	1	1	2	2	2	2	2	2	3	3	3
23	28	1	1	1	2	2	2	2	2	2	2	3	3	3
24	29	1	1	2	2	2	2	2	2	2	3	3	3	3
25	30	1	1	2	2	2	2	2	2	3	3	3	3	3
26	31	1	2	2	2	2	2	2	3	3	3	3	3	4
27	32	2	2	2	2	2	2	3	3	3	3	3	4	4
28	33	2	2	2	2	2	3	3	3	3	3	4	4	4
29	34	2	2	2	2	2	3	3	3	3	4	4	4	5
30	35	2	2	2	2	3	3	3	3	4	4	4	5	5
31	36	2	2	2	3	3	3	3	4	4	4	5	5	5
32	37	2	2	3	3	3	3	4	4	4	5	5	5	6
33	38	2	3	3	3	3	4	4	4	5	5	5	6	6
34	39	3	3	3	3	4	4	4	5	5	5	6	6	7
35	40	3	3	3	4	4	4	5	5	5	6	6	7	7
36	41	3	3	4	4	4	5	5	5	6	6	7	7	8
37	42	3	3	4	4	4	5	5	6	6	7	7	8	8

38	43	3	4	4	4	5	5	6	6	7	7	8	8	9
39	44	4	4	4	5	5	6	6	7	7	8	8	9	9
40	45	4	4	5	5	6	6	7	7	8	8	9	9	10
41	46	4	5	5	6	6	7	7	8	8	9	9	10	11
42	47	5	5	5	6	6	7	8	8	9	9	10	11	12
43	48		5	6	6	7	8	8	9	9	10	11	12	12
44	49	5	6	6	7	7	8	9	9	10	11	12	12	13
45	50	6	6	7	7	8	9	9	10	11	12	12	13	14
46	51	6	7	7	8	9	9	10	11	12	12	13	14	15
47	52	7	7	8	9	9	10	11	12	12	13	14	15	16
48	53	7	8	8	9	10	11	12	12	13	14	15	16	17
49	54	8	8	9	10	11	11	12	13	14	15	16	17	18
50	55	8	9	10	11	11	12	13	14	15	16	17	18	20
51	56	9	10	10	11	12	13	14	15	16	17	18	20	21
52	57	9	10	11	12	13	14	15	16	17	18	20	21	22
53	58	10	11	12	13	14	15	16	17	19	20	21	22	24
54	59	11	12	13	14	15	16	17	18	20	21	22	24	25
55	60	11	13	14	15	16	17	18	20	21	22	24	25	26
56	61	12	13	15	16	17	18	20	21	22	24	25	27	28
57	62	13	14	16	17	18	20	21	22	24	25	27	28	30
58	63	14	15	17	18	19	21	22	24	25	27	28	30	31
59	64	15	16	18	19	21	22	24	25	27	28	30	31	33
60	65	16	18	19	20	22	24	25	27	28	30	32	33	35
61	66	17	19	20	22	23	25	27	28	30	32	33	35	37
62	67	18	20	22	23	25	27	28	30	32	33	35	37	38
63	68	20	21	23	25	26	28	30	32	33	35	37	39	40
64	69	21	23	24	26	28	30	32	33	35	37	39	41	42
65	70	22	24	26	28	30	32	33	35	37	39	41	42	44
66	71	24	26	28	29	31	33	35	37	39	41	43	44	46
67	72	25	27	29	31	33	35	37	39	41	43	45	46	48
68	73	27	29	31	33	35	37	39	41	43	45	47	48	50
69	74	28	30	33	35	37	39	41	43	45	47	48	50	52
70	75	30	32	34	37	39	41	43	45	47	49	50	52	54
71	76	32	34	36	39	41	43	45	47	49	51	52	54	56
72	77	34	36	38	41	43	45	47	49	51	53	54	56	58
73	78	35	38	40	43	45	47	49	51	53	55	56	58	59
74	79	37	40	42	45	47	49	51	53	55	57	58	60	61
75	80	39	42	44	47	49	51	53	55	57	58	60	62	63
76	81	41	44	46	49	51	53	55	57	59	60	62	63	65
77	82	43	46	48	51	53	55	57	59	61	62	64	65	66
78	83	45	48	50	53	55	57	59	61	62	64	65	67	68
79	84	48	50	53	55	57	59	61	63	64	66	67	68	70
80	85	50	52	55	57	59	61	63	64	66	67	69	70	71

Ages		Duration of guaranteed amount—[Years]												
Male	Female	14	15	16	17	18	19	20	21	22	23	24	25	26
81	86	52	54	57	59	61	63	65	66	68	69	70	72	73
82	87	54	56	59	61	63	65	66	68	69	71	72	73	74
83	88	56	58	61	63	65	66	68	70	71	72	73	74	75
84	89	58	60	63	65	67	68	70	71	73	74	75	76	77
85	90	60	62	65	67	68	70	71	73	74	75	76	77	....

Ages		Duration of guaranteed amount—[Years]								
Male	Female	27	28	29	30	31	32	33	34	35
6	11	2	2	2	2	2	2	2	2	2
7	12	2	2	2	2	2	2	2	2	3
8	13	2	2	2	2	2	2	2	2	3
9	14	2	2	2	2	2	2	2	3	3
10	15	2	2	2	2	2	2	3	3	3
11	16	2	2	2	2	2	2	3	3	3
12	17	2	2	2	2	2	3	3	3	3
13	18	2	2	2	2	2	3	3	3	3
14	19	2	2	2	2	3	3	3	3	3
15	20	2	2	2	3	3	3	3	3	3
16	21	2	2	3	3	3	3	3	3	4
17	22	2	2	3	3	3	3	3	4	4
18	23	2	3	3	3	3	3	4	4	4
19	24	3	3	3	3	3	4	4	4	4
20	25	3	3	3	3	4	4	4	4	5
21	26	3	3	3	4	4	4	4	5	5
22	27	3	3	4	4	4	4	5	5	5
23	28	3	3	4	4	4	5	5	5	5
24	29	3	4	4	4	5	5	5	5	6
25	30	4	4	4	5	5	5	6	6	6
26	31	4	4	5	5	5	6	6	6	7
27	32	4	5	5	5	6	6	6	7	7
28	33	5	5	5	6	6	6	7	7	8
29	34	5	5	6	6	6	7	7	8	8
30	35	5	6	6	6	7	7	8	8	9
31	36	6	6	6	7	7	8	8	9	9
32	37	6	7	7	7	8	8	9	10	10
33	38	7	7	7	8	8	9	10	10	11
34	39	7	8	8	9	9	10	10	11	12
35	40	8	8	9	9	10	10	11	12	12

36	41	8	9	9	10	10	11	12	13	13
37	42	9	9	10	11	11	12	13	13	14
38	43	9	10	11	11	12	13	13	14	15
39	44	10	11	11	12	13	14	14	15	16
40	45	11	11	12	13	14	15	15	16	17
41	46	11	12	13	14	15	16	16	17	18
42	47	12	13	14	15	16	17	18	18	19
43	48	13	14	15	16	17	18	19	20	21
44	49	14	15	16	17	18	19	20	21	22
45	50	15	16	17	18	19	20	21	22	23
46	51	16	17	18	19	20	21	22	24	25
47	52	17	18	19	20	21	23	24	25	26
48	53	18	19	20	22	23	24	25	26	28
49	54	19	21	22	23	24	25	27	28	29
50	55	21	22	23	24	26	27	28	29	31
51	56	22	23	25	26	27	28	30	31	32
52	57	23	25	26	27	29	30	31	33	34
53	58	25	26	28	29	30	32	33	34	36
54	59	26	28	29	31	32	33	35	36	38
55	60	28	29	31	32	34	35	36	38	39
56	61	29	31	32	34	35	37	38	40	41
57	62	31	33	34	36	37	39	40	41	43
58	63	33	34	36	37	39	40	42	43	45
59	64	35	36	38	39	41	42	44	45	47
60	65	36	38	40	41	43	44	46	47	48
61	66	38	40	41	43	44	46	47	49	50
62	67	40	42	43	45	46	48	49	51	52
63	68	42	44	45	47	48	50	51	52	54
64	69	44	46	47	49	50	52	53	54	55
65	70	46	47	49	50	52	53	55	56	57
66	71	48	49	51	52	54	55	56	58	59
67	72	50	51	53	54	56	57	58	59	61
68	73	52	53	55	56	57	59	60	61	62
69	74	53	55	56	58	59	60	62	63	64
70	75	55	57	58	60	61	62	62	64	65
71	76	57	59	60	61	63	64	65	66	67
72	77	59	60	62	63	64	65	66	67	68
73	78	61	62	64	65	66	67	68	69	70
74	79	63	64	65	66	67	68	69	70	71
75	80	64	66	67	68	69	70	71	72	72
76	81	66	67	68	69	70	71	72	73	

Ages		Duration of guaranteed amount—[Years]								
Male	Female	27	28	29	30	31	32	33	34	35
77	82	68	69	70	71	72	73	74		
78	83	69	70	71	72	73	74			
79	84	71	72	73	74	75				
80	85	72	73	74	75					
81	86	74	75	75						
82	87	75	76							
83	88	76								
84	89.									
85	90	....	....	....	....	....	....	....	....	....

Ages		Duration of guaranteed amount—[Years]													
Male	Female	1	2	3	4	5	6	7	8	9	10	11	12	13	14
86	91	6	12	18	24	29	34	38	43	47	50	54	57	59	62
87	92	7	13	19	25	31	36	40	45	49	52	56	59	61	64
88	93	7	14	21	27	32	38	42	47	51	55	58	61	63	66
89	94	8	15	22	28	34	40	45	49	53	57	60	63	65	68
90	95	8	16	23	30	36	42	47	51	55	59	62	65	67	70
91	96	9	17	25	32	38	44	49	53	57	61	64	67	69	71
92	97	9	18	26	34	40	46	51	55	59	63	66	69	71	73
93	98	10	20	28	36	42	48	53	58	62	65	68	70	73	75
94	99	11	21	30	37	44	50	55	60	64	67	70	72	74	76
95	100	12	22	31	39	46	52	58	62	66	69	72	74	76	78
96	101	12	24	33	42	49	55	60	64	68	71	73	76	78	79
97	102	13	25	35	44	51	57	62	66	70	73	75	77	79	
98	103	14	27	37	46	54	60	65	69	72	75	77	79		
99	104	15	29	40	49	56	62	67	71	74	77	79			
100	105	17	31	43	52	59	65	70	74	76	79				
101	106	18	33	46	55	63	68	73	76	79					
102	107	20	36	49	59	66	71	75	78						
103	108	22	40	53	62	69	74	78							
104	109	24	43	57	66	73	77								
105	110	27	48	61	70	76									
106	111		53	66	74										
107	112	35	53	71											
108	113	40	64	....	....	....	....	....	....	....	....	....	....	....	....

Ages		Duration of guaranteed amount—[Years]										
Male	Female	15	16	17	18	19	20	21	22	23	24	25
86	91	64	66	68	70	72	73	74	75	76	77	
87	92	66	68	70	72	73	74	76	77	78		
88	93	68	70	72	73	75	76	77	78			
89	94	70	72	73	75	76	77	78				
90	95	72	73	75	76	77	79					
91	96	73	75	76	78	79						
92	97	75	76	78	79							
93	98	76	78	79								
94	99	78	79									
95	100	79	....	....	....	....	....	....	....	....	....	....

TABLE IV—TEMPORARY LIFE ANNUITIES [1]—ONE LIFE—EXPECTED RETURN MULTIPLES

[See footnote at end of table]

Ages		Temporary period—maximum duration of annuity—[Years]									
Male	Female	1	2	3	4	5	6	7	8	9	10
0 to 8	0 to 13	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	8.9	9.9
9	14	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	8.9	9.9
10	15	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	8.9	9.9
11	16	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	8.9	9.9
12	17	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	8.9	9.9
13	18	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	8.9	9.9
14	19	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	8.9	9.9
15	20	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	8.9	9.9
16	21	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	8.9	9.9
17	22	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	8.9	9.9
18	23	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	8.9	9.9
19	24	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	8.9	9.9
20	25	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	8.9	9.9
21	26	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	8.9	9.9
22	27	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	8.9	9.9
23	28	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	8.9	9.9
24	29	1.0	2.0	3.0	4.0	5.0	6.0	7.0	7.9	8.9	9.9
25	30	1.0	2.0	3.0	4.0	5.0	6.0	7.0	7.9	8.9	9.9
26	31	1.0	2.0	3.0	4.0	5.0	6.0	7.0	7.9	8.9	9.9
27	32	1.0	2.0	3.0	4.0	5.0	6.0	7.0	7.9	8.9	9.9
28	33	1.0	2.0	3.0	4.0	5.0	6.0	7.0	7.9	8.9	9.9
29	34	1.0	2.0	3.0	4.0	5.0	6.0	6.9	7.9	8.9	9.9
30	35	1.0	2.0	3.0	4.0	5.0	6.0	6.9	7.9	8.9	9.9

TABLE IV—TEMPORARY LIFE ANNUITIES [1]—ONE LIFE—EXPECTED RETURN MULTIPLES—Continued

[See footnote at end of table]

Ages		Temporary period—maximum duration of annuity—[Years]									
Male	Female	1	2	3	4	5	6	7	8	9	10
31	36	1.0	2.0	3.0	4.0	5.0	6.0	6.9	7.9	8.9	9.9
32	37	1.0	2.0	3.0	4.0	5.0	6.0	6.9	7.9	8.9	9.9
33	38	1.0	2.0	3.0	4.0	5.0	6.0	6.9	7.9	8.9	9.9
34	39	1.0	2.0	3.0	4.0	5.0	5.9	6.9	7.9	8.9	9.8
35	40	1.0	2.0	3.0	4.0	5.0	5.9	6.9	7.9	8.9	9.8
36	41	1.0	2.0	3.0	4.0	5.0	5.9	6.9	7.9	8.9	9.8
37	42	1.0	2.0	3.0	4.0	5.0	5.9	6.9	7.9	8.8	9.8
38	43	1.0	2.0	3.0	4.0	5.0	5.9	6.9	7.9	8.8	9.8
39	44	1.0	2.0	3.0	4.0	4.9	5.9	6.9	7.9	8.8	9.8
40	45	1.0	2.0	3.0	4.0	4.9	5.9	6.9	7.8	8.8	9.7
41	46	1.0	2.0	3.0	4.0	4.9	5.9	6.9	7.8	8.8	9.7
42	47	1.0	2.0	3.0	4.0	4.9	5.9	6.9	7.8	8.8	9.7
43	48	1.0	2.0	3.0	4.0	4.9	5.9	6.9	7.8	8.8	9.7
44	49	1.0	2.0	3.0	4.0	4.9	5.9	6.8	7.8	8.7	9.7
45	50	1.0	2.0	3.0	3.9	4.9	5.9	6.8	7.8	8.7	9.6
46	51	1.0	2.0	3.0	3.9	4.9	5.9	6.8	7.8	8.7	9.6
47	52	1.0	2.0	3.0	3.9	4.9	5.9	6.8	7.7	8.7	9.6
48	53	1.0	2.0	3.0	3.9	4.9	5.9	6.8	7.7	8.6	9.5
49	54	1.0	2.0	3.0	3.9	4.9	5.8	6.8	7.7	8.6	9.5
50	55	1.0	2.0	3.0	3.9	4.9	5.8	6.8	7.7	8.6	9.5
51	56	1.0	2.0	3.0	3.9	4.9	5.8	6.7	7.7	8.6	9.4
52	57	1.0	2.0	3.0	3.9	4.9	5.8	6.7	7.6	8.5	9.4
53	58	1.0	2.0	2.9	3.9	4.9	5.8	6.7	7.6	8.5	9.3
54	59	1.0	2.0	2.9	3.9	4.8	5.8	6.7	7.6	8.4	9.3
55	60	1.0	2.0	2.9	3.9	4.8	5.8	6.7	7.5	8.4	9.2
56	61	1.0	2.0	2.9	3.9	4.8	5.7	6.6	7.5	8.4	9.2
57	62	1.0	2.0	2.9	3.9	4.8	5.7	6.6	7.5	8.3	9.1
58	63	1.0	2.0	2.9	3.9	4.8	5.7	6.6	7.4	8.3	9.1
59	64	1.0	2.0	2.9	3.9	4.8	5.7	6.5	7.4	8.2	9.0
60	65	1.0	2.0	2.9	3.8	4.8	5.6	6.5	7.3	8.1	8.9
61	66	1.0	2.0	2.9	3.8	4.7	5.6	6.5	7.3	8.1	8.8
62	67	1.0	2.0	2.9	3.8	4.7	5.6	6.4	7.2	8.0	8.8
63	68	1.0	2.0	2.9	3.8	4.7	5.6	6.4	7.2	7.9	8.7
64	69	1.0	1.9	2.9	3.8	4.7	5.5	6.3	7.1	7.9	8.6
65	70	1.0	1.9	2.9	3.8	4.6	5.5	6.3	7.1	7.8	8.5

Male	Female	11	12	13	14	15	16	17	18	19	20
66	71	1.0	1.9	2.9	3.8	4.6	5.4	6.2	7.0	7.7	8.4
67	72	1.0	1.9	2.9	3.7	4.6	5.4	6.2	6.9	7.6	8.3
68	73	1.0	1.9	2.8	3.7	4.6	5.4	6.1	6.8	7.5	8.2
69	74	1.0	1.9	2.8	3.7	4.5	5.3	6.1	6.8	7.4	8.0
70	75	1.0	1.9	2.8	3.7	4.5	5.3	6.0	6.7	7.3	7.9
71	76	1.0	1.9	2.8	3.7	4.5	5.2	5.9	6.6	7.2	7.8
72	77	1.0	1.9	2.8	3.6	4.4	5.2	5.8	6.5	7.1	7.6
73	78	1.0	1.9	2.8	3.6	4.4	5.1	5.8	6.4	7.0	7.5
74	79	1.0	1.9	2.8	3.6	4.3	5.0	5.7	6.3	6.8	7.3
75	80	1.0	1.9	2.7	3.5	4.3	5.0	5.6	6.2	6.7	7.1
76	81	1.0	1.9	2.7	3.5	4.2	4.9	5.5	6.1	6.5	7.0
77	82	1.0	1.9	2.7	3.5	4.2	4.8	5.4	5.9	6.4	6.8
78	83	1.0	1.9	2.7	3.4	4.1	4.7	5.3	5.8	6.2	6.6
79	84	1.0	1.8	2.7	3.4	4.1	4.7	5.2	5.7	6.1	6.4
80	85	1.0	1.8	2.6	3.4	4.0	4.6	5.1	5.5	5.9	6.2
81	86	1.0	1.8	2.6	3.3	3.9	4.5	5.0	5.4	5.7	6.0
82	87	1.0	1.8	2.6	3.3	3.9	4.4	4.8	5.2	5.6	5.8
83	88	.9	1.8	2.6	3.2	3.8	4.3	4.7	5.1	5.4	5.6
84	89	.9	1.8	2.5	3.2	3.7	4.2	4.6	4.9	5.2	5.4
85	90	.9	1.8	2.5	3.1	3.6	4.1	4.5	4.8	5.0	5.2
86	91	.9	1.8	2.5	3.1	3.6	4.0	4.3	4.6	4.8	5.0

Ages		Temporary period—maximum duration of annuity—[Years]									
Male	Female	11	12	13	14	15	16	17	18	19	20
0 to 8	0 to 13	10.9	11.9	12.9	13.9	14.9	15.8	16.8	17.8	18.8	19.7
9	14	10.9	11.9	12.9	13.9	14.9	15.8	16.8	17.8	18.8	19.7
10	15	10.9	11.9	12.9	13.9	14.9	15.8	16.8	17.8	18.8	19.7
11	16	10.9	11.9	12.9	13.9	14.9	15.8	16.8	17.8	18.8	19.7
12	17	10.9	11.9	12.9	13.9	14.9	15.8	16.8	17.8	18.8	19.7
13	18	10.9	11.9	12.9	13.9	14.9	15.8	16.8	17.8	18.8	19.7
14	19	10.9	11.9	12.9	13.9	14.9	15.8	16.8	17.8	18.8	19.7
15	20	10.9	11.9	12.9	13.9	14.9	15.8	16.8	17.8	18.7	19.7
16	21	10.9	11.9	12.9	13.9	14.8	15.8	16.8	17.8	18.7	19.7
17	22	10.9	11.9	12.9	13.9	14.8	15.8	16.8	17.8	18.7	19.7
18	23	10.9	11.9	12.9	13.9	14.8	15.8	16.8	17.8	18.7	19.7
19	24	10.9	11.9	12.9	13.9	14.8	15.8	16.8	17.7	18.7	19.7
20	25	10.9	11.9	12.9	13.9	14.8	15.8	16.8	17.7	18.7	19.7
21	26	10.9	11.9	12.9	13.8	14.8	15.8	16.8	17.7	18.7	19.6
22	27	10.9	11.9	12.9	13.8	14.8	15.8	16.7	17.7	18.7	19.6
23	28	10.9	11.9	12.9	13.8	14.8	15.8	16.7	17.7	18.7	19.6
24	29	10.9	11.9	12.9	13.8	14.8	15.8	16.7	17.7	18.6	19.6
25	30	10.9	11.9	12.8	13.8	14.8	15.7	16.7	17.7	18.6	19.6

Ages		Temporary period—maximum duration of annuity—[Years]									
Male	Female	11	12	13	14	15	16	17	18	19	20
26	31	10.9	11.9	12.8	13.8	14.8	15.7	16.7	17.6	18.6	19.5
27	32	10.9	11.9	12.8	13.8	14.8	15.7	16.7	17.6	18.6	19.5
28	33	10.9	11.8	12.8	13.8	14.7	15.7	16.6	17.6	18.5	19.5
29	34	10.9	11.8	12.8	13.8	14.7	15.7	16.6	17.6	18.5	19.4
30	35	10.9	11.8	12.8	13.7	14.7	15.6	16.6	17.5	18.4	19.4
31	36	10.8	11.8	12.8	13.7	14.7	15.6	16.5	17.5	18.4	19.3
32	37	10.8	11.8	12.7	13.7	14.6	15.6	16.5	17.4	18.4	19.3
33	38	10.8	11.8	12.7	13.7	14.6	15.6	16.5	17.4	18.3	19.2
34	39	10.8	11.8	12.7	13.6	14.6	15.5	16.4	17.4	18.3	19.2
35	40	10.8	11.7	12.7	13.6	14.6	15.5	16.4	17.3	18.2	19.1
36	41	10.8	11.7	12.7	13.6	14.5	15.4	16.3	17.2	18.1	19.0
37	42	10.8	11.7	12.6	13.6	14.5	15.4	16.3	17.2	18.1	18.9
38	43	10.7	11.7	12.6	13.5	14.4	15.3	16.2	17.1	18.0	18.9
39	44	10.7	11.6	12.6	13.5	14.4	15.3	16.2	17.1	17.9	18.8
40	45	10.7	11.6	12.5	13.5	14.4	15.2	16.1	17.0	17.8	18.7
41	46	10.7	11.6	12.5	13.4	14.3	15.2	16.1	16.9	17.8	18.6
42	47	10.6	11.6	12.5	13.4	14.3	15.1	16.0	16.8	17.7	18.5
43	48	10.6	11.5	12.4	13.3	14.2	15.1	15.9	16.7	17.6	18.4
44	49	10.6	11.5	12.4	13.3	14.1	15.0	15.8	16.7	17.5	18.3
45	50	10.5	11.4	12.3	13.2	14.1	14.9	15.7	16.6	17.4	18.1
46	51	10.5	11.4	12.3	13.2	14.0	14.8	15.7	16.5	17.2	18.0
47	52	10.5	11.4	12.2	13.1	13.9	14.7	15.6	16.3	17.1	17.8
48	53	10.4	11.3	12.2	13.0	13.8	14.7	15.4	16.2	17.0	17.7
49	54	10.4	11.3	12.1	12.9	13.8	14.6	15.3	16.1	16.8	17.5
50	55	10.3	11.2	12.0	12.9	13.7	14.5	15.2	16.0	16.7	17.4
51	56	10.3	11.1	12.0	12.8	13.6	14.3	15.1	15.8	16.5	17.2
52	57	10.2	11.1	11.9	12.7	13.5	14.2	14.9	15.6	16.3	17.0
53	58	10.2	11.0	11.8	12.6	13.4	14.1	14.8	15.5	16.1	16.8
54	59	10.1	10.9	11.7	12.5	13.2	14.0	14.6	15.3	15.9	16.5
55	60	10.1	10.9	11.6	12.4	13.1	13.8	14.5	15.1	15.7	16.3
56	61	10.0	10.8	11.5	12.3	13.0	13.7	14.3	14.9	15.5	16.1
57	62	9.9	10.7	11.4	12.2	12.8	13.5	14.1	14.7	15.3	15.8
58	63	9.8	10.6	11.3	12.0	12.7	13.3	13.9	14.5	15.0	15.5
59	64	9.8	10.5	11.2	11.9	12.5	13.2	13.7	14.3	14.8	15.3
60	65	9.7	10.4	11.1	11.7	12.4	13.0	13.5	14.0	14.5	15.0
61	66	9.6	10.3	11.0	11.6	12.2	12.8	13.3	13.8	14.2	14.7
62	67	9.5	10.2	10.8	11.4	12.0	12.5	13.1	13.5	14.0	14.3
63	68	9.4	10.0	10.7	11.3	11.8	12.3	12.8	13.2	13.7	14.0

64	69	9.3	9.9	10.5	11.1	11.6	12.1	12.5	13.0	13.3	13.7
65	70	9.1	9.8	10.3	10.9	11.4	11.9	12.3	12.7	13.0	13.3
66	71	9.0	9.6	10.2	10.7	11.2	11.6	12.0	12.4	12.7	13.0
67	72	8.9	9.5	10.0	10.5	10.9	11.3	11.7	12.0	12.3	12.6
68	73	8.7	9.3	9.8	10.3	10.7	11.1	11.4	11.7	12.0	12.2
69	74	8.6	9.1	9.6	10.0	10.4	10.8	11.1	11.4	11.6	11.8
70	75	8.4	8.9	9.4	9.8	10.2	10.5	10.8	11.0	11.2	11.4
71	76	8.3	8.7	9.2	9.6	9.9	10.2	10.4	10.7	10.9	11.0
72	77	8.1	8.6	8.9	9.3	9.6	9.9	10.1	10.3	10.5	10.6
73	78	7.9	8.3	8.7	9.0	9.3	9.6	9.8	9.9	10.1	10.2
74	79	7.7	8.1	8.5	8.8	9.0	9.2	9.4	9.6	9.7	9.8
75	80	7.6	7.9	8.2	8.5	8.7	8.9	9.1	9.2	9.3	9.4
76	81	7.4	7.7	8.0	8.2	8.4	8.6	8.7	8.8	8.9	9.0
77	82	7.1	7.5	7.7	7.9	8.1	8.3	8.4	8.5	8.5	8.6
78	83	6.9	7.2	7.4	7.6	7.8	7.9	8.0	8.1	8.2	8.2
79	84	6.7	7.0	7.2	7.3	7.5	7.6	7.7	7.7	7.8	7.8
80	85	6.5	6.7	6.9	7.1	7.2	7.3	7.3	7.4	7.4	7.4
81	86	6.3	6.5	6.6	6.8	6.9	6.9	7.0	7.0	7.1	
82	87	6.0	6.2	6.4	6.5	6.5	6.6	6.7	6.7		
83	88	5.8	6.0	6.1	6.2	6.2	6.3	6.3			
84	89	5.6	5.7	5.8	5.9	5.9	6.0				
85	90	5.3	5.5	5.5	5.6	5.6					
86	91	5.1	5.2	5.3	5.3	....	....	....	....	....	....

Ages		Temporary period—maximum duration of annuity—[Years]									
Male	Female	21	22	23	24	25	26	27	28	29	30
0 to 8	0 to 13	20.7	21.7	22.7	23.6	24.6	25.6	26.5	27.5	28.4	29.4
9	14	20.7	21.7	22.7	23.6	24.6	25.5	26.5	27.5	28.4	29.4
10	15	20.7	21.7	22.7	23.6	24.6	25.5	26.5	27.5	28.4	29.4
11	16	20.7	21.7	22.6	23.6	24.6	25.5	26.5	27.4	28.4	29.3
12	17	20.7	21.7	22.6	23.6	24.6	25.5	26.5	27.4	28.4	29.3
13	18	20.7	21.7	22.6	23.6	24.6	25.5	26.5	27.4	28.4	29.3
14	19	20.7	21.7	22.6	23.6	24.5	25.5	26.4	27.4	28.3	29.3
15	20	20.7	21.6	22.6	23.6	24.5	25.5	26.4	27.4	28.3	29.2
16	21	20.7	21.6	22.6	23.6	24.5	25.5	26.4	27.3	28.3	29.2
17	22	20.7	21.6	22.6	23.5	24.5	25.4	26.4	27.3	28.2	29.2
18	23	20.7	21.6	22.6	23.5	24.5	25.4	26.3	27.3	28.2	29.1
19	24	20.6	21.6	22.5	23.5	24.4	25.4	26.3	27.2	28.1	29.1
20	25	20.6	21.6	22.5	23.5	24.4	25.3	26.3	27.2	28.1	29.0
21	26	20.6	21.5	22.5	23.4	24.4	25.3	26.2	27.1	28.0	28.9
22	27	20.6	21.5	22.5	23.4	24.3	25.3	26.2	27.1	28.0	28.9

Ages		Temporary period—maximum duration of annuity—[Years]									
Male	Female	21	22	23	24	25	26	27	28	29	30
23	28	20.6	21.5	22.4	23.4	24.3	25.2	26.1	27.0	27.9	28.8
24	29	20.5	21.5	22.4	23.3	24.2	25.2	26.1	27.0	27.8	28.7
25	30	20.5	21.4	22.4	23.3	24.2	25.1	26.0	26.9	27.8	28.6
26	31	20.5	21.4	22.3	23.2	24.1	25.0	25.9	26.8	27.7	28.5
27	32	20.4	21.3	22.3	23.2	24.1	25.0	25.8	26.7	27.6	28.4
28	33	20.4	21.3	22.2	23.1	24.0	24.9	25.8	26.6	27.5	28.3
29	34	20.3	21.2	22.1	23.0	23.9	24.8	25.7	26.5	27.4	28.2
30	35	20.3	21.2	22.1	23.0	23.8	24.7	25.6	26.4	27.2	28.1
31	36	20.2	21.1	22.0	22.9	23.8	24.6	25.5	26.3	27.1	27.9
32	37	20.2	21.1	21.9	22.8	23.7	24.5	25.4	26.2	27.0	27.8
33	38	20.1	21.0	21.9	22.7	23.6	24.4	25.2	26.0	26.8	27.6
34	39	20.0	20.9	21.8	22.6	23.5	24.3	25.1	25.9	26.7	27.4
35	40	20.0	20.8	21.7	22.5	23.3	24.2	25.0	25.7	26.5	27.2
36	41	19.9	20.7	21.6	22.4	23.2	24.0	24.8	25.6	26.3	27.0
37	42	19.8	20.6	21.5	22.3	23.1	23.9	24.6	25.4	26.1	26.8
38	43	19.7	20.5	21.4	22.2	23.0	23.7	24.5	25.2	25.9	26.6
39	44	19.6	20.4	21.2	22.0	22.8	23.6	24.3	25.0	25.7	26.4
40	45	19.5	20.3	21.1	21.9	22.6	23.4	24.1	24.8	25.5	26.1
41	46	19.4	20.2	21.0	21.7	22.5	23.2	23.9	24.6	25.2	25.9
42	47	19.3	20.1	20.8	21.6	22.3	23.0	23.7	24.3	25.0	25.6
43	48	19.2	19.9	20.7	21.4	22.1	22.8	23.4	24.1	24.7	25.3
44	49	19.0	19.8	20.5	21.2	21.9	22.6	23.2	23.8	24.4	25.0
45	50	18.9	19.6	20.3	21.0	21.7	22.3	22.9	23.5	24.1	24.6
46	51	18.7	19.4	20.1	20.8	21.5	22.1	22.7	23.2	23.8	24.3
47	52	18.6	19.3	19.9	20.6	21.2	21.8	22.4	22.9	23.4	23.9
48	53	18.4	19.1	19.7	20.4	21.0	21.5	22.1	22.6	23.1	23.5
49	54	18.2	18.9	19.5	20.1	20.7	21.2	21.7	22.2	22.7	23.1
50	55	18.0	18.7	19.3	19.8	20.4	20.9	21.4	21.9	22.3	22.7
51	56	17.8	18.4	19.0	19.6	20.1	20.6	21.1	21.5	21.9	22.3
52	57	17.6	18.2	18.7	19.3	19.8	20.2	20.7	21.1	21.5	21.8
53	58	17.4	17.9	18.5	19.0	19.4	19.9	20.3	20.7	21.0	21.3
54	59	17.1	17.7	18.2	18.7	19.1	19.5	19.9	20.2	20.6	20.8
55	60	16.9	17.4	17.9	18.3	18.7	19.1	19.5	19.8	20.1	20.3
56	61	16.6	17.1	17.5	18.0	18.4	18.7	19.0	19.3	19.6	19.8
57	62	16.3	16.8	17.2	17.6	18.0	18.3	18.6	18.9	19.1	19.3
58	63	16.0	16.5	16.9	17.2	17.6	17.9	18.1	18.4	18.6	18.8
59	64	15.7	16.1	16.5	16.8	17.1	17.4	17.7	17.9	18.1	18.2
60	65	15.4	15.8	16.1	16.4	16.7	17.0	17.2	17.4	17.5	17.7

61	66	15.1	15.4	15.7	16.0	16.3	16.5	16.7	16.9	17.0	17.1
62	67	14.7	15.0	15.3	15.6	15.8	16.0	16.2	16.3	16.4	16.5
63	68	14.4	14.6	14.9	15.1	15.3	15.5	15.7	15.8	15.9	16.0
64	69	14.0	14.3	14.5	14.7	14.9	15.0	15.2	15.3	15.3	15.4
65	70	13.6	13.8	14.1	14.2	14.4	14.5	14.6	14.7	14.8	14.9
66	71	13.2	13.4	13.6	13.8	13.9	14.0	14.1	14.2	14.2	14.3
67	72	12.8	13.0	13.2	13.3	13.4	13.5	13.6	13.7	13.7	13.7
68	73	12.4	12.6	12.7	12.8	12.9	13.0	13.1	13.1	13.2	13.2
69	74	12.0	12.1	12.3	12.4	12.4	12.5	12.6	12.6	12.6	12.6
70	75	11.6	11.7	11.8	11.9	12.0	12.0	12.0	12.1	12.1	12.1
71	76	11.2	11.3	11.3	11.4	11.5	11.5	11.5	11.6	11.6	
72	77	10.7	10.8	10.9	10.9	11.0	11.0	11.0	11.0		
73	78	10.3	10.4	10.4	10.5	10.5	10.5	10.5			
74	79	9.9	9.9	10.0	10.0	10.1	10.1				
75	80	9.5	9.5	9.6	9.6	9.6					
76	81	9.1	9.1	9.1	9.1						
77	82	8.6	8.7	8.7							
78	83	8.2	8.3								
79	84	7.8									

Footnote to Table IV:
[1] The multiples in this table are not applicable to annuities for a term certain; for such cases see paragraph (c) of § 1.72–5.

TABLE V—ORDINARY LIFE ANNUITIES ONE LIFE—EXPECTED RETURN MULTIPLES

Age	Multiple
5	76.6
6	75.6
7	74.7
8	73.7
9	72.7
10	71.7
11	70.7
12	69.7
13	68.8
14	67.8
15	66.8
16	65.8
17	64.8
18	63.9
19	62.9
20	61.9
21	60.9
22	59.9
23	59.0
24	58.0
25	57.0
26	56.0
27	55.1
28	54.1
29	53.1
30	52.2
31	51.2
32	50.2
33	49.3
34	48.3
35	47.3
36	46.4
37	45.4
38	44.4
39	43.5
40	42.5
41	41.5
42	40.6
43	39.6
44	38.7
45	37.7
46	36.8
47	35.9
48	34.9
49	34.0
50	33.1
51	32.2
52	31.3
53	30.4
54	29.5
55	28.6
56	27.7
57	26.8
58	25.9
59	25.0
60	24.2
61	23.3
62	22.5
63	21.6
64	20.8
65	20.0
66	19.2
67	18.4
68	17.6
69	16.8
70	16.0
71	15.3
72	14.6
73	13.9
74	13.2
75	12.5
76	11.9
77	11.2
78	10.6
79	10.0
80	9.5
81	8.9
82	8.4
83	7.9
84	7.4
85	6.9
86	6.5
87	6.1
88	5.7
89	5.3
90	5.0
91	4.7
92	4.4
93	4.1
94	3.9
95	3.7
96	3.4
97	3.2
98	3.0
99	2.8
100	2.7
101	2.5
102	2.3
103	2.1
104	1.9
105	1.8
106	1.6
107	1.4
108	1.3
109	1.1
110	1.0
111	.9
112	.8
113	.7
114	.6
115	.5

TABLE VI—ORDINARY JOINT LIFE AND LAST SURVIVOR ANNUITIES; TWO LIVES—EXPECTED RETURN MULTIPLES

Ages	5	6	7	8	9	10	11	12	13	14
5	83.8	83.3	82.8	82.4	82.0	81.6	81.2	80.9	80.6	80.3
6	83.3	82.8	82.3	81.8	81.4	81.0	80.6	80.3	79.9	79.6
7	82.8	82.3	81.8	81.3	80.9	80.4	80.0	79.6	79.3	78.9
8	82.4	81.8	81.3	80.8	80.3	79.9	79.4	79.0	78.6	78.3
9	82.0	81.4	80.9	80.3	79.8	79.3	78.9	78.4	78.0	77.6
10	81.6	81.0	80.4	79.9	79.3	78.8	78.3	77.9	77.4	77.0
11	81.2	80.6	80.0	79.4	78.9	78.3	77.8	77.3	76.9	76.4
12	80.9	80.3	79.6	79.0	78.4	77.9	77.3	76.8	76.3	75.9

TABLE VI—ORDINARY JOINT LIFE AND LAST SURVIVOR ANNUITIES; TWO LIVES—EXPECTED RETURN MULTIPLES—Continued

Ages	5	6	7	8	9	10	11	12	13	14
13	80.6	79.9	79.3	78.6	78.0	77.4	76.9	76.3	75.8	75.3
14	80.3	79.6	78.9	78.3	77.6	77.0	76.4	75.9	75.3	74.8
15	80.0	79.3	78.6	77.9	77.3	76.6	76.0	75.4	74.9	74.3
16	79.8	79.0	78.3	77.6	76.9	76.3	75.6	75.0	74.4	73.9
17	79.5	78.8	78.0	77.3	76.6	75.9	75.3	74.6	74.0	73.4
18	79.3	78.5	77.8	77.0	76.3	75.6	74.9	74.3	73.6	73.0
19	79.1	78.3	77.5	76.8	76.0	75.3	74.6	73.9	73.3	72.6
20	78.9	78.1	77.3	76.5	75.8	75.0	74.3	73.6	72.9	72.3
21	78.7	77.9	77.1	76.3	75.5	74.8	74.0	73.3	72.6	71.9
22	78.6	77.7	76.9	76.1	75.3	74.5	73.8	73.0	72.3	71.6
23	78.4	77.6	76.7	75.9	75.1	74.3	73.5	72.8	72.0	71.3
24	78.3	77.4	76.6	75.7	74.9	74.1	73.3	72.6	71.8	71.1
25	78.2	77.3	76.4	75.6	74.8	73.9	73.1	72.3	71.6	70.8
26	78.0	77.2	76.3	75.4	74.6	73.8	72.9	72.1	71.3	70.6
27	77.9	77.1	76.2	75.3	74.4	73.6	72.8	71.9	71.1	70.3
28	77.8	76.9	76.1	75.2	74.3	73.4	72.6	71.8	70.9	70.1
29	77.7	76.8	76.0	75.1	74.2	73.3	72.5	71.6	70.8	70.0
30	77.7	76.8	75.9	75.0	74.1	73.2	72.3	71.5	70.6	69.8
31	77.6	76.7	75.8	74.9	74.0	73.1	72.2	71.3	70.5	69.6
32	77.5	76.6	75.7	74.8	73.9	73.0	72.1	71.2	70.3	69.5
33	77.5	76.5	75.6	74.7	73.8	72.9	72.0	71.1	70.2	69.3
34	77.4	76.5	75.5	74.6	73.7	72.8	71.9	71.0	70.1	69.2
35	77.3	76.4	75.5	74.5	73.6	72.7	71.8	70.9	70.0	69.1
36	77.3	76.3	75.4	74.5	73.5	72.6	71.7	70.8	69.9	69.0
37	77.2	76.3	75.4	74.4	73.5	72.6	71.6	70.7	69.8	68.9
38	77.2	76.2	75.3	74.4	73.4	72.5	71.6	70.6	69.7	68.8
39	77.2	76.2	75.3	74.3	73.4	72.4	71.5	70.6	69.6	68.7
40	77.1	76.2	75.2	74.3	73.3	72.4	71.4	70.5	69.6	68.6
41	77.1	76.1	75.2	74.2	73.3	72.3	71.4	70.4	69.5	68.6
42	77.0	76.1	75.1	74.2	73.2	72.3	71.3	70.4	69.4	68.5
43	77.0	76.1	75.1	74.1	73.2	72.2	71.3	70.3	69.4	68.5
44	77.0	76.0	75.1	74.1	73.1	72.2	71.2	70.3	69.3	68.4
45	77.0	76.0	75.0	74.1	73.1	72.2	71.2	70.2	69.3	68.4
46	76.9	76.0	75.0	74.0	73.1	72.1	71.2	70.2	69.3	68.3
47	76.9	75.9	75.0	74.0	73.1	72.1	71.1	70.2	69.2	68.3
48	76.9	75.9	75.0	74.0	73.0	72.1	71.1	70.1	69.2	68.2
49	76.9	75.9	74.9	74.0	73.0	72.0	71.1	70.1	69.1	68.2
50	76.9	75.9	74.9	73.9	73.0	72.0	71.0	70.1	69.1	68.2
51	76.8	75.9	74.9	73.9	73.0	72.0	71.0	70.1	69.1	68.1
52	76.8	75.9	74.9	73.9	72.9	72.0	71.0	70.0	69.1	68.1
53	76.8	75.8	74.9	73.9	72.9	71.9	71.0	70.0	69.0	68.1
54	76.8	75.8	74.8	73.9	72.9	71.9	71.0	70.0	69.0	68.1
55	76.8	75.8	74.8	73.9	72.9	71.9	70.9	70.0	69.0	68.0
56	76.8	75.8	74.8	73.8	72.9	71.9	70.9	69.9	69.0	68.0
57	76.8	75.8	74.8	73.8	72.9	71.9	70.9	69.9	69.0	68.0
58	76.8	75.8	74.8	73.8	72.8	71.9	70.9	69.9	68.9	68.0
59	76.7	75.8	74.8	73.8	72.8	71.9	70.9	69.9	68.9	68.0
60	76.7	75.8	74.8	73.8	72.8	71.8	70.9	69.9	68.9	67.9
61	76.7	75.7	74.8	73.8	72.8	71.8	70.9	69.9	68.9	67.9
62	76.7	75.7	74.8	73.8	72.8	71.8	70.8	69.9	68.9	67.9
63	76.7	75.7	74.8	73.8	72.8	71.8	70.8	69.9	68.9	67.9
64	76.7	75.7	74.7	73.8	72.8	71.8	70.8	69.8	68.9	67.9
65	76.7	75.7	74.7	73.8	72.8	71.8	70.8	69.8	68.9	67.9
66	76.7	75.7	74.7	73.7	72.8	71.8	70.8	69.8	68.9	67.9
67	76.7	75.7	74.7	73.7	72.8	71.8	70.8	69.8	68.8	67.9
68	76.7	75.7	74.7	73.7	72.8	71.8	70.8	69.8	68.8	67.9
69	76.7	75.7	74.7	73.7	72.7	71.8	70.8	69.8	68.8	67.8
70	76.7	75.7	74.7	73.7	72.7	71.8	70.8	69.8	68.8	67.8
71	76.7	75.7	74.7	73.7	72.7	71.8	70.8	69.8	68.8	67.8
72	76.7	75.7	74.7	73.7	72.7	71.8	70.8	69.8	68.8	67.8
73	76.7	75.7	74.7	73.7	72.7	71.7	70.8	69.8	68.8	67.8
74	76.7	75.7	74.7	73.7	72.7	71.7	70.8	69.8	68.8	67.8
75	76.7	75.7	74.7	73.7	72.7	71.7	70.8	69.8	68.8	67.8
76	76.6	75.7	74.7	73.7	72.7	71.7	70.8	69.8	68.8	67.8
77	76.6	75.7	74.7	73.7	72.7	71.7	70.8	69.8	68.8	67.8
78	76.6	75.7	74.7	73.7	72.7	71.7	70.7	69.8	68.8	67.8
79	76.6	75.7	74.7	73.7	72.7	71.7	70.7	69.8	68.8	67.8
80	76.6	75.7	74.7	73.7	72.7	71.7	70.7	69.8	68.8	67.8
81	76.6	75.7	74.7	73.7	72.7	71.7	70.7	69.8	68.8	67.8
82	76.6	75.7	74.7	73.7	72.7	71.7	70.7	69.8	68.8	67.8
83	76.6	75.7	74.7	73.7	72.7	71.7	70.7	69.8	68.8	67.8

TABLE VI—ORDINARY JOINT LIFE AND LAST SURVIVOR ANNUITIES; TWO LIVES—EXPECTED RETURN MULTIPLES—Continued

Ages	5	6	7	8	9	10	11	12	13	14
84	76.6	75.7	74.7	73.7	72.7	71.7	70.7	69.8	68.8	67.8
85	76.6	75.7	74.7	73.7	72.7	71.7	70.7	69.8	68.8	67.8
86	76.6	75.7	74.7	73.7	72.7	71.7	70.7	69.8	68.8	67.8
87	76.6	75.7	74.7	73.7	72.7	71.7	70.7	69.8	68.8	67.8
88	76.6	75.7	74.7	73.7	72.7	71.7	70.7	69.8	68.8	67.8
89	76.6	75.7	74.7	73.7	72.7	71.7	70.7	69.7	68.8	67.8
90	76.6	75.6	74.7	73.7	72.7	71.7	70.7	69.7	68.8	67.8
91	76.6	75.6	74.7	73.7	72.7	71.7	70.7	69.7	68.8	67.8
92	76.6	75.6	74.7	73.7	72.7	71.7	70.7	69.7	68.8	67.8
93	76.6	75.6	74.7	73.7	72.7	71.7	70.7	69.7	68.8	67.8
94	76.6	75.6	74.7	73.7	72.7	71.7	70.7	69.7	68.8	67.8
95	76.6	75.6	74.7	73.7	72.7	71.7	70.7	69.7	68.8	67.8
96	76.6	75.6	74.7	73.7	72.7	71.7	70.7	69.7	68.8	67.8
97	76.6	75.6	74.7	73.7	72.7	71.7	70.7	69.7	68.8	67.8
98	76.6	75.6	74.7	73.7	72.7	71.7	70.7	69.7	68.8	67.8
99	76.6	75.6	74.7	73.7	72.7	71.7	70.7	69.7	68.8	67.8
100	76.6	75.6	74.7	73.7	72.7	71.7	70.7	69.7	68.8	67.8
101	76.6	75.6	74.7	73.7	72.7	71.7	70.7	69.7	68.8	67.8
102	76.6	75.6	74.7	73.7	72.7	71.7	70.7	69.7	68.8	67.8
103	76.6	75.6	74.7	73.7	72.7	71.7	70.7	69.7	68.8	67.8
104	76.6	75.6	74.7	73.7	72.7	71.7	70.7	69.7	68.8	67.8
105	76.6	75.6	74.7	73.7	72.7	71.7	70.7	69.7	68.8	67.8
106	76.6	75.6	74.7	73.7	72.7	71.7	70.7	69.7	68.8	67.8
107	76.6	75.6	74.7	73.7	72.7	71.7	70.7	69.7	68.8	67.8
108	76.6	75.6	74.7	73.7	72.7	71.7	70.7	69.7	68.8	67.8
109	76.6	75.6	74.7	73.7	72.7	71.7	70.7	69.7	68.8	67.8
110	76.6	75.6	74.7	73.7	72.7	71.7	70.7	69.7	68.8	67.8
111	76.6	75.6	74.7	73.7	72.7	71.7	70.7	69.7	68.8	67.8
112	76.6	75.6	74.7	73.7	72.7	71.7	70.7	69.7	68.8	67.8
113	76.6	75.6	74.7	73.7	72.7	71.7	70.7	69.7	68.8	67.8
114	76.6	75.6	74.7	73.7	72.7	71.7	70.7	69.7	68.8	67.8
115	76.6	75.6	74.7	73.7	72.7	71.7	70.7	69.7	68.8	67.8

TABLE VI—ORDINARY JOINT LIFE AND LAST SURVIVOR ANNUITIES; TWO LIVES—EXPECTED RETURN MULTIPLES

Ages	15	16	17	18	19	20	21	22	23	24
15	73.8	73.3	72.9	72.4	72.0	71.6	71.3	70.9	70.6	70.3
16	73.3	72.8	72.3	71.9	71.4	71.0	70.7	70.3	70.0	69.6
17	72.9	72.3	71.8	71.3	70.9	70.5	70.0	69.7	69.3	69.0
18	72.4	71.9	71.3	70.8	70.4	69.0	69.5	69.9	68.7	68.3
19	72.0	71.4	70.9	70.4	69.8	69.4	68.9	68.5	68.1	67.7
20	71.6	71.0	70.5	69.9	69.4	68.8	68.4	67.9	67.5	67.1
21	71.3	70.7	70.0	69.5	68.9	68.4	67.9	67.4	66.9	66.5
22	70.9	70.3	69.7	69.0	68.5	67.9	67.4	66.9	66.4	65.9
23	70.6	70.0	69.3	68.7	68.1	67.5	66.9	66.4	65.9	65.4
24	70.3	69.6	69.0	68.3	67.7	67.1	66.5	65.9	65.4	64.9
25	70.1	69.3	68.6	68.0	67.3	66.7	66.1	65.5	64.9	64.4
26	69.8	69.1	68.3	67.6	67.0	66.3	65.7	65.1	64.5	63.9
27	69.6	68.8	68.1	67.3	66.7	66.0	65.3	64.7	64.1	63.5
28	69.3	68.6	67.8	67.1	66.4	65.7	65.0	64.3	63.7	63.1
29	69.1	68.4	67.6	66.8	66.1	65.4	64.7	64.0	63.3	62.7
30	69.0	68.2	67.4	66.6	65.8	65.1	64.4	63.7	63.0	62.3
31	68.8	68.0	67.2	66.4	65.6	64.8	64.1	63.4	62.7	62.0
32	68.6	67.8	67.0	66.2	65.4	64.6	63.8	63.1	62.4	61.7
33	68.5	67.6	66.8	66.0	65.2	64.4	63.6	62.8	62.1	61.4
34	68.3	67.5	66.6	65.8	65.0	64.2	63.4	62.6	61.9	61.1
35	68.2	67.4	66.5	65.6	64.8	64.0	63.2	62.4	61.6	60.9
36	68.1	67.2	66.4	65.5	64.7	63.8	63.0	62.2	61.4	60.6
37	68.0	67.1	66.2	65.4	64.5	63.7	62.8	62.0	61.2	60.4
38	67.9	67.0	66.1	65.2	64.4	63.5	62.7	61.8	61.0	60.2
39	67.8	66.9	66.0	65.1	64.2	63.4	62.5	61.7	60.8	60.0
40	67.7	66.8	65.9	65.0	64.1	63.3	62.4	61.5	60.7	59.9
41	67.7	66.7	65.8	64.9	64.0	63.1	62.3	61.4	60.5	59.7
42	67.6	66.7	65.7	64.8	63.9	63.0	62.2	61.3	60.4	59.6
43	67.5	66.6	65.7	64.8	63.8	62.9	62.1	61.2	60.3	59.4
44	67.5	66.5	65.6	64.7	63.8	62.9	62.0	61.1	60.2	59.3
45	67.4	66.5	65.5	64.6	63.7	62.8	61.9	61.0	60.1	59.2
46	67.4	66.4	65.4	64.6	63.6	62.7	61.8	60.9	60.0	59.1

TABLE VI—ORDINARY JOINT LIFE AND LAST SURVIVOR ANNUITIES; TWO LIVES—EXPECTED RETURN MULTIPLES—Continued

Ages	15	16	17	18	19	20	21	22	23	24
47	67.3	66.4	65.4	64.5	63.6	62.6	61.7	60.8	59.9	59.0
48	67.3	66.3	65.4	64.4	63.5	62.6	61.6	60.7	59.8	58.9
49	67.2	66.3	65.3	64.4	63.5	62.5	61.6	60.7	59.7	58.8
50	67.2	66.2	65.3	64.3	63.4	62.5	61.5	60.6	59.7	58.8
51	67.2	66.2	65.3	64.3	63.4	62.4	61.5	60.5	59.6	58.7
52	67.1	66.2	65.2	64.3	63.3	62.4	61.4	60.5	59.6	58.6
53	67.1	66.2	65.2	64.2	63.3	62.3	61.4	60.4	59.5	58.6
54	67.1	66.1	65.2	64.2	63.2	62.3	61.3	60.4	59.5	58.5
55	67.1	66.1	65.1	64.2	63.2	62.3	61.3	60.4	59.4	58.5
56	67.0	66.1	65.1	64.1	63.2	62.2	61.3	60.3	59.4	58.4
57	67.0	66.1	65.1	64.1	63.2	62.2	61.2	60.3	59.3	58.4
58	67.0	66.0	65.1	64.1	63.1	62.2	61.2	60.3	59.3	58.4
59	67.0	66.0	65.0	64.1	63.1	62.1	61.2	60.2	59.3	58.3
60	67.0	66.0	65.0	64.1	63.1	62.1	61.2	60.2	59.2	58.3
61	67.0	66.0	65.0	64.0	63.1	62.1	61.1	60.2	59.2	58.3
62	66.9	66.0	65.0	64.0	63.1	62.1	61.1	60.2	59.2	58.2
63	66.9	66.0	65.0	64.0	63.0	62.1	61.1	60.1	59.2	58.2
64	66.9	65.9	65.0	64.0	63.0	62.1	61.1	60.1	59.2	58.2
65	66.9	65.9	65.0	64.0	63.0	62.0	61.1	60.1	59.1	58.2
66	66.9	65.9	64.9	64.0	63.0	62.0	61.1	60.1	59.1	58.2
67	66.9	65.9	64.9	64.0	63.0	62.0	61.1	60.1	59.1	58.1
68	66.9	65.9	64.9	64.0	63.0	62.0	61.0	60.1	59.1	58.1
69	66.9	65.9	64.9	63.9	63.0	62.0	61.0	60.0	59.1	58.1
70	66.9	65.9	64.9	63.9	63.0	62.0	61.0	60.0	59.1	58.1
71	66.9	65.9	64.9	63.9	62.9	62.0	61.0	60.0	59.1	58.1
72	66.9	65.9	64.9	63.9	62.9	62.0	61.0	60.0	59.0	58.1
73	66.8	65.9	64.9	63.9	62.9	62.0	61.0	60.0	59.0	58.1
74	66.8	65.9	64.9	63.9	62.9	62.0	61.0	60.0	59.0	58.1
75	66.8	65.9	64.9	63.9	62.9	61.9	61.0	60.0	59.0	58.1
76	66.8	65.9	64.9	63.9	62.9	61.9	61.0	60.0	59.0	58.0
76	66.8	65.9	64.9	63.9	62.9	61.9	61.0	60.0	59.0	58.0
77	66.8	65.9	64.9	63.9	63.9	62.9	61.0	60.0	59.0	58.0
78	66.8	65.8	64.9	63.9	62.9	61.9	61.0	60.0	59.0	58.0
79	66.8	65.8	64.9	63.9	62.9	61.9	61.0	60.0	59.0	58.0
80	66.8	65.9	64.9	63.9	62.9	61.9	60.9	60.0	59.0	58.0
81	66.8	65.8	64.9	63.9	62.9	61.9	60.9	60.0	59.0	58.0
82	66.8	65.8	64.9	63.9	62.9	61.9	60.9	60.0	59.0	58.0
83	66.8	65.8	64.9	63.9	62.9	61.9	60.9	60.0	59.0	58.0
84	66.8	65.8	64.8	63.9	62.9	61.9	60.9	60.0	59.0	58.0
85	66.8	65.8	64.8	63.9	62.9	61.9	60.9	60.0	59.0	58.0
86	66.8	65.8	64.8	63.9	62.9	61.9	60.9	60.0	59.0	58.0
87	66.8	65.8	64.8	63.9	62.9	61.9	60.9	60.0	59.0	58.0
88	66.8	65.8	64.8	63.9	62.9	61.9	60.9	60.0	59.0	58.0
89	66.8	65.8	64.8	63.9	62.9	61.9	60.9	60.0	59.0	58.0
90	66.8	65.8	64.8	63.9	62.9	61.9	60.9	60.0	59.0	58.0
91	66.8	65.8	64.8	63.9	62.9	61.9	60.9	60.0	59.0	58.0
92	66.8	65.8	64.8	63.9	62.9	61.9	60.9	59.9	59.0	58.0
93	66.8	65.8	64.8	63.9	62.9	61.9	60.9	59.9	59.0	58.0
94	66.8	65.8	64.8	63.9	62.9	61.9	60.9	59.9	59.0	58.0
95	66.8	65.8	64.8	63.9	62.9	61.9	60.9	59.9	59.0	58.0
96	66.8	65.8	64.8	63.9	62.9	61.9	60.9	59.9	59.0	58.0
97	66.8	65.8	64.8	63.9	62.9	61.9	60.9	59.9	59.0	58.0
98	66.8	65.8	64.8	63.9	62.9	61.9	60.9	59.9	59.0	58.0
99	66.8	65.8	64.8	63.9	62.9	61.9	60.9	59.9	59.0	58.0
100	66.8	65.8	64.8	63.9	62.9	61.9	60.9	59.9	59.0	58.0
101	66.8	65.8	64.8	63.9	62.9	61.9	60.9	59.9	59.0	58.0
102	66.8	65.8	64.8	63.9	62.9	61.9	60.9	59.9	59.0	58.0
103	66.8	65.8	64.8	63.9	62.9	61.9	60.9	59.9	59.0	58.0
104	66.8	65.8	64.8	63.9	62.9	61.9	60.9	59.9	59.0	58.0
105	66.8	65.8	64.8	63.9	62.9	61.9	60.9	59.9	59.0	58.0
106	66.8	65.8	64.8	63.9	62.9	61.9	60.9	59.9	59.0	58.0
107	66.8	65.8	64.8	63.9	62.9	61.9	60.9	59.9	59.0	58.0
108	66.8	65.8	64.8	63.9	62.9	61.9	60.9	59.9	59.0	58.0
109	66.8	65.8	64.8	63.9	62.9	61.9	60.9	59.9	59.0	58.0
110	66.8	65.8	64.8	63.9	62.9	61.9	60.9	59.9	59.0	58.0
111	66.8	65.8	64.8	63.9	62.9	61.9	60.9	59.9	59.0	58.0
112	66.8	65.8	64.8	63.9	62.9	61.9	60.9	59.9	59.0	58.0
113	66.8	65.8	64.8	63.9	62.9	61.9	60.9	59.9	59.0	58.0
114	66.8	65.8	64.8	63.9	62.9	61.9	60.9	59.9	59.0	58.0
115	66.8	65.8	64.8	63.9	62.9	61.9	60.9	59.9	59.0	58.0

TABLE VI—ORDINARY JOINT LIFE AND LAST SURVIVOR ANNUITIES; TWO LIVES—EXPECTED RETURN MULTIPLES

Ages	25	26	27	28	29	30	31	32	33	34
25	63.9	63.4	62.9	62.5	62.1	61.7	61.3	61.0	60.7	60.4
26	63.4	62.9	62.4	61.9	61.5	61.1	60.7	60.4	60.0	59.7
27	62.9	62.4	61.9	61.4	60.9	60.5	60.1	59.7	59.4	59.0
28	62.5	61.9	61.4	60.9	60.4	60.0	59.5	59.1	58.7	58.4
29	62.1	61.5	60.9	60.4	59.9	59.4	59.0	58.5	58.1	57.7
30	61.7	61.1	60.5	60.0	59.4	58.9	58.4	58.0	57.5	57.1
31	61.3	60.7	60.1	59.5	59.0	58.4	57.9	57.4	57.0	56.5
32	61.0	60.4	59.7	59.1	58.5	58.0	57.4	56.9	56.4	56.0
33	60.7	60.0	59.4	58.7	58.1	57.5	57.0	56.4	55.9	55.5
34	60.4	59.7	59.0	58.4	57.7	57.1	56.5	56.0	55.5	54.9
35	60.1	59.4	58.7	58.0	57.4	56.7	56.1	55.6	55.0	54.5
36	59.9	59.1	58.4	57.7	57.0	56.4	55.8	55.1	54.6	54.0
37	59.6	58.9	58.1	57.4	56.7	56.0	55.4	54.8	54.2	53.6
38	59.4	58.6	57.9	57.9	56.4	55.7	55.1	54.4	53.8	53.2
39	59.2	58.4	57.7	56.9	56.2	55.4	54.7	54.1	53.4	52.8
40	59.0	58.2	57.4	56.7	55.9	55.2	54.5	53.8	53.1	52.4
41	58.9	58.0	57.2	56.4	55.7	54.9	54.2	53.5	52.8	52.1
42	58.7	57.9	57.1	56.2	55.5	54.7	53.9	53.2	52.5	51.8
43	58.6	57.7	56.9	56.1	55.3	54.5	53.7	52.9	52.2	51.5
44	58.4	57.6	56.7	55.9	55.1	54.3	53.5	52.7	52.0	51.2
45	58.3	57.4	56.6	55.7	54.9	54.1	53.3	52.5	51.7	51.0
46	58.2	57.3	56.5	55.6	54.8	53.9	53.1	52.3	51.5	50.7
47	58.1	57.2	56.3	55.5	54.6	53.8	52.9	52.1	51.3	50.5
48	58.0	57.1	56.2	55.3	54.5	53.6	52.8	51.9	51.1	50.3
49	57.9	57.0	56.1	55.2	54.4	53.5	52.6	51.8	51.0	50.1
50	57.8	56.9	56.0	55.1	54.2	53.4	52.5	51.7	50.8	50.0
51	57.8	56.9	55.9	55.0	54.1	53.3	52.4	51.5	50.7	49.8
52	57.7	56.8	55.9	55.0	54.1	53.2	52.3	51.4	50.5	49.7
53	57.6	56.7	55.8	54.9	54.0	53.1	52.2	51.3	50.4	49.6
54	57.6	56.7	55.7	54.8	53.9	53.0	52.1	51.2	50.3	49.4
55	57.5	56.6	55.7	54.7	53.8	52.9	52.0	51.1	40.2	49.3
56	57.5	56.5	55.6	54.7	53.8	52.8	51.9	51.0	50.1	49.2
57	57.4	56.5	55.6	54.6	53.7	52.8	51.9	50.9	50.0	49.1
58	57.4	56.5	55.5	54.6	53.6	52.7	51.8	50.9	50.0	49.1
59	57.4	56.4	55.5	54.5	53.6	52.7	51.7	50.8	49.9	49.0
60	57.3	56.4	55.4	54.5	53.6	52.6	51.7	50.8	49.8	48.9
61	57.3	56.4	55.4	54.5	53.5	52.6	51.6	50.7	49.8	48.9
62	57.3	56.3	55.4	54.4	53.5	52.5	51.6	50.7	49.7	48.8
63	57.3	56.3	55.3	54.4	53.4	52.5	51.6	50.6	49.7	48.7
64	57.2	56.3	55.3	54.4	53.4	52.5	51.5	50.6	49.6	48.7
65	57.2	56.3	55.3	54.3	53.4	52.4	51.5	50.5	49.6	48.7
66	57.2	56.2	55.3	54.3	53.4	52.4	51.5	50.5	49.6	48.6
67	57.2	56.2	55.3	54.3	53.3	52.4	51.4	50.5	49.5	48.6
68	57.2	56.2	55.2	54.3	53.3	52.4	51.4	50.4	49.5	48.6
69	57.1	56.2	55.2	54.3	53.3	52.3	51.4	50.4	49.5	48.5
70	57.1	56.2	55.2	54.2	53.3	52.3	51.4	50.4	49.4	48.5
71	57.1	56.2	55.2	54.2	53.3	52.3	51.3	50.4	49.4	48.5
72	57.1	56.1	55.2	54.2	53.2	52.3	51.3	50.4	49.4	48.5
73	57.1	56.1	55.2	54.2	53.2	52.3	51.3	50.3	49.4	48.4
74	57.1	56.1	55.2	54.2	53.2	52.3	51.3	50.3	49.4	48.4
75	57.1	56.1	55.1	54.2	53.2	52.2	51.3	50.3	49.4	48.4
76	57.1	56.1	55.1	54.2	53.2	52.2	51.3	50.3	49.3	48.4
77	57.1	56.1	55.1	54.2	53.2	52.2	51.3	50.3	49.3	48.4
78	57.1	56.1	55.1	54.2	53.2	52.2	51.3	50.3	49.3	48.4
79	57.1	56.1	55.1	54.1	53.2	52.2	51.2	50.3	49.3	48.4
80	57.1	56.1	55.1	54.1	53.2	52.2	51.2	50.3	49.3	48.3
81	57.0	56.1	55.1	54.1	53.2	52.2	51.2	50.3	49.3	48.3
82	57.0	56.1	55.1	54.1	53.2	52.2	51.2	50.3	49.3	48.3
83	57.0	56.1	55.1	54.1	53.2	52.2	51.2	50.3	49.3	48.3
84	57.0	56.1	55.1	54.1	53.2	52.2	51.2	50.3	49.3	48.3
85	57.0	56.1	55.1	54.1	53.2	52.2	51.2	50.2	49.3	48.3
86	57.0	56.1	55.1	54.1	53.1	52.2	51.2	50.2	49.3	48.3
87	57.0	56.1	55.1	54.1	53.1	52.2	51.2	50.2	49.3	48.3
88	57.0	56.1	55.1	54.1	53.1	52.2	51.2	50.2	49.3	48.3
89	57.0	56.1	55.1	54.1	53.1	52.2	51.2	50.2	49.3	48.3
90	57.0	56.1	55.1	54.1	53.1	52.2	51.2	50.2	49.3	48.3
91	57.0	56.1	55.1	54.1	53.1	52.2	51.2	50.2	49.3	48.3
92	57.0	56.1	55.1	54.1	53.1	52.2	51.2	50.2	49.3	48.3
93	57.0	56.1	55.1	54.1	53.1	52.2	51.2	50.2	49.3	48.3
94	57.0	56.0	55.1	54.1	53.1	52.2	51.2	50.2	49.3	48.3
95	57.0	56.0	55.1	54.1	53.1	52.2	51.2	50.2	49.3	48.3

TABLE VI—ORDINARY JOINT LIFE AND LAST SURVIVOR ANNUITIES; TWO LIVES—EXPECTED RETURN MULTIPLES—Continued

Ages	25	26	27	28	29	30	31	32	33	34
96	57.0	56.0	55.1	54.1	53.1	52.2	51.2	50.2	49.3	48.3
97	57.0	56.0	55.1	54.1	53.1	52.2	51.2	50.2	49.3	48.3
98	57.0	56.0	55.1	54.1	53.1	52.2	51.2	50.2	49.3	48.3
99	57.0	56.0	55.1	54.1	53.1	52.2	51.2	50.2	49.3	48.3
100	57.0	56.0	55.1	54.1	53.1	52.2	51.2	50.2	49.3	48.3
101	57.0	56.0	55.1	54.1	53.1	52.2	51.2	50.2	49.3	48.3
102	57.0	56.0	55.1	54.1	53.1	52.2	51.2	50.2	49.3	48.3
103	57.0	56.0	55.1	54.1	53.1	52.2	51.2	50.2	49.3	48.3
104	57.0	56.0	55.1	54.1	53.1	52.2	51.2	50.2	49.3	48.3
105	57.0	56.0	55.1	54.1	53.1	52.2	51.2	50.2	49.3	48.3
106	57.0	56.0	55.1	54.1	53.1	52.2	51.2	50.2	49.3	48.3
107	57.0	56.0	55.1	54.1	53.1	52.2	51.2	50.2	49.3	48.3
108	57.0	56.0	55.1	54.1	53.1	52.2	51.2	50.2	49.3	48.3
109	57.0	56.0	55.1	54.1	53.1	52.2	51.2	50.2	49.3	48.3
110	57.0	56.0	55.1	54.1	53.1	52.2	51.2	50.2	49.3	48.3
111	57.0	56.0	55.1	54.1	53.1	52.2	51.2	50.2	49.3	48.3
112	57.0	56.0	55.1	54.1	53.1	52.2	51.2	50.2	49.3	48.3
113	57.0	56.0	55.1	54.1	53.1	52.2	51.2	50.2	49.3	48.3
114	57.0	56.0	55.1	54.1	53.1	52.2	51.2	50.2	49.3	48.3
115	57.0	56.0	55.1	54.1	53.1	52.2	51.2	50.2	49.3	48.3

TABLE VI—ORDINARY JOINT LIFE AND LAST SURVIVOR ANNUITIES; TWO LIVES—EXPECTED RETURN MULTIPLES

Ages	35	36	37	38	39	40	41	42	43	44
35	54.0	53.5	53.0	52.6	52.2	51.8	51.4	51.1	50.8	50.5
36	53.5	53.0	52.5	52.0	51.6	51.2	50.8	50.4	50.1	49.8
37	53.0	52.5	52.0	51.5	51.0	50.6	50.2	49.8	49.5	49.1
38	52.6	52.0	51.5	51.0	50.5	50.0	49.6	49.2	48.8	48.5
39	52.2	51.6	51.0	50.5	50.0	49.5	49.1	48.6	48.2	47.8
40	51.8	51.2	50.6	50.0	49.5	49.0	48.5	48.1	47.6	47.2
41	51.4	50.8	50.2	49.6	49.1	48.5	48.0	47.5	47.1	46.7
42	51.1	50.4	49.8	49.2	48.6	48.1	47.5	47.0	46.6	46.1
43	50.8	50.1	49.5	48.8	48.2	47.6	47.1	46.6	46.0	45.6
44	50.5	49.8	49.1	48.5	47.8	47.2	46.7	46.1	45.6	45.1
45	50.2	49.5	48.8	48.1	47.5	46.9	46.3	45.7	45.1	44.6
46	50.0	49.2	48.5	47.8	47.2	46.5	45.9	45.3	44.7	44.1
47	49.7	49.0	48.3	47.5	46.8	46.2	45.5	44.9	44.3	43.7
48	49.5	48.8	48.0	47.3	46.6	45.9	45.2	44.5	43.9	43.3
49	49.3	48.5	47.8	47.0	46.3	45.6	44.9	44.2	43.6	42.9
50	49.2	48.4	47.6	46.8	46.0	45.3	44.6	43.9	43.2	42.6
51	49.0	48.2	47.4	46.6	45.8	45.1	44.3	43.6	42.9	44.2
52	48.8	48.0	47.2	46.4	45.6	44.8	44.1	43.3	42.6	41.9
53	48.7	47.9	47.0	46.2	45.4	44.6	43.9	43.1	42.4	41.7
54	48.6	47.7	46.9	46.0	45.2	44.4	43.6	42.9	42.1	41.4
55	48.5	47.6	46.7	45.9	45.1	44.2	43.4	42.7	41.9	41.2
56	48.3	47.5	46.6	45.8	44.9	44.1	43.3	42.5	41.7	40.9
57	48.3	47.4	46.5	45.6	44.8	43.9	43.1	42.3	41.5	40.7
58	48.2	47.3	46.4	45.5	44.7	43.8	43.0	42.1	41.3	40.5
59	48.1	47.2	46.3	45.4	44.5	43.7	42.8	42.0	41.2	40.4
60	48.0	47.1	46.2	45.3	44.4	43.6	42.7	41.9	41.0	40.2
61	47.9	47.0	46.1	45.2	44.3	43.5	42.6	41.7	40.9	40.0
62	47.9	47.0	46.0	45.1	44.2	43.4	42.5	41.6	40.8	39.9
63	47.8	46.9	46.0	45.1	44.2	43.3	42.4	41.5	40.6	39.8
64	47.8	46.8	45.9	45.0	44.1	43.2	42.3	41.4	40.5	39.7
65	47.7	46.8	45.9	44.9	44.0	43.1	42.2	41.3	40.4	39.6
66	47.7	46.7	45.8	44.9	44.0	43.1	42.2	41.3	40.4	39.5
67	47.6	46.7	45.8	44.8	43.9	43.0	42.1	41.2	40.3	39.4
68	47.6	46.7	45.7	44.8	43.9	42.9	42.0	41.1	40.2	39.3
69	47.6	46.6	45.7	44.8	43.8	42.9	42.0	41.1	40.2	39.3
70	47.5	46.6	45.7	44.7	43.8	42.9	41.9	41.0	40.1	39.2
71	47.5	46.6	45.6	44.7	43.8	42.8	41.9	41.0	40.1	39.1
72	47.5	46.6	45.6	44.7	43.7	42.8	41.9	40.9	40.0	39.1
73	47.5	46.5	45.6	44.6	43.7	42.8	41.8	40.9	40.0	39.0
74	47.5	46.5	45.6	44.6	43.7	42.7	41.8	40.9	39.9	39.0
75	47.4	46.5	45.5	44.6	43.6	42.7	41.8	40.8	39.9	39.0
76	47.4	46.5	45.5	44.6	43.6	42.7	41.7	40.8	39.9	38.9
77	47.4	46.5	45.5	44.6	43.6	42.7	41.7	40.8	39.8	38.9
78	47.4	46.4	45.5	44.5	43.6	42.6	41.7	40.7	39.8	38.9

TABLE VI—ORDINARY JOINT LIFE AND LAST SURVIVOR ANNUITIES; TWO LIVES—EXPECTED RETURN MULTIPLES—Continued

Ages	35	36	37	38	39	40	41	42	43	44
79	47.4	46.4	45.5	44.5	43.6	42.6	41.7	40.7	39.8	38.9
80	47.4	46.4	45.5	44.5	43.6	42.6	41.7	40.7	39.8	38.8
81	47.4	46.4	45.5	44.5	43.5	42.6	41.6	40.7	39.8	38.8
82	47.4	46.4	45.4	44.5	43.5	42.6	41.6	40.7	39.7	38.8
83	47.4	46.4	45.4	44.5	43.5	42.6	41.6	40.7	39.7	38.8
84	47.4	46.4	45.4	44.5	43.5	42.6	41.6	40.7	39.7	38.8
85	47.4	46.4	45.4	44.5	43.5	42.6	41.6	40.7	39.7	38.8
86	47.3	46.4	45.4	44.5	43.5	42.5	41.6	40.6	39.7	38.8
87	47.3	46.4	45.4	44.5	43.5	42.5	41.6	40.6	39.7	38.7
88	47.3	46.4	45.4	44.5	43.5	42.5	41.6	40.6	39.7	38.7
89	47.3	46.4	45.4	44.4	43.5	42.5	41.6	40.6	39.7	38.7
90	47.3	46.4	45.4	44.4	43.5	42.5	41.6	40.6	39.7	38.7
91	47.3	46.4	45.4	44.4	43.5	42.5	41.6	40.6	39.7	39.7
92	47.3	46.4	45.4	44.4	44.4	43.5	42.5	41.6	40.6	38.7
93	47.3	46.4	45.4	43.5	42.5	41.6	40.6	39.7	39.7	38.7
94	47.3	46.4	45.4	44.4	43.5	42.5	41.6	40.6	39.7	38.7
95	47.3	46.4	45.4	44.4	43.5	42.5	41.6	40.6	39.7	38.7
96	47.3	46.4	45.4	44.4	43.5	42.5	41.6	40.6	39.7	38.7
97	47.3	46.4	45.4	44.4	43.5	42.5	41.6	40.6	39.6	38.7
98	47.3	46.4	45.4	44.4	43.5	42.5	41.6	40.6	39.6	38.7
99	47.3	46.4	45.4	44.4	43.5	42.5	41.5	40.6	39.6	38.7
100	47.3	46.4	45.4	44.4	43.5	42.5	41.5	40.6	39.6	38.7
101	47.3	46.4	45.4	44.4	43.5	42.5	41.5	40.6	39.6	38.7
102	47.3	46.4	45.4	44.4	43.5	42.5	41.5	40.6	39.6	38.7
103	47.3	46.4	45.4	44.4	43.5	42.5	41.5	40.6	39.6	38.7
104	47.3	46.4	45.4	44.4	43.5	42.5	41.5	40.6	39.6	38.7
105	47.3	46.4	45.4	44.4	43.5	42.5	41.5	40.6	39.6	38.7
106	47.3	46.4	45.4	44.4	43.5	42.5	41.5	40.6	39.6	38.7
107	47.3	46.4	45.4	44.4	43.5	42.5	41.5	40.6	39.6	38.7
108	47.3	46.4	45.4	44.4	43.5	42.5	41.5	40.6	39.6	38.7
109	47.3	46.4	45.4	44.4	43.5	42.5	41.5	40.6	39.6	38.7
110	47.3	46.4	45.4	44.4	43.5	42.5	41.5	40.6	39.6	38.7
111	47.3	46.4	45.4	44.4	43.5	42.5	41.5	40.6	39.6	38.7
112	47.3	46.4	45.4	44.4	43.5	42.5	41.5	40.6	39.6	38.7
113	47.3	46.4	45.4	44.4	43.5	42.5	41.5	40.6	39.6	38.7
114	47.3	46.4	45.4	44.4	43.5	42.5	41.5	40.6	39.6	38.7
114	47.3	46.4	45.4	44.4	43.5	42.5	41.5	40.6	39.6	38.7
115	47.3	46.4	45.4	44.4	43.5	42.5	41.5	40.6	39.6	38.7

TABLE VI—ORDINARY JOINT LIFE AND LAST SURVIVOR ANNUITIES; TWO LIVES—EXPECTED RETURN MULTIPLES

Ages	45	46	47	48	49	50	51	52	53	54
45	44.1	43.6	43.2	42.7	42.3	42.0	41.6	41.3	41.0	40.7
46	43.6	43.1	42.6	42.2	41.8	41.4	41.0	40.6	40.3	40.0
47	43.2	42.6	42.1	41.7	41.2	40.8	40.4	40.0	39.7	39.3
48	42.7	42.2	41.7	41.2	40.7	40.2	39.8	39.4	39.0	38.7
49	42.3	41.8	41.2	40.7	40.2	39.7	39.3	38.8	38.4	38.1
50	42.0	41.4	40.8	40.2	39.7	39.2	38.7	38.3	37.9	37.5
51	41.6	41.0	40.4	39.8	39.3	38.7	38.2	37.8	37.3	36.9
52	41.3	40.6	40.0	39.4	38.8	38.3	37.8	37.3	36.8	36.4
53	41.0	40.3	39.7	39.0	38.4	37.9	37.3	36.8	36.3	35.8
54	40.7	40.0	39.3	38.7	38.1	37.5	36.9	36.4	35.8	35.3
55	40.4	39.7	39.0	38.4	37.7	37.1	36.5	35.9	35.4	34.9
56	40.2	39.5	38.7	38.1	37.4	36.8	36.1	35.6	35.0	34.4
57	40.0	39.2	38.5	37.8	37.1	36.4	35.8	35.2	34.6	34.0
58	39.7	39.0	38.2	37.5	36.8	36.1	35.5	34.8	34.2	33.6
59	39.6	38.8	38.0	37.3	36.6	35.9	35.2	34.5	33.9	33.3
60	39.4	38.6	37.8	37.1	36.3	35.6	34.9	34.2	33.6	32.9
61	39.2	38.4	37.6	36.9	36.1	35.4	34.6	33.9	33.3	32.6
62	39.1	38.3	37.5	36.7	35.9	35.1	34.4	33.7	33.0	32.3
63	38.9	38.1	37.3	36.5	35.7	34.9	34.2	33.5	32.7	32.0
64	38.8	38.0	37.2	36.3	35.5	34.8	34.0	33.2	32.5	31.8
65	38.7	37.9	37.0	36.2	35.4	34.6	33.8	33.0	32.3	31.6
66	38.6	37.8	36.9	36.1	35.2	34.4	33.6	32.9	32.1	31.4
67	38.5	37.7	36.8	36.0	35.1	34.3	33.5	32.7	31.9	31.2
68	38.4	37.6	36.7	35.8	35.0	34.2	33.4	32.5	31.8	31.0
69	38.4	37.5	36.6	35.7	34.9	34.1	33.2	32.4	31.6	30.8
70	38.3	37.4	36.5	35.7	34.8	34.0	33.1	32.3	31.5	30.7

TABLE VI—ORDINARY JOINT LIFE AND LAST SURVIVOR ANNUITIES; TWO LIVES—EXPECTED RETURN MULTIPLES—Continued

Ages	45	46	47	48	49	50	51	52	53	54
71	38.2	37.3	36.5	35.6	34.7	33.9	33.0	32.2	31.4	30.5
72	38.2	37.3	36.4	35.5	34.6	33.8	32.9	32.1	31.2	30.4
73	38.1	37.2	36.3	35.4	34.6	33.7	32.8	32.0	31.1	30.3
74	38.1	37.2	36.3	35.4	34.5	33.6	32.8	31.9	31.1	30.2
75	38.1	37.1	36.2	35.3	34.5	33.6	32.7	31.8	31.0	30.1
76	38.0	37.1	36.2	35.3	34.4	33.5	32.6	31.8	30.9	30.1
77	38.0	37.1	36.2	35.3	34.4	33.5	32.6	31.7	30.8	30.0
78	38.0	37.0	36.1	35.2	34.3	33.4	32.5	31.7	30.8	29.9
79	37.9	37.0	36.1	35.2	34.3	33.4	32.5	31.6	30.7	29.9
80	37.9	37.0	36.1	35.2	34.2	33.4	32.5	31.6	30.7	29.8
81	37.9	37.0	36.0	35.1	34.2	33.3	32.4	31.5	30.7	29.8
82	37.9	36.9	36.0	35.1	34.2	33.3	32.4	31.5	30.6	29.7
83	37.9	36.9	36.0	35.1	34.2	33.3	32.4	31.5	30.6	29.7
84	37.8	36.9	36.9	35.0	34.2	33.2	32.3	31.4	30.6	29.7
85	37.8	36.9	36.0	35.1	34.1	33.2	32.3	31.4	30.5	29.6
86	38.8	36.9	36.0	35.0	34.1	33.2	32.3	31.4	30.5	29.6
87	37.8	36.9	35.9	35.0	34.1	33.2	32.3	31.4	30.5	29.6
88	37.8	36.9	35.9	35.0	34.1	33.2	32.3	31.4	30.5	29.6
89	37.8	36.9	35.9	35.0	34.1	33.2	32.3	31.4	30.5	29.6
90	37.8	36.9	35.9	35.0	34.1	33.2	32.3	31.3	30.5	29.6
91	37.8	36.8	35.9	35.0	34.1	33.2	32.2	31.3	30.4	29.5
92	37.8	36.8	35.9	35.0	34.1	33.2	32.2	31.3	30.4	29.5
93	37.8	36.8	35.9	35.0	34.1	33.1	32.2	31.3	30.4	29.5
94	37.8	36.8	35.9	35.0	34.1	33.1	32.2	31.3	30.4	29.5
95	37.8	36.8	35.9	35.0	34.0	33.1	32.2	31.3	30.4	29.5
96	37.8	36.8	35.9	35.0	34.0	33.1	32.2	31.3	30.4	29.5
97	37.8	36.8	35.9	35.0	34.0	33.1	32.2	31.3	30.4	29.5
98	37.8	36.8	35.9	35.0	34.0	33.1	32.2	31.3	30.4	29.5
99	37.8	36.8	35.9	35.0	34.0	33.1	32.2	31.3	30.4	29.5
101	37.8	36.8	35.9	35.0	34.0	33.1	32.2	31.3	30.4	29.5
102	37.8	36.8	35.9	35.0	34.0	33.1	32.2	31.3	30.4	29.5
103	37.7	36.8	35.9	34.9	34.0	33.1	32.2	31.3	30.4	29.5
104	37.7	36.8	35.9	34.9	34.0	33.1	32.2	31.3	30.4	29.5
105	37.7	36.8	35.9	34.9	34.0	33.1	32.2	31.3	30.4	29.5
106	37.7	36.8	35.9	34.9	34.0	33.1	32.2	31.3	30.4	29.5
107	37.7	36.8	35.9	34.9	34.0	33.1	32.2	31.3	30.4	29.5
108	37.7	36.8	35.9	34.9	34.0	33.1	32.2	31.3	30.4	29.5
109	37.7	36.8	35.9	34.9	34.0	33.1	32.2	31.3	30.4	29.5
110	37.7	36.8	35.9	34.9	34.0	33.1	32.2	31.3	30.4	29.5
111	37.7	36.8	35.9	34.9	34.0	33.1	32.2	31.3	30.4	29.5
112	37.7	36.8	35.9	34.9	34.0	33.1	32.2	31.3	30.4	29.5
113	37.7	36.8	35.9	34.9	34.0	33.1	32.2	31.3	30.4	29.5
114	37.7	36.8	35.9	34.9	34.0	33.1	32.2	31.3	30.4	29.5
115	37.7	36.8	35.9	34.9	34.0	33.1	32.2	31.3	30.4	29.5

TABLE VI—ORDINARY JOINT LIFE AND LAST SURVIVOR ANNUITIES; TWO LIVES—EXPECTED RETURN MULTIPLES

Ages	55	56	57	58	59	60	61	62	63	64
55	34.4	33.9	33.5	33.1	32.7	32.3	32.0	31.7	31.4	31.1
56	33.9	33.4	33.0	32.5	32.1	31.7	31.4	31.0	30.7	30.4
57	33.5	33.0	32.5	32.0	31.6	31.2	30.8	30.4	30.1	29.8
58	33.1	32.5	32.0	31.5	31.1	30.6	30.2	29.9	29.5	29.2
59	32.7	32.1	31.6	31.1	30.6	30.1	29.7	29.3	28.9	28.6
60	32.3	31.7	31.2	30.6	30.1	29.7	29.2	28.8	28.4	28.0
61	32.0	31.4	30.8	30.2	29.7	29.2	28.7	28.3	27.8	27.4
62	31.7	31.0	30.4	29.9	29.3	28.8	28.3	27.8	27.3	26.9
63	31.4	30.7	30.1	29.5	28.9	28.4	27.8	27.3	26.9	26.4
64	31.1	30.4	29.8	29.2	28.6	28.0	27.4	26.9	26.4	25.9
65	30.9	30.2	29.5	28.9	28.2	27.6	27.1	26.5	26.0	25.5
66	30.6	29.9	29.2	28.6	27.9	27.3	26.7	26.1	25.6	25.1
67	30.4	29.7	29.0	28.3	27.6	27.0	26.4	25.8	25.2	24.7
68	30.2	29.5	28.8	28.1	27.4	26.7	26.1	25.5	24.9	24.3
69	30.1	29.3	28.6	27.8	27.1	26.5	25.8	25.2	24.6	24.0
70	29.9	29.1	28.4	27.6	26.9	26.2	25.6	24.9	24.3	23.7
71	29.7	29.0	28.2	27.5	26.7	26.0	25.3	24.7	24.0	23.4
72	29.6	28.8	28.1	27.3	26.5	25.8	25.1	24.4	23.8	23.1
73	29.5	28.7	27.9	27.1	26.4	25.6	24.9	24.2	23.5	22.9
74	29.4	28.6	27.8	27.0	26.2	25.5	24.7	24.0	23.3	22.7

TABLE VI—ORDINARY JOINT LIFE AND LAST SURVIVOR ANNUITIES; TWO LIVES—EXPECTED RETURN MULTIPLES—Continued

Ages	55	56	57	58	59	60	61	62	63	64
75	29.3	28.5	27.7	26.9	26.1	25.3	24.6	23.8	23.1	22.4
76	29.2	28.4	27.6	26.8	26.0	25.2	24.4	23.7	23.0	22.3
77	29.1	28.3	27.5	26.7	25.9	25.1	24.3	23.6	22.8	22.1
78	29.1	28.2	27.4	26.6	25.8	25.0	24.2	23.4	22.7	21.9
79	29.0	28.2	27.3	26.5	25.7	24.9	24.1	23.3	22.6	21.8
80	29.0	28.1	27.3	26.4	25.6	24.8	24.0	23.2	22.4	21.7
81	28.9	28.1	27.2	26.4	25.5	24.7	23.9	23.1	22.3	21.6
82	28.9	28.0	27.2	26.3	25.5	24.6	23.8	23.0	22.3	21.5
83	28.8	28.0	27.1	26.3	25.4	24.6	23.8	23.0	22.2	21.4
84	28.8	27.9	27.1	26.2	25.4	24.5	23.7	22.9	22.1	21.3
85	28.8	27.9	27.0	26.2	25.3	24.5	23.7	22.8	22.0	21.3
86	28.7	27.9	27.0	26.1	25.3	24.5	23.6	22.8	22.0	21.2
87	28.7	27.8	27.0	26.1	25.3	24.4	23.6	22.8	21.9	21.1
88	28.7	27.8	27.0	26.1	25.2	24.4	23.5	22.7	21.9	21.1
89	28.7	27.8	26.9	26.1	25.2	24.4	23.5	22.7	21.9	21.1
90	28.7	27.8	26.9	26.1	25.2	24.3	23.5	22.7	21.8	21.0
91	28.7	27.8	26.9	26.0	25.2	24.3	23.5	22.6	21.8	21.0
92	28.6	27.8	26.9	26.0	25.2	24.3	23.5	22.6	21.8	21.0
93	28.6	27.8	26.9	26.0	25.1	24.3	23.4	22.6	21.8	20.9
94	28.6	27.7	26.9	26.0	25.1	24.3	23.4	22.6	21.7	20.9
95	28.6	27.7	26.9	26.0	25.1	24.3	23.4	22.6	21.7	20.9
96	28.6	27.7	26.9	26.0	25.1	24.2	23.4	22.6	21.7	20.9
97	28.6	27.7	26.8	26.0	25.1	24.2	23.4	22.5	21.7	20.9
98	28.6	27.7	26.8	26.0	25.1	24.2	23.4	22.5	21.7	20.9
99	28.6	27.7	26.8	26.0	25.1	24.2	23.4	22.5	21.7	20.9
100	28.6	27.7	26.8	26.0	25.1	24.2	23.4	22.5	21.7	20.8
101	28.6	27.7	26.8	25.9	25.1	24.2	23.4	22.5	21.7	20.8
102	28.6	27.7	26.8	25.9	25.1	24.2	23.3	22.5	21.7	20.8
103	28.6	27.7	26.8	25.9	25.1	24.2	23.3	22.5	21.7	20.8
104	28.6	27.7	26.8	25.9	25.1	24.2	23.3	22.5	21.6	20.8
105	28.6	27.7	26.8	25.9	25.1	24.2	23.3	22.5	21.6	20.8
106	28.6	27.7	26.8	25.9	25.1	24.2	23.3	22.5	21.6	20.8
107	28.6	27.7	26.8	25.9	25.1	24.2	23.3	22.5	21.6	20.8
108	28.6	27.7	26.8	25.9	25.1	24.2	23.3	22.5	21.6	20.8
109	28.6	27.7	26.8	25.9	25.1	24.2	23.3	22.5	21.6	20.8
110	28.6	27.7	26.8	25.9	25.1	24.2	23.3	22.5	21.6	20.8
111	28.6	27.7	26.8	25.9	25.0	24.2	23.3	22.5	21.6	20.8
112	28.6	27.7	26.8	25.9	25.0	24.2	23.3	22.5	21.6	20.8
113	28.6	27.7	26.8	25.9	25.0	24.2	23.3	22.5	21.6	20.8
114	28.6	27.7	26.8	25.9	25.0	24.2	23.3	22.5	21.6	20.8
115	28.6	27.7	26.8	25.9	25.0	24.2	23.3	22.5	21.6	20.8

TABLE VI—ORDINARY JOINT LIFE AND LAST SURVIVOR ANNUITIES; TWO LIVES—EXPECTED RETURN MULTIPLES

Ages	65	66	67	68	69	70	71	72	73	74
65	25.0	24.6	24.2	23.8	23.4	23.1	22.8	22.5	22.2	22.0
66	24.6	24.1	23.7	23.3	22.9	22.5	22.2	21.9	21.6	21.4
67	24.2	23.7	23.2	22.8	22.4	22.0	21.7	21.3	21.0	20.8
68	23.8	23.3	22.8	22.3	21.9	21.5	21.2	20.8	20.5	20.2
69	23.4	22.9	22.4	21.9	21.5	21.1	20.7	20.3	20.0	19.6
70	23.1	22.5	22.0	21.5	21.1	20.6	20.2	19.8	19.4	19.1
71	22.8	22.2	21.7	21.2	20.7	20.2	19.8	19.4	19.0	18.6
72	22.5	21.9	21.3	20.8	20.3	19.8	19.4	18.9	18.5	18.2
73	22.2	21.6	21.0	20.5	20.0	19.4	19.0	18.5	18.1	17.7
74	22.0	21.4	20.8	20.2	19.6	19.1	18.6	18.2	17.7	17.3
75	21.8	21.1	20.5	19.9	19.3	18.8	18.3	17.8	17.3	16.9
76	21.6	20.9	20.3	19.7	19.1	18.5	18.0	17.5	17.0	16.5
77	21.4	20.7	20.1	19.4	18.8	18.3	17.7	17.2	16.7	16.2
78	21.2	20.5	19.9	19.2	18.6	18.0	17.5	16.9	16.4	15.9
79	21.1	20.4	19.7	19.0	18.4	17.8	17.2	16.7	16.1	15.6
80	21.0	20.2	19.5	18.9	18.2	17.6	17.0	16.4	15.9	15.4
81	20.8	20.1	19.4	18.7	18.1	17.4	16.8	16.2	15.7	15.1
82	20.7	20.0	19.3	18.6	17.9	17.3	16.6	16.0	15.5	14.9
83	20.6	19.9	19.2	18.5	17.8	17.1	16.5	15.9	15.3	14.7
84	20.5	19.8	19.1	18.4	17.7	17.0	16.3	15.7	15.1	14.5
85	20.5	19.7	19.0	18.3	17.6	16.9	16.2	15.6	15.0	14.4
86	20.4	19.6	18.9	18.2	17.5	16.8	16.1	15.5	14.8	14.2
87	20.4	19.6	18.8	18.1	17.4	16.7	16.0	15.4	14.7	14.1

TABLE VI—ORDINARY JOINT LIFE AND LAST SURVIVOR ANNUITIES; TWO LIVES—EXPECTED RETURN MULTIPLES—Continued

Ages	65	66	67	68	69	70	71	72	73	74
88	20.3	19.5	18.8	18.0	17.3	16.6	15.9	15.3	14.6	14.0
89	20.3	19.5	18.7	18.0	17.2	16.5	15.8	15.2	14.5	13.9
90	20.2	19.4	18.7	17.9	17.2	16.5	15.8	15.1	14.5	13.8
91	20.2	19.4	18.6	17.9	17.1	16.4	15.7	15.0	14.4	13.7
92	20.2	19.4	18.6	17.8	17.1	16.4	15.7	15.0	14.3	13.7
93	20.1	19.3	18.6	17.8	17.1	16.3	15.6	14.9	14.3	13.6
94	20.1	19.3	18.5	17.8	17.0	16.3	15.6	14.9	14.2	13.6
95	20.1	19.3	18.5	17.8	17.0	16.3	15.6	14.9	14.2	13.5
96	20.1	19.3	18.5	17.7	17.0	16.2	15.5	14.8	14.2	13.5
97	20.1	19.3	18.5	17.7	17.0	16.2	15.5	14.8	14.1	13.5
98	20.1	19.3	18.5	17.7	16.9	16.2	15.5	14.8	14.1	13.4
99	20.0	19.2	18.5	17.7	16.9	16.2	15.5	14.7	14.1	13.4
100	20.0	19.2	18.4	17.7	16.9	16.2	15.4	14.7	14.0	13.4
101	20.0	19.2	18.4	17.7	16.9	16.1	15.4	14.7	14.0	13.3
102	20.0	19.2	18.4	17.6	16.9	16.1	15.4	14.7	14.0	13.3
103	20.0	19.2	18.4	17.6	16.9	16.1	15.4	14.7	14.0	13.3
104	20.0	19.2	18.4	17.6	16.9	16.1	15.4	14.7	14.0	13.3
105	20.0	19.2	18.4	17.6	16.8	16.1	15.4	14.6	13.9	13.3
106	20.0	19.2	18.4	17.6	16.8	16.1	15.3	14.6	13.9	13.3
107	20.0	19.2	18.4	17.6	16.8	16.1	15.3	14.6	13.9	13.2
108	20.0	19.2	18.4	17.6	16.8	16.1	15.3	14.6	13.9	13.2
109	20.0	19.2	18.4	17.6	16.8	16.1	15.3	14.6	13.9	13.2
110	20.0	19.2	18.4	17.6	16.8	16.1	15.3	14.6	13.9	13.2
111	20.0	19.2	18.4	17.6	16.8	16.0	15.3	14.6	13.9	13.2
112	20.0	19.2	18.4	17.6	16.8	16.0	15.3	14.6	13.9	13.2
113	20.0	19.2	18.4	17.6	16.8	16.0	15.3	14.6	13.9	13.2
114	20.0	19.2	18.4	17.6	16.8	16.0	15.3	14.6	13.9	13.2
115	20.0	19.2	18.4	17.6	16.8	16.0	15.3	14.6	13.9	13.2

TABLE VI—ORDINARY JOINT LIFE AND LAST SURVIVOR ANNUITIES; TWO LIVES—EXPECTED RETURN MULTIPLES

Ages	75	76	77	78	79	80	81	82	83	84
75	16.5	16.1	15.8	15.4	15.1	14.9	14.6	14.4	14.2	14.0
76	16.1	15.7	15.4	15.0	14.7	14.4	14.1	13.9	13.7	13.5
77	15.8	15.4	15.0	14.6	14.3	14.0	13.7	13.4	13.2	13.0
78	15.4	15.0	14.6	14.2	13.9	13.5	13.2	13.0	12.7	12.5
79	15.1	14.7	14.3	13.9	13.5	13.2	12.8	12.5	12.3	12.0
80	14.9	14.4	14.0	13.5	13.2	12.8	12.5	12.2	11.9	11.6
81	14.6	14.1	13.7	13.2	12.8	12.5	12.1	11.8	11.5	11.2
82	14.4	13.9	13.4	13.0	12.5	12.2	11.8	11.5	11.1	10.9
83	14.2	13.7	13.2	12.7	12.3	11.9	11.5	11.1	10.8	10.5
84	14.0	13.5	13.0	12.5	12.0	11.6	11.2	10.9	10.5	10.2
85	13.8	13.3	12.8	12.3	11.8	11.4	11.0	10.6	10.2	9.9
86	13.7	13.1	12.6	12.1	11.6	11.2	10.8	10.4	10.0	9.7
87	13.5	13.0	12.4	11.9	11.4	11.0	10.6	10.1	9.8	9.4
88	13.4	12.8	12.3	11.8	11.3	10.8	10.4	10.0	9.6	9.2
89	13.3	12.7	12.2	11.6	11.1	10.7	10.2	9.8	9.4	9.0
90	13.2	12.6	12.1	11.5	11.0	10.5	10.1	9.6	9.2	8.8
91	13.1	12.5	12.0	11.4	10.9	10.4	9.9	9.5	9.1	8.7
92	13.1	12.5	11.9	11.3	10.8	10.3	9.8	9.4	8.9	8.5
93	13.0	12.4	11.8	11.3	10.7	10.2	9.7	9.3	8.8	8.4
94	12.9	12.3	11.7	11.2	10.6	10.1	9.6	9.2	8.7	8.3
95	12.9	12.3	11.7	11.1	10.6	10.1	9.6	9.1	8.6	8.2
96	12.9	12.2	11.6	11.1	10.5	10.0	9.5	9.0	8.5	8.1
97	12.8	12.2	11.6	11.0	10.5	9.9	9.4	8.9	8.5	8.0
98	12.8	12.2	11.5	11.0	10.4	9.9	9.4	8.9	8.4	8.0
99	12.7	12.1	11.5	10.9	10.4	9.8	9.3	8.8	8.3	7.9
100	12.7	12.1	11.5	10.9	10.3	9.8	9.2	8.7	8.3	7.8
101	12.7	12.1	11.4	10.8	10.3	9.7	9.2	8.7	8.2	7.8
102	12.7	12.0	11.4	10.8	10.2	9.7	9.2	8.7	8.2	7.7
103	12.6	12.0	11.4	10.8	10.2	9.7	9.1	8.6	8.1	7.7
104	12.6	12.0	11.4	10.8	10.2	9.6	9.1	8.6	8.1	7.6
105	12.6	12.0	11.3	10.7	10.2	9.6	9.1	8.5	8.0	7.6
106	12.6	11.9	11.3	10.7	10.1	9.6	9.0	8.5	8.0	7.5
107	12.6	11.9	11.3	10.7	10.1	9.6	9.0	8.5	8.0	7.5
108	12.6	11.9	11.3	10.7	10.1	9.5	9.0	8.5	8.0	7.5
109	12.6	11.9	11.3	10.7	10.1	9.5	9.0	8.4	7.9	7.5
110	12.6	11.9	11.3	10.7	10.1	9.5	9.0	8.4	7.9	7.4

TABLE VI—ORDINARY JOINT LIFE AND LAST SURVIVOR ANNUITIES; TWO LIVES—EXPECTED RETURN MULTIPLES—Continued

Ages	75	76	77	78	79	80	81	82	83	84
111	12.5	11.9	11.3	10.7	10.1	9.5	8.9	8.4	7.9	7.4
112	12.5	11.9	11.3	10.6	10.1	9.5	8.9	8.4	7.9	7.4
113	12.5	11.9	11.2	10.6	10.0	9.5	8.9	8.4	7.9	7.4
114	12.5	11.9	11.2	10.6	10.0	9.5	8.9	8.4	7.9	7.4
115	12.5	11.9	11.2	10.6	10.0	9.5	8.9	8.4	7.9	7.4

TABLE VI—ORDINARY JOINT LIFE AND LAST SURVIVOR ANNUITIES; TWO LIVES—EXPECTED RETURN MULTIPLES

Ages	85	86	87	88	89	90	91	92	93	94
85	9.6	9.3	9.1	8.9	8.7	8.5	8.3	8.2	8.0	7.9
86	9.3	9.1	8.8	8.6	8.3	8.2	8.0	7.8	7.7	7.6
87	9.1	8.8	8.5	8.3	8.1	7.9	7.7	7.5	7.4	7.2
88	8.9	8.6	8.3	8.0	7.8	7.6	7.4	7.2	7.1	6.9
89	8.7	8.3	8.1	7.8	7.5	7.3	7.1	6.9	6.8	6.6
90	8.5	8.2	7.9	7.6	7.3	7.1	6.9	6.7	6.5	6.4
91	8.3	8.0	7.7	7.4	7.1	6.9	6.7	6.5	6.3	6.2
92	8.2	7.8	7.5	7.2	6.9	6.7	6.5	6.3	6.1	5.9
93	8.0	7.7	7.4	7.1	6.8	6.5	6.3	6.1	5.9	5.8
94	7.9	7.6	7.2	6.9	6.6	6.4	6.2	5.9	5.8	5.6
95	7.8	7.5	7.1	6.8	6.5	6.3	6.0	5.8	5.6	5.4
96	7.7	7.3	7.0	6.7	6.4	6.1	5.9	5.7	5.5	5.3
97	7.6	7.3	6.9	6.6	6.3	6.0	5.8	5.5	5.3	5.1
98	7.6	7.2	6.8	6.5	6.2	5.9	5.6	5.4	5.2	5.0
99	7.5	7.1	6.7	6.4	6.1	5.8	5.5	5.3	5.1	4.9
100	7.4	7.0	6.6	6.3	6.0	5.7	5.4	5.2	5.0	4.8
101	7.3	6.9	6.6	6.2	5.9	5.6	5.3	5.1	4.9	4.7
102	7.3	6.9	6.5	6.2	5.8	5.5	5.3	5.0	4.8	4.6
103	7.2	6.8	6.4	6.1	5.8	5.5	5.2	4.9	4.7	4.5
104	7.2	6.8	6.4	6.0	5.7	5.4	5.1	4.8	4.6	4.4
105	7.1	6.7	6.3	6.0	5.6	5.3	5.0	4.8	4.5	4.3
106	7.1	6.7	6.3	5.9	5.6	5.3	5.0	4.7	4.5	4.2
107	7.1	6.6	6.2	5.9	5.5	5.2	4.9	4.6	4.4	4.2
108	7.0	6.6	6.2	5.8	5.5	5.2	4.9	4.6	4.3	4.1
109	7.0	6.6	6.2	5.8	5.5	5.1	4.8	4.5	4.3	4.1
110	7.0	6.6	6.2	5.8	5.4	5.1	4.8	4.5	4.3	4.0
111	7.0	6.5	6.1	5.7	5.4	5.1	4.8	4.5	4.2	4.0
112	7.0	6.5	6.1	5.7	5.4	5.0	4.7	4.4	4.2	3.9
113	6.9	6.5	6.1	5.7	5.4	5.0	4.7	4.4	4.2	3.9
114	6.9	6.5	6.1	5.7	5.3	5.0	4.7	4.4	4.1	3.9
115	6.9	6.5	6.1	5.7	5.3	5.0	4.7	4.4	4.1	3.9

TABLE VI—ORDINARY JOINT LIFE AND LAST SURVIVOR ANNUITIES; TWO LIVES—EXPECTED RETURN MULTIPLES

Ages	95	96	97	98	99	100	101	102	103	104
95	5.3	5.1	5.0	4.8	4.7	4.6	4.5	4.4	4.3	4.2
96	5.1	5.0	4.8	4.7	4.5	4.4	4.3	4.2	4.1	4.0
97	5.0	4.8	4.7	4.5	4.4	4.3	4.1	4.0	3.9	3.8
98	4.8	4.7	4.5	4.4	4.2	4.1	4.0	3.9	3.8	3.7
99	4.7	4.5	4.4	4.2	4.1	4.0	3.8	3.7	3.6	3.5
100	4.6	4.4	4.3	4.1	4.0	3.8	3.7	3.6	3.5	3.3
101	4.5	4.3	4.1	4.0	3.8	3.7	3.6	3.4	3.3	3.2
102	4.4	4.2	4.0	3.9	3.7	3.6	3.4	3.3	3.2	3.1
103	4.3	4.1	3.9	3.8	3.6	3.5	3.3	3.2	3.0	2.9
104	4.2	4.0	3.8	3.7	3.5	3.3	3.2	3.1	2.9	2.8
105	4.1	3.9	3.7	3.6	3.4	3.2	3.1	2.9	2.8	2.7
106	4.0	3.8	3.6	3.5	3.3	3.1	3.0	2.8	2.7	2.5
107	4.0	3.8	3.6	3.4	3.2	3.1	2.9	2.7	2.6	2.4
108	3.9	3.7	3.5	3.3	3.1	3.0	2.8	2.7	2.5	2.3
109	3.8	3.6	3.4	3.3	3.1	2.9	2.7	2.6	2.4	2.3
110	3.8	3.6	3.4	3.2	3.0	2.8	2.7	2.5	2.3	2.2
111	3.8	3.5	3.3	3.2	3.0	2.8	2.6	2.4	2.3	2.1
112	3.7	3.5	3.3	3.1	2.9	2.8	2.6	2.4	2.2	2.1
113	3.7	3.5	3.3	3.1	2.9	2.7	2.5	2.4	2.2	2.0
114	3.7	3.5	3.3	3.1	2.9	2.7	2.5	2.3	2.1	2.0
115	3.7	3.4	3.2	3.0	2.8	2.7	2.5	2.3	2.1	1.9

TABLE VI—ORDINARY JOINT LIFE AND LAST SURVIVOR ANNUITIES; TWO LIVES—EXPECTED RETURN MULTIPLES

Ages	105	106	107	108	109	110	111	112	113	114	115
105	2.5	2.4	2.3	2.2	2.1	2.0	2.0	1.9	1.8	1.8	1.8
106	2.4	2.3	2.2	2.1	2.0	1.9	1.8	1.7	1.7	1.6	1.6
107	2.3	2.2	2.1	1.9	1.8	1.7	1.7	1.6	1.5	1.5	1.4
108	2.2	2.1	1.9	1.8	1.7	1.6	1.5	1.5	1.4	1.3	1.3
109	2.1	2.0	1.8	1.7	1.6	1.5	1.4	1.3	1.3	1.2	1.1
110	2.0	1.9	1.7	1.6	1.5	1.4	1.3	1.2	1.1	1.1	1.0
111	2.0	1.8	1.7	1.5	1.4	1.3	1.2	1.1	1.0	.9	.9
112	1.9	1.7	1.6	1.5	1.3	1.2	1.1	1.0	.9	.8	.8
113	1.8	1.7	1.5	1.4	1.3	1.1	1.0	.9	.8	.7	.7
114	1.8	1.6	1.5	1.3	1.2	1.1	.9	.8	.7	.6	.6
115	1.8	1.6	1.4	1.3	1.1	1.0	.9	.8	.7	.6	.5

TABLE VIA—ANNUITIES FOR JOINT LIFE ONLY; TWO LIVES—EXPECTED RETURN MULTIPLES

Ages	5	6	7	8	9	10	11	12	13	14
5	69.5	69.0	68.4	67.9	67.3	66.7	66.1	65.5	64.8	64.1
6	69.0	68.5	68.0	67.5	66.9	66.4	65.8	65.1	64.5	63.8
7	68.4	68.0	67.5	67.0	66.5	66.0	65.4	64.8	64.2	63.5
8	67.9	67.5	67.0	66.6	66.1	65.5	65.0	64.4	63.8	63.2
9	67.3	66.9	66.5	66.1	65.6	65.1	64.6	64.0	63.4	62.8
10	66.7	66.4	66.0	65.5	65.1	64.6	64.1	63.6	63.0	62.5
11	66.1	65.8	65.4	65.0	64.6	64.1	63.6	63.1	62.6	62.1
12	65.5	65.1	64.8	64.4	64.0	63.6	63.1	62.7	62.2	61.7
13	64.8	64.5	64.2	63.8	63.4	63.0	62.6	62.2	61.7	61.2
14	64.1	63.8	63.5	63.2	62.8	62.5	62.1	61.7	61.2	60.7
15	63.4	63.1	62.9	62.6	62.2	61.9	61.5	61.1	60.7	60.2
16	62.7	62.4	62.2	61.9	61.6	61.3	60.9	60.5	60.1	59.7
17	61.9	61.7	61.5	61.2	60.9	60.6	60.3	59.9	59.6	59.2
18	61.2	61.0	60.7	60.5	60.2	60.0	59.7	59.3	59.0	58.6
19	60.4	60.2	60.0	59.8	59.5	59.3	59.0	58.7	58.4	58.0
20	59.6	59.4	59.2	59.0	58.8	58.6	58.3	58.0	57.7	57.4
21	58.8	58.7	58.5	58.3	58.1	57.8	57.6	57.3	57.1	56.8
22	58.0	57.8	57.7	57.5	57.3	57.1	56.9	56.6	56.4	56.1
23	57.2	57.0	56.9	56.7	56.5	56.4	56.1	55.9	55.7	55.4
24	56.3	56.2	56.1	55.9	55.8	55.6	55.4	55.2	55.0	54.7
25	55.5	55.4	55.2	55.1	55.0	54.8	54.6	54.4	54.2	54.0
26	54.6	54.5	54.4	54.3	54.1	54.0	53.8	53.7	53.5	53.3
27	53.8	53.7	53.6	53.4	53.3	53.2	53.0	52.9	52.7	52.5
28	52.9	52.8	52.7	52.6	52.5	52.4	52.2	52.1	51.9	51.7
29	52.0	51.9	51.8	51.7	51.6	51.5	51.4	51.3	51.1	51.0
30	51.1	51.0	51.0	50.9	50.8	50.7	50.6	50.4	50.3	50.2
31	50.2	50.2	50.1	50.0	49.9	49.8	49.7	49.6	49.5	49.3
32	49.3	49.3	49.2	49.1	49.0	49.0	48.9	48.8	48.6	48.5
33	48.4	48.4	48.3	48.2	48.2	48.1	48.0	47.9	47.8	47.7
34	47.5	47.5	47.4	47.4	47.3	47.2	47.1	47.0	47.0	46.8
35	46.6	46.6	46.5	46.5	46.4	46.3	46.3	46.2	46.1	46.0
36	45.7	45.7	45.6	45.6	45.5	45.4	45.4	45.3	45.2	45.1
37	44.8	44.7	44.7	44.6	44.6	44.5	44.5	44.4	44.3	44.3
38	43.9	43.8	43.8	43.7	43.7	43.6	43.6	43.5	43.5	43.4
39	42.9	42.9	42.9	42.8	42.8	42.7	42.7	42.6	42.6	42.5
40	42.0	42.0	42.0	41.9	41.9	41.8	41.8	41.7	41.7	41.6
41	41.1	41.1	41.0	41.0	41.0	40.9	40.9	40.8	40.8	40.7
42	40.2	40.1	40.1	40.1	40.1	40.0	40.0	39.9	39.9	39.8
43	39.2	39.2	39.2	39.2	39.1	39.1	39.1	39.0	39.0	39.0
44	38.3	38.3	38.3	38.3	38.2	38.2	38.2	38.1	38.1	38.1
45	37.4	37.4	37.4	37.3	37.3	37.3	37.3	37.2	37.2	37.2
46	36.5	36.5	36.5	36.4	36.4	36.4	36.4	36.3	36.3	36.3
47	35.6	35.6	35.5	35.5	35.5	35.5	35.5	35.4	35.4	35.4
48	34.7	34.7	34.6	34.6	34.6	34.6	34.6	34.5	34.5	34.5
49	33.8	33.8	33.7	33.7	33.7	33.7	33.7	33.7	33.6	33.6
50	32.9	32.9	32.8	32.8	32.8	32.8	32.8	32.8	32.7	32.7
51	32.0	32.0	31.9	31.9	31.9	31.9	31.9	31.9	31.9	31.8
52	31.1	31.1	31.1	31.0	31.0	31.0	31.0	31.0	31.0	30.9
53	30.2	30.2	30.2	30.2	30.1	30.1	30.1	30.1	30.1	30.1
54	29.3	29.3	29.3	29.3	29.3	29.2	29.2	29.2	29.2	29.2
55	28.4	28.4	28.4	28.4	28.4	28.4	28.4	28.3	28.3	28.3
56	27.5	27.5	27.5	27.5	27.5	27.5	27.5	27.5	27.5	27.5
57	26.7	26.7	26.7	26.6	26.6	26.6	26.6	26.6	26.6	26.6
58	25.8	25.8	25.8	25.8	25.8	25.8	25.8	25.7	25.7	25.7

TABLE VIA—ANNUITIES FOR JOINT LIFE ONLY; TWO LIVES—EXPECTED RETURN MULTIPLES—Continued

Ages	5	6	7	8	9	10	11	12	13	14
59	24.9	24.9	24.9	24.9	24.9	24.9	24.9	24.9	24.9	24.9
60	24.1	24.1	24.1	24.1	24.1	24.0	24.0	24.0	24.0	24.0
61	23.2	23.2	23.2	23.2	23.2	23.2	23.2	23.2	23.2	23.2
62	22.4	22.4	22.4	22.4	22.4	22.4	22.3	22.3	22.3	22.3
63	21.5	21.5	21.5	21.5	21.5	21.5	21.5	21.5	21.5	21.5
64	20.7	20.7	20.7	20.7	20.7	20.7	20.7	20.7	20.7	20.7
65	19.9	19.9	19.9	19.9	19.9	19.9	19.9	19.9	19.9	19.9
66	19.1	19.1	19.1	19.1	19.1	19.1	19.1	19.1	19.1	19.1
67	18.3	18.3	18.3	18.3	18.3	18.3	18.3	18.3	18.3	18.3
68	17.5	17.5	17.5	17.5	17.5	17.5	17.5	17.5	17.5	17.5
69	16.8	16.8	16.8	16.7	16.7	16.7	16.7	16.7	16.7	16.7
70	16.0	16.0	16.0	16.0	16.0	16.0	16.0	16.0	16.0	16.0
71	15.3	15.3	15.3	15.3	15.3	15.3	15.3	15.3	15.3	15.2
72	14.6	14.6	14.5	14.5	14.5	14.5	14.5	14.5	14.5	14.5
73	13.9	13.9	13.8	13.8	13.8	13.8	13.8	13.8	13.8	13.8
74	13.2	13.2	13.2	13.2	13.2	13.2	13.2	13.2	13.2	13.2
75	12.5	12.5	12.5	12.5	12.5	12.5	12.5	12.5	12.5	12.5
76	11.9	11.9	11.8	11.8	11.8	11.8	11.8	11.8	11.8	11.8
77	11.2	11.2	11.2	11.2	11.2	11.2	11.2	11.2	11.2	11.2
78	10.6	10.6	10.6	10.6	10.6	10.6	10.6	10.6	10.6	10.6
79	10.0	10.0	10.0	10.0	10.0	10.0	10.0	10.0	10.0	10.0
80	9.5	9.5	9.5	9.5	9.5	9.5	9.5	9.5	9.4	9.4
81	8.9	8.9	8.9	8.9	8.9	8.9	8.9	8.9	8.9	8.9
82	8.4	8.4	8.4	8.4	8.4	8.4	8.4	8.4	8.4	8.4
83	7.9	7.9	7.9	7.9	7.9	7.9	7.9	7.9	7.9	7.9
84	7.4	7.4	7.4	7.4	7.4	7.4	7.4	7.4	7.4	7.4
85	6.9	6.9	6.9	6.9	6.9	6.9	6.9	6.9	6.9	6.9
86	6.5	6.5	6.5	6.5	6.5	6.5	6.5	6.5	6.5	6.5
87	6.1	6.1	6.1	6.1	6.1	6.1	6.1	6.1	6.1	6.1
88	5.7	5.7	5.7	5.7	5.7	5.7	5.7	5.7	5.7	5.7
89	5.3	5.3	5.3	5.3	5.3	5.3	5.3	5.3	5.3	5.3
90	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0
91	4.7	4.7	4.7	4.7	4.7	4.7	4.7	4.7	4.7	4.7
92	4.4	4.4	4.4	4.4	4.4	4.4	4.4	4.4	4.4	4.4
93	4.1	4.1	4.1	4.1	4.1	4.1	4.1	4.1	4.1	4.1
94	3.9	3.9	3.9	3.9	3.9	3.9	3.9	3.9	3.9	3.9
95	3.7	3.7	3.7	3.7	3.7	3.7	3.6	3.6	3.6	3.6
96	3.4	3.4	3.4	3.4	3.4	3.4	3.4	3.4	3.4	3.4
97	3.2	3.2	3.2	3.2	3.2	3.2	3.2	3.2	3.2	3.2
98	3.0	3.0	3.0	3.0	3.0	3.0	3.0	3.0	3.0	3.0
99	2.8	2.8	2.8	2.8	2.8	2.8	2.8	2.8	2.8	2.8
100	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.7
101	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
102	2.3	2.3	2.3	2.3	2.3	2.3	2.3	2.3	2.3	2.3
103	2.1	2.1	2.1	2.1	2.1	2.1	2.1	2.1	2.1	2.1
104	1.9	1.9	1.9	1.9	1.9	1.9	1.9	1.9	1.9	1.9
105	1.8	1.8	1.8	1.8	1.8	1.8	1.8	1.8	1.8	1.8
106	1.6	1.6	1.6	1.6	1.6	1.6	1.6	1.6	1.6	1.6
107	1.4	1.4	1.4	1.4	1.4	1.4	1.4	1.4	1.4	1.4
108	1.3	1.3	1.3	1.3	1.3	1.3	1.3	1.3	1.3	1.3
109	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1
110	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0
111	.9	.9	.9	.9	.9	.9	.9	.9	.9	.9
112	.8	.8	.8	.8	.8	.8	.8	.8	.8	.8
113	.7	.7	.7	.7	.7	.7	.7	.7	.7	.7
114	.6	.6	.6	.6	.6	.6	.6	.6	.6	.6
115	.5	.5	.5	.5	.5	.5	.5	.5	.5	.5

TABLE VIA—ANNUITIES FOR JOINT LIFE ONLY; TWO LIVES—EXPECTED RETURN MULTIPLES

Ages	15	16	17	18	19	20	21	22	23	24
15	59.8	59.3	58.8	58.2	57.6	57.0	56.4	55.8	55.1	54.5
16	59.3	58.8	58.3	57.8	57.2	56.7	56.1	55.5	54.8	54.2
17	58.8	58.3	57.8	57.3	56.8	56.3	55.7	55.1	54.5	53.9
18	58.2	57.8	57.3	56.9	56.4	55.9	55.3	54.7	54.2	53.5
19	57.6	57.2	56.8	56.4	55.9	55.4	54.9	54.4	53.8	53.2
20	57.0	56.7	56.3	55.9	55.4	54.9	54.5	53.9	53.4	52.8
21	56.4	56.1	55.7	55.3	54.9	54.5	54.0	53.5	53.0	52.4
22	55.8	55.5	55.1	54.7	54.4	53.9	53.5	53.0	52.5	52.0

TABLE VIA—ANNUITIES FOR JOINT LIFE ONLY; TWO LIVES—EXPECTED RETURN MULTIPLES—Continued

Ages	15	16	17	18	19	20	21	22	23	24
23	55.1	54.8	54.5	54.2	53.8	53.4	53.0	52.5	52.1	51.6
24	54.5	54.2	53.9	53.5	53.2	52.8	52.4	52.0	51.6	51.1
25	53.8	53.5	53.2	52.9	52.6	52.2	51.9	51.5	51.1	50.6
26	53.0	52.8	52.5	52.3	52.0	51.6	51.3	50.9	50.5	50.1
27	52.3	52.1	51.8	51.6	51.3	51.0	50.7	50.3	50.0	49.6
28	51.5	51.3	51.1	50.9	50.6	50.3	50.0	49.7	49.4	49.0
29	50.8	50.6	50.4	50.2	49.9	49.7	49.4	49.1	48.8	48.4
30	50.0	49.8	49.6	49.4	49.2	49.0	48.7	48.4	48.1	47.8
31	49.2	49.0	48.9	48.7	48.5	48.3	48.0	47.8	47.5	47.2
32	48.4	48.2	48.1	47.9	47.7	47.5	47.3	47.1	46.8	46.5
33	47.6	47.4	47.3	47.1	47.0	46.8	46.6	46.3	46.1	45.9
34	46.7	46.6	46.5	46.3	46.2	46.0	45.8	45.6	45.4	45.2
35	45.9	45.8	45.7	45.5	45.4	45.2	45.1	44.9	44.7	44.4
36	45.0	44.9	44.8	44.7	44.6	44.4	44.3	44.1	43.9	43.7
37	44.2	44.1	44.0	43.9	43.8	43.6	43.5	43.3	43.2	43.0
38	43.3	43.2	43.1	43.0	42.9	42.8	42.7	42.5	42.4	42.2
39	42.4	42.4	42.3	42.2	42.1	42.0	41.9	41.7	41.6	41.4
40	41.6	41.5	41.4	41.3	41.2	41.1	41.0	40.9	40.8	40.6
41	40.7	40.6	40.5	40.5	40.4	40.3	40.2	40.1	40.0	39.8
42	39.8	39.7	39.7	39.6	39.5	39.4	39.4	39.3	39.1	39.0
43	38.9	38.9	38.8	38.7	38.7	38.6	38.5	38.4	38.3	38.2
44	38.0	38.0	37.9	37.9	37.8	37.7	37.7	37.6	37.5	37.4
45	37.1	37.1	37.0	37.0	36.9	36.9	36.8	36.7	36.6	36.5
46	36.2	36.2	36.2	36.1	36.1	36.0	35.9	35.9	35.8	35.7
47	35.3	35.3	35.3	35.2	35.2	35.1	35.1	35.0	34.9	34.9
48	34.5	34.4	34.4	34.4	34.3	34.3	34.2	34.2	34.1	34.0
49	33.6	33.5	33.5	33.5	33.4	33.4	33.4	33.3	33.2	33.2
50	32.7	32.7	32.6	32.6	32.6	32.5	32.5	32.4	32.4	32.3
51	31.8	31.8	31.8	31.7	31.7	31.7	31.6	31.6	31.5	31.5
52	30.9	30.9	30.9	30.9	30.8	30.8	30.8	30.7	30.7	30.6
53	30.0	30.0	30.0	30.0	30.0	29.9	29.9	29.9	29.8	29.8
54	29.2	29.2	29.1	29.1	29.1	29.1	29.0	29.0	29.0	28.9
55	28.3	28.3	28.3	28.3	28.2	28.2	28.2	28.2	28.1	28.1
56	27.4	27.4	27.4	27.4	27.4	27.3	27.3	27.3	27.3	27.2
57	26.6	26.6	26.5	26.5	26.5	26.5	26.5	26.5	26.4	26.4
58	25.7	25.7	25.7	25.7	25.7	25.6	25.6	25.6	25.6	25.6
59	24.9	24.8	24.8	24.8	24.8	24.8	24.8	24.8	24.7	24.7
60	24.0	24.0	24.0	24.0	24.0	23.9	23.9	23.9	23.9	23.9
61	23.2	23.2	23.1	23.1	23.1	23.1	23.1	23.1	23.1	23.0
62	22.3	22.3	22.3	22.3	22.3	22.3	22.3	22.2	22.2	22.2
63	21.5	21.5	21.5	21.5	21.5	21.4	21.4	21.4	21.4	21.4
64	20.7	20.7	20.7	20.6	20.6	20.6	20.6	20.6	20.6	20.6
65	19.9	19.8	19.8	19.8	19.8	19.8	19.8	19.8	19.8	19.8
66	19.1	19.0	19.0	19.0	19.0	19.0	19.0	19.0	19.0	19.0
67	18.3	18.3	18.3	18.3	18.2	18.2	18.2	18.2	18.2	18.2
68	17.5	17.5	17.5	17.5	17.5	17.5	17.5	17.5	17.4	17.4
69	16.7	16.7	16.7	16.7	16.7	16.7	16.7	16.7	16.7	16.7
70	16.0	16.0	16.0	16.0	16.0	16.0	15.9	15.9	15.9	15.9
71	15.2	15.2	15.2	15.2	15.2	15.2	15.2	15.2	15.2	15.2
72	14.5	14.5	14.5	14.5	14.5	14.5	14.5	14.5	14.5	14.5
73	13.8	13.8	13.8	13.8	13.8	13.8	13.8	13.8	13.8	13.8
74	13.2	13.1	13.1	13.1	13.1	13.1	13.1	13.1	13.1	13.1
75	12.5	12.5	12.5	12.5	12.5	12.5	12.5	12.5	12.5	12.5
76	11.8	11.8	11.8	11.8	11.8	11.8	11.8	11.8	11.8	11.8
77	11.2	11.2	11.2	11.2	11.2	11.2	11.2	11.2	11.2	11.2
78	10.6	10.6	10.6	10.6	10.6	10.6	10.6	10.6	10.6	10.6
79	10.0	10.0	10.0	10.0	10.0	10.0	10.0	10.0	10.0	10.0
80	9.4	9.4	9.4	9.4	9.4	9.4	9.4	9.4	9.4	9.4
81	8.9	8.9	8.9	8.9	8.9	8.9	8.9	8.9	8.9	8.9
82	8.4	8.4	8.4	8.4	8.4	8.4	8.4	8.4	8.4	8.4
83	7.9	7.9	7.9	7.9	7.9	7.9	7.9	7.9	7.8	7.8
84	7.4	7.4	7.4	7.4	7.4	7.4	7.4	7.4	7.4	7.4
85	6.9	6.9	6.9	6.9	6.9	6.9	6.9	6.9	6.9	6.9
86	6.5	6.5	6.5	6.5	6.5	6.5	6.5	6.5	6.5	6.5
87	6.1	6.1	6.1	6.1	6.1	6.1	6.1	6.1	6.1	6.1
88	5.7	5.7	5.7	5.7	5.7	5.7	5.7	5.7	5.7	5.7
89	5.3	5.3	5.3	5.3	5.3	5.3	5.3	5.3	5.3	5.3
90	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0
91	4.7	4.7	4.7	4.7	4.7	4.7	4.7	4.7	4.7	4.7
92	4.4	4.4	4.4	4.4	4.4	4.4	4.4	4.4	4.4	4.4
93	4.1	4.1	4.1	4.1	4.1	4.1	4.1	4.1	4.1	4.1

TABLE VIA—ANNUITIES FOR JOINT LIFE ONLY; TWO LIVES—EXPECTED RETURN MULTIPLES—Continued

Ages	15	16	17	18	19	20	21	22	23	24
94	3.9	3.9	3.9	3.9	3.9	3.9	3.9	3.9	3.9	3.9
95	3.6	3.6	3.6	3.6	3.6	3.6	3.6	3.6	3.6	3.6
96	3.4	3.4	3.4	3.4	3.4	3.4	3.4	3.4	3.4	3.4
97	3.2	3.2	3.2	3.2	3.2	3.2	3.2	3.2	3.2	3.2
98	3.0	3.0	3.0	3.0	3.0	3.0	3.0	3.0	3.0	3.0
99	2.8	2.8	2.8	2.8	2.8	2.8	2.8	2.8	2.8	2.8
100	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.7
101	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
102	2.3	2.3	2.3	2.3	2.3	2.3	2.3	2.3	2.3	2.3
103	2.1	2.1	2.1	2.1	2.1	2.1	2.1	2.1	2.1	2.1
104	1.9	1.9	1.9	1.9	1.9	1.9	1.9	1.9	1.9	1.9
105	1.8	1.8	1.8	1.8	1.8	1.8	1.8	1.8	1.8	1.8
106	1.6	1.6	1.6	1.6	1.6	1.6	1.6	1.6	1.6	1.6
107	1.4	1.4	1.4	1.4	1.4	1.4	1.4	1.4	1.4	1.4
108	1.3	1.3	1.3	1.3	1.3	1.3	1.3	1.3	1.3	1.3
109	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1
110	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0
111	.9	.9	.9	.9	.9	.9	.9	.9	.9	.9
112	.8	.8	.8	.8	.8	.8	.8	.8	.8	.8
113	.7	.7	.7	.7	.7	.7	.7	.7	.7	.7
114	.6	.6	.6	.6	.6	.6	.6	.6	.6	.6
115	.5	.5	.5	.5	.5	.5	.5	.5	.5	.5

TABLE VIA—ANNUITIES FOR JOINT LIFE ONLY; TWO LIVES—EXPECTED RETURN MULTIPLES

Ages	25	26	27	28	29	30	31	32	33	34
25	50.2	49.7	49.2	48.6	48.1	47.5	46.9	46.2	45.6	44.9
26	49.7	49.2	48.7	48.2	47.7	47.1	46.5	45.9	45.3	44.6
27	49.2	48.7	48.3	47.8	47.3	46.7	46.2	45.6	45.0	44.3
28	48.6	48.2	47.8	47.3	46.8	46.3	45.8	45.2	44.6	44.0
29	48.1	47.7	47.3	46.8	46.4	45.9	45.4	44.8	44.3	43.7
30	47.5	47.1	46.7	46.3	45.9	45.4	44.9	44.4	43.9	43.3
31	46.9	46.5	46.2	45.8	45.4	44.9	44.5	44.0	43.5	42.9
32	46.2	45.9	45.6	45.2	44.8	44.4	44.0	43.5	43.0	42.5
33	45.6	45.3	45.0	44.6	44.3	43.9	43.5	43.0	42.6	42.1
34	44.9	44.6	44.3	44.0	43.7	43.3	42.9	42.5	42.1	41.6
35	44.2	44.0	43.7	43.4	43.1	42.7	42.4	42.0	41.6	41.1
36	43.5	43.3	43.0	42.7	42.4	42.1	41.8	41.4	41.0	40.6
37	42.8	42.5	42.3	42.1	41.8	41.5	41.2	40.8	40.5	40.1
38	42.0	41.8	41.6	41.4	41.1	40.8	40.6	40.2	39.9	39.5
39	41.3	41.1	40.9	40.7	40.4	40.2	39.9	39.6	39.3	39.0
40	40.5	40.3	40.1	39.9	39.7	39.5	39.2	39.0	38.7	38.4
41	39.7	39.5	39.4	39.2	39.0	38.8	38.5	38.3	38.0	37.7
42	38.9	38.8	38.6	38.4	38.3	38.1	37.8	37.6	37.4	37.1
43	38.1	38.0	37.8	37.7	37.5	37.3	37.1	36.9	36.7	36.4
44	37.3	37.2	37.0	36.9	36.7	36.6	36.4	36.2	36.0	35.8
45	36.5	36.3	36.2	36.1	36.0	35.8	35.6	35.5	35.3	35.1
46	35.6	35.5	35.4	35.3	35.2	35.0	34.9	34.7	34.5	34.4
47	34.8	34.7	34.6	34.5	34.4	34.3	34.1	34.0	33.8	33.6
48	34.0	33.9	33.8	33.7	33.6	33.5	33.4	33.2	33.1	32.9
49	33.1	33.0	33.0	32.9	32.8	32.7	32.6	32.4	32.3	32.2
50	32.3	32.2	32.1	32.1	32.0	31.9	31.8	31.7	31.5	31.4
51	31.4	31.4	31.3	31.2	31.2	31.1	31.0	30.9	30.8	30.6
52	30.6	30.5	30.5	30.4	30.3	30.3	30.2	30.1	30.0	29.9
53	29.7	29.7	29.6	29.6	29.5	29.5	29.4	29.3	29.2	29.1
54	28.9	28.9	28.8	28.8	28.7	28.6	28.6	28.5	28.4	28.3
55	28.1	28.0	28.0	27.9	27.9	27.8	27.8	27.7	27.6	27.5
56	27.2	27.2	27.1	27.1	27.0	27.0	26.9	26.9	26.8	26.7
57	26.4	26.3	26.3	26.3	26.2	26.2	26.1	26.1	26.0	25.9
58	25.5	25.5	25.5	25.4	25.4	25.4	25.3	25.3	25.2	25.1
59	24.7	24.7	24.6	24.6	24.6	24.5	24.5	24.5	24.4	24.3
60	23.9	23.8	23.8	23.8	23.8	23.7	23.7	23.6	23.6	23.5
61	23.0	23.0	23.0	23.0	22.9	22.9	22.9	22.8	22.8	22.7
62	22.2	22.2	22.2	22.1	22.1	22.1	22.1	22.0	22.0	21.9
63	21.4	21.4	21.3	21.3	21.3	21.3	21.3	21.2	21.2	21.2
64	20.6	20.6	20.5	20.5	20.5	20.5	20.5	20.4	20.4	20.4
65	19.8	19.8	19.7	19.7	19.7	19.7	19.7	19.6	19.6	19.6
66	19.0	19.0	19.0	18.9	18.9	18.9	18.9	18.9	18.8	18.8
67	18.2	18.2	18.2	18.2	18.2	18.1	18.1	18.1	18.1	18.1

TABLE VIA—ANNUITIES FOR JOINT LIFE ONLY; TWO LIVES—EXPECTED RETURN MULTIPLES—Continued

Ages	25	26	27	28	29	30	31	32	33	34
68	17.4	17.4	17.4	17.4	17.4	17.4	17.4	17.3	17.3	17.3
69	16.7	16.7	16.7	16.6	16.6	16.6	16.6	16.6	16.6	16.6
70	15.9	15.9	15.9	15.9	15.9	15.9	15.9	15.9	15.8	15.8
71	15.2	15.2	15.2	15.2	15.2	15.2	15.2	15.1	15.1	15.1
72	14.5	14.5	14.5	14.5	14.5	14.5	14.5	14.4	14.4	14.4
73	13.8	13.8	13.8	13.8	13.8	13.8	13.8	13.8	13.7	13.7
74	13.1	13.1	13.1	13.1	13.1	13.1	13.1	13.1	13.1	13.1
75	12.5	12.5	12.5	12.4	12.4	12.4	12.4	12.4	12.4	12.4
76	11.8	11.8	11.8	11.8	11.8	11.8	11.8	11.8	11.8	11.8
77	11.2	11.2	11.2	11.2	11.2	11.2	11.2	11.2	11.2	11.1
78	10.6	10.6	10.6	10.6	10.6	10.6	10.6	10.6	10.6	10.5
79	10.0	10.0	10.0	10.0	10.0	10.0	10.0	10.0	10.0	10.0
80	9.4	9.4	9.4	9.4	9.4	9.4	9.4	9.4	9.4	9.4
81	8.9	8.9	8.9	8.9	8.9	8.9	8.9	8.9	8.9	8.9
82	8.4	8.4	8.3	8.3	8.3	8.3	8.3	8.3	8.3	8.3
83	7.8	7.8	7.8	7.8	7.8	7.8	7.8	7.8	7.8	7.8
84	7.4	7.4	7.4	7.4	7.4	7.4	7.4	7.4	7.4	7.4
85	6.9	6.9	6.9	6.9	6.9	6.9	6.9	6.9	6.9	6.9
86	6.5	6.5	6.5	6.5	6.5	6.5	6.5	6.5	6.5	6.5
87	6.1	6.1	6.1	6.1	6.1	6.1	6.1	6.1	6.1	6.1
88	5.7	5.7	5.7	5.7	5.7	5.7	5.7	5.7	5.7	5.7
89	5.3	5.3	5.3	5.3	5.3	5.3	5.3	5.3	5.3	5.3
90	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0
91	4.7	4.7	4.7	4.7	4.7	4.7	4.7	4.7	4.7	4.7
92	4.4	4.4	4.4	4.4	4.4	4.4	4.4	4.4	4.4	4.4
93	4.1	4.1	4.1	4.1	4.1	4.1	4.1	4.1	4.1	4.1
94	3.9	3.9	3.9	3.9	3.9	3.9	3.9	3.9	3.9	3.9
95	3.6	3.6	3.6	3.6	3.6	3.6	3.6	3.6	3.6	3.6
96	3.4	3.4	3.4	3.4	3.4	3.4	3.4	3.4	3.4	3.4
97	3.2	3.2	3.2	3.2	3.2	3.2	3.2	3.2	3.2	3.2
98	3.0	3.0	3.0	3.0	3.0	3.0	3.0	3.0	3.0	3.0
99	2.8	2.8	2.8	2.8	2.8	2.8	2.8	2.8	2.8	2.8
100	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.7
101	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
102	2.3	2.3	2.3	2.3	2.3	2.3	2.3	2.3	2.3	2.3
103	2.1	2.1	2.1	2.1	2.1	2.1	2.1	2.1	2.1	2.1
104	1.9	1.9	1.9	1.9	1.9	1.9	1.9	1.9	1.9	1.9
105	1.8	1.8	1.8	1.8	1.8	1.8	1.8	1.8	1.8	1.8
106	1.6	1.6	1.6	1.6	1.6	1.6	1.6	1.6	1.6	1.6
107	1.4	1.4	1.4	1.4	1.4	1.4	1.4	1.4	1.4	1.4
108	1.3	1.3	1.3	1.3	1.3	1.3	1.3	1.3	1.3	1.3
109	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1
110	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0
111	.9	.9	.9	.9	.9	.9	.9	.9	.9	.9
112	.8	.8	.8	.8	.8	.8	.8	.8	.8	.8
113	.7	.7	.7	.7	.7	.7	.7	.7	.7	.7
114	.6	.6	.6	.6	.6	.6	.6	.6	.6	.6
115	.5	.5	.5	.5	.5	.5	.5	.5	.5	.5

TABLE VIA—ANNUITIES FOR JOINT LIFE ONLY; TWO LIVES—EXPECTED RETURN MULTIPLES

Ages	35	36	37	38	39	40	41	42	43	44
35	40.7	40.2	39.7	39.2	38.6	38.0	37.4	36.8	36.2	35.5
36	40.2	39.7	39.3	38.7	38.2	37.7	37.1	36.5	35.9	35.2
37	39.7	39.3	38.8	38.3	37.8	37.3	36.7	36.2	35.6	34.9
38	39.2	38.7	38.3	37.9	37.4	36.9	36.3	35.8	35.2	34.6
39	38.6	38.2	37.8	37.4	36.9	36.4	35.9	35.4	34.9	34.3
40	38.0	37.7	37.3	36.9	36.4	36.0	35.5	35.0	34.5	34.0
41	37.4	37.1	36.7	36.3	35.9	35.5	35.1	34.6	34.1	33.6
42	36.8	36.5	36.2	35.8	35.4	35.0	34.6	34.1	33.7	33.2
43	36.2	35.9	35.6	35.2	34.9	34.5	34.1	33.7	33.2	32.8
44	35.5	35.2	34.9	34.6	34.3	34.0	33.6	33.2	32.8	32.3
45	34.8	34.6	34.3	34.0	33.7	33.4	33.0	32.7	32.3	31.8
46	34.1	33.9	33.7	33.4	33.1	32.8	32.5	32.1	31.8	31.4
47	33.4	33.2	33.0	32.8	32.5	32.2	31.9	31.6	31.2	30.8
48	32.7	32.5	32.3	32.1	31.8	31.6	31.3	31.0	30.7	30.3
49	32.0	31.8	31.6	31.4	31.2	30.9	30.7	30.4	30.1	29.8
50	31.3	31.1	30.9	30.7	30.5	30.3	30.0	29.8	29.5	29.2
51	30.5	30.4	30.2	30.0	29.8	29.6	29.4	29.2	28.9	28.6

TABLE VIA—ANNUITIES FOR JOINT LIFE ONLY; TWO LIVES—EXPECTED RETURN MULTIPLES—Continued

Ages	35	36	37	38	39	40	41	42	43	44
52	29.7	29.6	29.5	29.3	29.1	28.9	28.7	28.5	28.3	28.0
53	29.0	28.9	28.7	28.6	28.4	28.2	28.1	27.9	27.6	27.4
54	28.2	28.1	28.0	27.8	27.7	27.5	27.4	27.2	27.0	26.8
55	27.4	27.3	27.2	27.1	27.0	26.8	26.7	26.5	26.3	26.1
56	26.7	26.6	26.5	26.3	26.2	26.1	26.0	25.8	25.6	25.4
57	25.9	25.8	25.7	25.6	25.5	25.4	25.2	25.1	24.9	24.8
58	25.1	25.0	24.9	24.8	24.7	24.6	24.5	24.4	24.2	24.1
59	24.3	24.2	24.1	24.1	24.0	23.9	23.8	23.6	23.5	23.4
60	23.5	23.4	23.4	23.3	23.2	23.1	23.0	22.9	22.8	22.7
61	22.7	22.6	22.6	22.5	22.4	22.4	22.3	22.2	22.1	22.0
62	21.9	21.9	21.8	21.7	21.7	21.6	21.5	21.4	21.3	21.2
63	21.1	21.1	21.0	21.0	20.9	20.8	20.8	20.7	20.6	20.5
64	20.3	20.3	20.2	20.2	20.1	20.1	20.0	20.0	19.9	19.8
65	19.6	19.5	19.5	19.4	19.4	19.3	19.3	19.2	19.1	19.1
66	18.8	18.8	18.7	18.7	18.6	18.6	18.5	18.5	18.4	18.4
67	18.0	18.0	18.0	17.9	17.9	17.9	17.8	17.8	17.7	17.6
68	17.3	17.3	17.2	17.2	17.2	17.1	17.1	17.0	17.0	16.9
69	16.5	16.5	16.5	16.5	16.4	16.4	16.4	16.3	16.3	16.2
70	15.8	15.8	15.8	15.7	15.7	15.7	15.6	15.6	15.6	15.5
71	15.1	15.1	15.1	15.0	15.0	15.0	15.0	14.9	14.9	14.9
72	14.4	14.4	14.4	14.3	14.3	14.3	14.3	14.2	14.2	14.2
73	13.7	13.7	13.7	13.7	13.7	13.6	13.6	13.6	13.6	13.5
74	13.1	13.0	13.0	13.0	13.0	13.0	13.0	12.9	12.9	12.9
75	12.4	12.4	12.4	12.4	12.3	12.3	12.3	12.3	12.3	12.2
76	11.8	11.8	11.7	11.7	11.7	11.7	11.7	11.7	11.6	11.6
77	11.1	11.1	11.1	11.1	11.1	11.1	11.1	11.1	11.0	11.0
78	10.5	10.5	10.5	10.5	10.5	10.5	10.5	10.5	10.5	10.4
79	10.0	10.0	9.9	9.9	9.9	9.9	9.9	9.9	9.9	9.9
80	9.4	9.4	9.4	9.4	9.4	9.4	9.4	9.3	9.3	9.3
81	8.9	8.8	8.8	8.8	8.8	8.8	8.8	8.8	8.8	8.8
82	8.3	8.3	8.3	8.3	8.3	8.3	8.3	8.3	8.3	8.3
83	7.8	7.8	7.8	7.8	7.8	7.8	7.8	7.8	7.8	7.8
84	7.3	7.3	7.3	7.3	7.3	7.3	7.3	7.3	7.3	7.3
85	6.9	6.9	6.9	6.9	6.9	6.9	6.9	6.9	6.9	6.9
86	6.5	6.5	6.5	6.5	6.4	6.4	6.4	6.4	6.4	6.4
87	6.1	6.0	6.0	6.0	6.0	6.0	6.0	6.0	6.0	6.0
88	5.7	5.7	5.7	5.7	5.7	5.7	5.7	5.6	5.6	5.6
89	5.3	5.3	5.3	5.3	5.3	5.3	5.3	5.3	5.3	5.3
90	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0
91	4.7	4.7	4.7	4.7	4.7	4.7	4.7	4.7	4.6	4.6
92	4.4	4.4	4.4	4.4	4.4	4.4	4.4	4.4	4.4	4.4
93	4.1	4.1	4.1	4.1	4.1	4.1	4.1	4.1	4.1	4.1
94	3.9	3.9	3.9	3.9	3.9	3.9	3.9	3.9	3.9	3.9
95	3.6	3.6	3.6	3.6	3.6	3.6	3.6	3.6	3.6	3.6
96	3.4	3.4	3.4	3.4	3.4	3.4	3.4	3.4	3.4	3.4
97	3.2	3.2	3.2	3.2	3.2	3.2	3.2	3.2	3.2	3.2
98	3.0	3.0	3.0	3.0	3.0	3.0	3.0	3.0	3.0	3.0
99	2.8	2.8	2.8	2.8	2.8	2.8	2.8	2.8	2.8	2.8
100	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.6	2.6
101	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
102	2.3	2.3	2.3	2.3	2.3	2.3	2.3	2.3	2.3	2.3
103	2.1	2.1	2.1	2.1	2.1	2.1	2.1	2.1	2.1	2.1
104	1.9	1.9	1.9	1.9	1.9	1.9	1.9	1.9	1.9	1.9
105	1.8	1.8	1.8	1.8	1.8	1.8	1.8	1.8	1.8	1.8
106	1.6	1.6	1.6	1.6	1.6	1.6	1.6	1.6	1.6	1.6
107	1.4	1.4	1.4	1.4	1.4	1.4	1.4	1.4	1.4	1.4
108	1.3	1.3	1.3	1.3	1.3	1.3	1.3	1.3	1.3	1.3
109	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1
110	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0
111	.9	.9	.9	.9	.9	.9	.9	.9	.9	.9
112	.8	.8	.8	.8	.8	.8	.8	.8	.8	.8
113	.7	.7	.7	.7	.7	.7	.7	.7	.7	.7
114	.6	.6	.6	.6	.6	.6	.6	.6	.6	.6
115	.5	.5	.5	.5	.5	.5	.5	.5	.5	.5

TABLE VIA—ANNUITIES FOR JOINT LIFE ONLY; TWO LIVES—EXPECTED RETURN MULTIPLES

Ages	45	46	47	48	49	50	51	52	53	54
45	31.4	30.9	30.5	30.0	29.4	28.9	28.3	27.7	27.1	26.5

TABLE VIA—ANNUITIES FOR JOINT LIFE ONLY; TWO LIVES—EXPECTED RETURN MULTIPLES—Continued

Ages	45	46	47	48	49	50	51	52	53	54
46	30.9	30.5	30.0	29.6	29.1	28.5	28.0	27.4	26.9	26.3
47	30.5	30.0	29.6	29.2	28.7	28.2	27.7	27.1	26.6	26.0
48	30.0	29.6	29.2	28.7	28.3	27.8	27.3	26.8	26.3	25.7
49	29.4	29.1	28.7	28.3	27.9	27.4	26.9	26.5	25.9	25.4
50	28.9	28.5	28.2	27.4	27.4	27.0	26.5	26.1	25.6	25.1
51	28.3	28.0	27.7	27.3	26.9	26.5	26.1	25.7	25.2	24.7
52	27.7	27.4	27.1	26.8	26.5	26.1	25.7	25.3	24.8	24.4
53	27.1	26.9	26.6	26.3	25.9	25.6	25.2	24.8	24.4	24.0
54	26.5	26.3	26.0	25.7	25.4	25.1	24.7	24.4	24.0	23.6
55	25.9	25.7	25.4	25.1	24.9	24.6	24.2	23.9	23.5	23.2
56	25.2	25.0	24.8	24.6	24.3	24.0	23.7	23.4	23.1	22.7
57	24.6	24.4	24.2	24.0	23.7	23.5	23.2	22.9	22.6	22.2
58	23.9	23.7	23.5	23.3	23.1	22.9	22.6	22.4	22.1	21.7
59	23.2	23.1	22.9	22.7	22.5	22.3	22.1	21.8	21.5	21.2
60	22.5	22.4	22.2	22.1	21.9	21.7	21.5	21.2	21.0	20.7
61	21.8	21.7	21.6	21.4	21.2	21.1	20.9	20.6	20.4	20.2
62	21.1	21.0	20.9	20.7	20.6	20.4	20.2	20.0	19.8	19.6
63	20.4	20.3	20.2	20.1	19.9	19.8	19.6	19.4	19.2	19.0
64	19.7	19.6	19.5	19.4	19.3	19.1	19.0	18.8	18.6	18.5
65	19.0	18.9	18.8	18.7	18.6	18.5	18.3	18.2	18.0	17.9
66	18.3	18.2	18.1	18.0	17.9	17.8	17.7	17.6	17.4	17.3
67	17.6	17.5	17.4	17.3	17.3	17.2	17.1	16.9	16.8	16.7
68	16.9	16.8	16.7	16.7	16.6	16.5	16.4	16.3	16.2	16.1
69	16.2	16.1	16.1	16.0	15.9	15.8	15.8	15.7	15.6	15.4
70	15.5	15.4	15.4	15.3	15.3	15.2	15.1	15.0	14.9	14.8
71	14.8	14.8	14.7	14.7	14.6	14.5	14.5	14.4	14.3	14.2
72	14.1	14.1	14.1	14.0	14.0	13.9	13.8	13.8	13.7	13.6
73	13.5	13.5	13.4	13.4	13.3	13.3	13.2	13.2	13.1	13.0
74	12.8	12.8	12.8	12.7	12.7	12.7	12.6	12.6	12.5	12.4
75	12.2	12.2	12.2	12.1	12.1	12.1	12.0	12.0	11.9	11.9
76	11.6	11.6	11.6	11.5	11.5	11.5	11.4	11.4	11.3	11.3
77	11.0	11.0	11.0	10.9	10.9	10.9	10.8	10.8	10.8	10.7
78	10.4	10.4	10.4	10.4	10.3	10.3	10.3	10.2	10.2	10.2
79	9.9	9.8	9.8	9.8	9.8	9.8	9.7	9.7	9.7	9.6
80	9.3	9.3	9.3	9.3	9.2	9.2	9.2	9.2	9.1	9.1
81	8.8	8.8	8.7	8.7	8.7	8.7	8.7	8.7	8.6	8.6
82	8.3	8.2	8.2	8.2	8.2	8.2	8.2	8.2	8.1	8.1
83	7.8	7.8	7.7	7.7	7.7	7.7	7.7	7.7	7.7	7.6
84	7.3	7.3	7.3	7.3	7.3	7.2	7.2	7.2	7.2	7.2
85	6.8	6.8	6.8	6.8	6.8	6.8	6.8	6.8	6.8	6.7
86	6.4	6.4	6.4	6.4	6.4	6.4	6.4	6.4	6.3	6.3
87	6.0	6.0	6.0	6.0	6.0	6.0	6.0	6.0	6.0	5.9
88	5.6	5.6	5.6	5.6	5.6	5.6	5.6	5.6	5.6	5.6
89	5.3	5.3	5.3	5.3	5.3	5.3	5.2	5.2	5.2	5.2
90	5.0	4.9	4.9	4.9	4.9	4.9	4.9	4.9	4.9	4.9
91	4.6	4.6	4.6	4.6	4.6	4.6	4.6	4.6	4.6	4.6
92	4.4	4.4	4.4	4.3	4.3	4.3	4.3	4.3	4.3	4.3
93	4.1	4.1	4.1	4.1	4.1	4.1	4.1	4.1	4.1	4.1
94	3.9	3.9	3.8	3.8	3.8	3.8	3.8	3.8	3.8	3.8
95	3.6	3.6	3.6	3.6	3.6	3.6	3.6	3.6	3.6	3.6
96	3.4	3.4	3.4	3.4	3.4	3.4	3.4	3.4	3.4	3.4
97	3.2	3.2	3.2	3.2	3.2	3.2	3.2	3.2	3.2	3.2
98	3.0	3.0	3.0	3.0	3.0	3.0	3.0	3.0	3.0	3.0
99	2.8	2.8	2.8	2.8	2.8	2.8	2.8	2.8	2.8	2.8
100	2.6	2.6	2.6	2.6	2.6	2.6	2.6	2.6	2.6	2.6
101	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
102	2.3	2.3	2.3	2.3	2.3	2.3	2.3	2.3	2.3	2.3
103	2.1	2.1	2.1	2.1	2.1	2.1	2.1	2.1	2.1	2.1
104	1.9	1.9	1.9	1.9	1.9	1.9	1.9	1.9	1.9	1.9
105	1.8	1.8	1.8	1.8	1.8	1.8	1.8	1.8	1.8	1.8
106	1.6	1.6	1.6	1.6	1.6	1.6	1.6	1.6	1.6	1.6
107	1.4	1.4	1.4	1.4	1.4	1.4	1.4	1.4	1.4	1.4
108	1.3	1.3	1.3	1.3	1.3	1.3	1.3	1.3	1.3	1.3
109	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1
110	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0
111	.9	.9	.9	.9	.9	.9	.9	.9	.9	.9
112	.8	.8	.8	.8	.8	.8	.8	.8	.8	.8
113	.7	.7	.7	.7	.7	.7	.7	.7	.7	.7
114	.6	.6	.6	.6	.6	.6	.6	.6	.6	.6
115	.5	.5	.5	.5	.5	.5	.5	.5	.5	.5

TABLE VIA—ANNUITIES FOR JOINT LIFE ONLY; TWO LIVES—EXPECTED RETURN MULTIPLES

Ages	55	56	57	58	59	60	61	62	63	64
55	22.7	22.3	21.9	21.4	20.9	20.4	19.9	19.4	18.8	18.3
56	22.3	21.9	21.5	21.1	20.6	20.1	19.6	19.1	18.6	18.0
57	21.9	21.5	21.1	20.7	20.3	19.8	19.3	18.8	18.3	17.8
58	21.4	21.1	20.7	20.3	19.9	19.5	19.0	18.5	18.0	17.5
59	20.9	20.6	20.3	19.9	19.5	19.1	18.7	18.2	17.7	17.3
60	20.4	20.1	19.8	19.5	19.1	18.7	18.3	17.9	17.4	17.0
61	29.9	19.6	19.3	19.0	18.7	18.3	17.9	17.5	17.1	16.7
62	19.4	19.1	18.8	18.5	18.2	17.9	17.5	17.1	16.8	16.3
63	18.8	18.6	18.3	18.0	17.7	17.4	17.1	16.8	16.4	16.0
64	18.3	18.0	17.8	17.5	17.3	17.0	16.7	16.3	16.0	15.6
65	17.7	17.5	17.3	17.0	16.8	16.5	16.2	15.9	15.6	15.3
66	17.1	16.9	16.7	16.5	16.3	16.0	15.8	15.5	15.2	14.9
67	16.5	16.3	16.2	16.0	15.8	15.5	15.3	15.0	14.7	14.5
68	15.9	15.8	15.6	15.4	15.2	15.0	14.8	14.6	14.3	14.0
69	15.3	15.2	15.0	14.9	14.7	14.5	14.3	14.1	13.9	13.6
70	14.7	14.6	14.5	14.3	14.2	14.0	13.8	13.6	13.4	13.2
71	14.1	14.0	13.9	13.8	13.6	13.5	13.3	13.1	12.9	12.7
72	13.5	13.4	13.3	13.2	13.1	12.9	12.8	12.6	12.4	12.3
73	13.0	12.9	12.8	12.7	12.5	12.4	12.3	12.1	12.0	11.8
74	12.4	12.3	12.2	12.1	12.0	11.9	11.8	11.6	11.5	11.3
75	11.8	11.7	11.7	11.6	11.5	11.4	11.3	11.1	11.0	10.9
76	11.2	11.2	11.1	11.0	10.9	10.9	10.8	10.6	10.5	10.4
77	10.7	10.6	10.6	10.5	10.4	10.3	10.3	10.2	10.0	9.9
78	10.1	10.1	10.0	10.0	9.9	9.8	9.8	9.7	9.6	9.5
79	9.6	9.6	9.5	9.5	9.4	9.3	9.3	9.2	9.1	9.0
80	9.1	9.0	9.0	9.0	8.9	8.9	8.8	8.7	8.7	8.6
81	8.6	8.5	8.5	8.5	8.4	8.4	8.3	8.3	8.2	8.1
82	8.1	8.1	8.0	8.0	8.0	7.9	7.9	7.8	7.8	7.7
83	7.6	7.6	7.6	7.5	7.5	7.5	7.4	7.4	7.3	7.3
84	7.2	7.1	7.1	7.1	7.1	7.0	7.0	7.0	6.9	6.9
85	6.7	6.7	6.7	6.7	6.6	6.6	6.6	6.5	6.5	6.5
86	6.3	6.3	6.3	6.3	6.2	6.2	6.2	6.2	6.1	6.1
87	5.9	5.9	5.9	5.9	5.9	5.8	5.8	5.8	5.8	5.7
88	5.6	5.5	5.5	5.5	5.5	5.5	5.5	5.4	5.4	5.4
89	5.2	5.2	5.2	5.2	5.2	5.1	5.1	5.1	5.1	5.1
90	4.9	4.9	4.9	4.9	4.9	4.8	4.8	4.8	4.8	4.8
91	4.6	4.6	4.6	4.6	4.6	4.5	4.5	4.5	4.5	4.5
92	4.3	4.3	4.3	4.3	4.3	4.3	4.3	4.2	4.2	4.2
93	4.1	4.1	4.0	4.0	4.0	4.0	4.0	4.0	4.0	4.0
94	3.8	3.8	3.8	3.8	3.8	3.8	3.8	3.8	3.8	3.7
95	3.6	3.6	3.6	3.6	3.6	3.6	3.6	3.6	3.5	3.5
96	3.4	3.4	3.4	3.4	3.4	3.4	3.4	3.3	3.3	3.3
97	3.2	3.2	3.2	3.2	3.2	3.2	3.2	3.2	3.1	3.1
98	3.0	3.0	3.0	3.0	3.0	3.0	3.0	3.0	3.0	3.0
99	2.8	2.8	2.8	2.8	2.8	2.8	2.8	2.8	2.8	2.8
100	2.6	2.6	2.6	2.6	2.6	2.6	2.6	2.6	2.6	2.6
101	2.5	2.4	2.4	2.4	2.4	2.4	2.4	2.4	2.4	2.4
102	2.3	2.3	2.3	2.3	2.3	2.3	2.3	2.3	2.3	2.2
103	2.1	2.1	2.1	2.1	2.1	2.1	2.1	2.1	2.1	2.1
104	1.9	1.9	1.9	1.9	1.9	1.9	1.9	1.9	1.9	1.9
105	1.8	1.8	1.8	1.8	1.8	1.8	1.7	1.7	1.7	1.7
106	1.6	1.6	1.6	1.6	1.6	1.6	1.6	1.6	1.6	1.6
107	1.4	1.4	1.4	1.4	1.4	1.4	1.4	1.4	1.4	1.4
108	1.3	1.3	1.3	1.3	1.3	1.3	1.3	1.3	1.3	1.3
109	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1
110	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0
111	.9	.9	.9	.9	.9	.9	.9	.9	.9	.9
112	.8	.8	.8	.8	.8	.8	.8	.8	.8	.8
113	.7	.7	.7	.7	.7	.7	.7	.7	.7	.7
114	.6	.6	.6	.6	.6	.6	.6	.6	.6	.6
115	.5	.5	.5	.5	.5	.5	.5	.5	.5	.5

TABLE VIA—ANNUITIES FOR JOINT LIFE ONLY; TWO LIVES—EXPECTED RETURN MULTIPLES

Ages	65	66	67	68	69	70	71	72	73	74
65	14.9	14.5	14.1	13.7	13.3	12.9	12.5	12.0	11.6	11.2
66	14.5	14.2	13.8	13.4	13.1	12.6	12.2	11.8	11.4	11.0
67	14.1	13.8	13.5	13.1	12.8	12.4	12.0	11.6	11.2	10.8
68	13.7	13.4	13.1	12.8	12.5	12.1	11.7	11.4	11.0	10.6
69	13.3	13.1	12.8	12.5	12.1	11.8	11.4	11.1	10.7	10.4

TABLE VIA—ANNUITIES FOR JOINT LIFE ONLY; TWO LIVES—EXPECTED RETURN MULTIPLES—Continued

Ages	65	66	67	68	69	70	71	72	73	74
70	12.9	12.6	12.4	12.1	11.8	11.5	11.2	10.8	10.5	10.1
71	12.5	12.2	12.0	11.7	11.4	11.2	10.9	10.5	10.2	9.9
72	12.0	11.8	11.6	11.4	11.1	10.8	10.5	10.2	9.9	9.6
73	11.6	11.4	11.2	11.0	10.7	10.5	10.2	9.9	9.7	9.4
74	11.2	11.0	10.8	10.6	10.4	10.1	9.9	9.6	9.4	9.1
75	10.7	10.5	10.4	10.2	10.0	9.8	9.5	9.3	9.1	8.8
76	10.3	10.1	9.9	9.8	9.6	9.4	9.2	9.0	8.8	8.5
77	9.8	9.7	9.5	9.4	9.2	9.0	8.8	8.6	8.4	8.2
78	9.4	9.2	9.1	9.0	8.8	8.7	8.5	8.3	8.1	7.9
79	8.9	8.8	8.7	8.6	8.4	8.3	8.1	8.0	7.8	7.6
80	8.5	8.4	8.3	8.2	8.0	7.9	7.8	7.6	7.5	7.3
81	8.0	8.0	7.9	7.9	7.7	7.5	7.4	7.3	7.1	7.0
82	7.6	7.5	7.5	7.4	7.3	7.2	7.1	6.9	6.8	6.7
83	7.2	7.1	7.1	7.0	6.9	6.8	6.7	6.6	6.5	6.4
84	6.8	6.7	6.7	6.6	6.5	6.4	6.4	6.3	6.2	6.0
85	6.4	6.4	6.3	6.2	6.2	6.1	6.0	5.9	5.8	5.7
86	6.0	6.0	5.9	5.9	5.8	5.8	5.7	5.6	5.5	5.4
87	5.7	5.6	5.6	5.6	5.5	5.4	5.4	5.3	5.2	5.2
88	5.3	5.3	5.3	5.2	5.2	5.1	5.1	5.0	5.0	4.9
89	5.0	5.0	5.0	4.9	4.9	4.8	4.8	4.7	4.7	4.6
90	4.7	4.7	4.7	4.6	4.6	4.6	4.5	4.5	4.4	4.4
91	4.5	4.4	4.4	4.4	4.3	4.3	4.3	4.2	4.2	4.1
92	4.2	4.2	4.1	4.1	4.1	4.1	4.0	4.0	3.9	3.9
93	3.9	3.9	3.9	3.9	3.9	3.8	3.8	3.8	3.7	3.7
94	3.7	3.7	3.7	3.7	3.6	3.6	3.6	3.6	3.5	3.5
95	3.5	3.5	3.5	3.5	3.4	3.4	3.4	3.4	3.3	3.3
96	3.3	3.3	3.3	3.3	3.3	3.2	3.2	3.2	3.2	3.1
97	3.1	3.1	3.1	3.1	3.1	3.1	3.0	3.0	3.0	3.0
98	2.9	2.9	2.9	2.9	2.9	2.9	2.9	2.9	2.8	2.8
99	2.8	2.8	2.8	2.7	2.7	2.7	2.7	2.7	2.7	2.6
100	2.6	2.6	2.6	2.6	2.6	2.5	2.5	2.5	2.5	2.5
101	2.4	2.4	2.4	2.4	2.4	2.4	2.4	2.4	2.3	2.3
102	2.2	2.2	2.2	2.2	2.2	2.2	2.2	2.2	2.2	2.2
103	2.1	2.1	2.1	2.1	2.1	2.0	2.0	2.0	2.0	2.0
104	1.9	1.9	1.9	1.9	1.9	1.9	1.9	1.9	.19	1.9
105	1.7	1.7	1.7	1.7	.17	1.7	1.7	1.7	1.7	1.7
106	1.6	1.6	.16	1.6	1.6	1.6	1.6	1.6	1.5	1.5
107	1.4	1.4	1.4	1.4	1.4	1.4	1.4	1.4	1.4	1.4
108	1.3	1.3	1.3	1.3	1.3	1.3	1.3	1.3	1.3	1.3
109	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1
110	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0
111	.9	.9	.9	.9	.9	.9	.9	.9	.9	.9
112	.8	.8	.8	.8	.8	.8	.8	.8	.8	.8
113	.7	.7	.7	.7	.7	.6	.6	.6	.6	.6
114	.6	.6	.6	.6	.6	.6	.5	.5	.5	.5
115	.5	.5	.5	.5	.5	.5	.5	.5	.5	.5

TABLE VIA—ANNUITIES FOR JOINT LIFE ONLY; TWO LIVES—EXPECTED RETURN MULTIPLES

Ages	75	76	77	78	79	80	81	82	83	84
75	8.6	8.3	8.0	7.7	7.4	7.1	6.8	6.5	6.2	5.9
76	8.3	8.0	7.8	7.5	7.2	6.9	6.7	6.4	6.1	5.8
77	8.0	7.8	7.5	7.3	7.0	6.8	6.5	6.2	5.9	5.7
78	7.7	7.5	7.3	7.0	6.8	6.6	6.3	6.0	5.8	5.5
79	7.4	7.2	7.0	6.8	6.6	6.3	6.1	5.9	5.6	5.4
80	7.1	6.9	6.8	6.6	6.3	6.1	5.9	5.7	5.5	5.2
81	6.8	6.7	6.5	6.3	6.1	5.9	5.7	5.5	5.3	5.1
82	6.5	6.4	6.2	6.0	5.9	5.7	5.5	5.3	5.1	4.9
83	6.2	6.1	5.9	5.8	5.6	5.5	5.3	5.1	4.9	4.7
84	5.9	5.8	5.7	5.5	5.4	5.2	5.1	4.9	4.7	4.6
85	5.6	5.5	5.4	5.3	5.2	5.0	4.9	4.7	4.6	4.4
86	5.4	5.3	5.1	5.0	4.9	4.8	4.7	4.5	4.4	4.2
87	5.1	5.0	4.9	4.8	4.7	4.6	4.4	4.3	4.2	4.1
88	4.8	4.7	4.6	4.5	4.4	4.3	4.2	4.1	4.0	3.9
89	4.5	4.5	4.4	4.3	4.2	4.1	4.0	3.9	3.8	3.7
90	4.3	4.2	4.2	4.1	4.0	3.9	3.8	3.8	3.7	3.5
91	4.1	4.0	4.0	3.9	3.8	3.7	3.7	3.6	3.5	3.4
92	3.9	3.8	3.7	3.7	3.6	3.6	3.5	3.4	3.3	3.2
93	3.7	3.6	3.6	3.5	3.4	3.4	3.3	3.2	3.2	3.1

TABLE VIA—ANNUITIES FOR JOINT LIFE ONLY; TWO LIVES—EXPECTED RETURN MULTIPLES—Continued

Ages	75	76	77	78	79	80	81	82	83	84
94	3.5	3.4	3.4	3.3	3.3	3.2	3.2	3.1	3.0	3.0
95	3.3	3.2	3.2	3.2	3.1	3.1	3.0	3.0	2.9	2.8
96	3.1	3.1	3.0	3.0	3.0	2.9	2.9	2.8	2.8	2.7
97	2.9	2.9	2.9	2.9	2.8	2.8	2.7	2.7	2.6	2.6
98	2.8	2.8	2.7	2.7	2.7	2.6	2.6	2.6	2.5	2.5
99	2.6	2.6	2.6	2.6	2.5	2.5	2.5	2.4	2.4	2.3
100	2.5	2.5	2.4	2.4	2.4	2.4	2.3	2.3	2.3	2.2
101	2.3	2.3	2.3	2.3	2.2	2.2	2.2	2.2	2.1	2.1
102	2.2	2.1	2.1	2.1	2.1	2.1	2.0	2.0	2.0	2.0
103	2.0	2.0	2.0	2.0	1.9	1.9	1.9	1.9	1.9	1.8
104	1.8	1.8	1.8	1.8	1.8	1.8	1.8	1.7	1.7	1.7
105	1.7	1.7	1.7	1.7	1.6	1.6	1.6	1.6	1.6	1.6
106	1.5	1.5	1.5	1.5	1.5	1.5	1.5	1.5	1.5	1.4
107	1.4	1.4	1.4	1.4	1.4	1.4	1.3	1.3	1.3	1.3
108	1.3	1.2	1.2	1.2	1.2	1.2	1.2	1.2	1.2	1.2
109	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1
110	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0
111	.9	.9	.9	.9	.9	.9	.9	.9	.8	.8
112	.8	.8	.8	.7	.7	.7	.7	.7	.7	.7
113	.6	.6	.6	.6	.6	.6	.6	.6	.6	.6
114	.5	.5	.5	.5	.5	.5	.5	.5	.5	.5
115	.5	.5	.5	.5	.5	.5	.5	.5	.5	.5

TABLE VIA—ANNUITIES FOR JOINT LIFE ONLY; TWO LIVES—EXPECTED RETURN MULTIPLES

Ages	85	86	87	88	89	90	91	92	93	94
85	4.2	4.1	3.9	3.8	3.6	3.4	3.3	3.2	3.0	2.9
86	4.1	3.9	3.8	3.6	3.5	3.3	3.2	3.1	2.9	2.8
87	3.9	3.8	3.6	3.5	3.4	3.2	3.1	3.0	2.8	2.7
88	3.8	3.6	3.5	3.4	3.2	3.1	3.0	2.9	2.8	2.6
89	3.6	3.5	3.4	3.2	3.1	3.0	2.9	2.8	2.7	2.6
90	3.4	3.3	3.2	3.1	3.0	2.9	2.8	2.7	2.6	2.5
91	3.3	3.2	3.1	3.0	2.9	2.8	2.7	2.6	2.5	2.4
92	3.2	3.1	3.0	2.9	2.8	2.7	2.6	2.5	2.4	2.3
93	3.0	2.9	2.8	2.8	2.7	2.6	2.5	2.4	2.3	2.3
94	2.9	2.8	2.7	2.6	2.6	2.5	2.4	2.3	2.3	2.2
95	2.8	2.7	2.6	2.5	2.5	2.4	2.3	2.2	2.2	2.1
96	2.6	2.6	2.5	2.4	2.4	2.3	2.2	2.2	2.1	2.0
97	2.5	2.5	2.4	2.3	2.3	2.2	2.2	2.1	2.0	2.0
98	2.4	2.4	2.3	2.2	2.2	2.1	2.1	2.0	2.0	1.9
99	2.3	2.2	2.2	2.1	2.1	2.0	2.0	1.9	1.9	1.8
100	2.2	2.1	2.1	2.0	2.0	1.9	1.9	1.9	1.8	1.8
101	2.1	2.0	2.0	1.9	1.9	1.9	1.8	1.8	1.7	1.7
102	1.9	1.9	1.9	1.8	1.8	1.8	1.7	1.7	1.6	1.6
103	1.8	1.8	1.8	1.7	1.7	1.7	1.6	1.6	1.5	1.5
104	1.7	1.7	1.6	1.6	1.6	1.5	1.5	1.5	1.5	1.4
105	1.6	1.5	1.5	1.5	1.5	1.4	1.4	1.4	1.4	1.3
106	1.4	1.4	1.4	1.4	1.4	1.3	1.3	1.3	1.3	1.2
107	1.3	1.3	1.3	1.3	1.2	1.2	1.2	1.2	1.2	1.2
108	1.2	1.2	1.2	1.1	1.1	1.1	1.1	1.1	1.1	1.1
109	1.1	1.1	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0
110	.9	.9	.9	.9	.9	.9	.9	.9	.9	.9
111	.8	.8	.8	.8	.8	.8	.8	.8	.8	.8
112	.7	.7	.7	.7	.7	.7	.7	.7	.7	.7
113	.6	.6	.6	.6	.6	.6	.6	.6	.6	.6
114	.5	.5	.5	.5	.5	.5	.5	.5	.5	.5
115	.5	.5	.5	.5	.5	.5	.5	.5	.5	.5

TABLE VIA—ANNUITIES FOR JOINT LIFE ONLY; TWO LIVES—EXPECTED RETURN MULTIPLES

Ages	95	96	97	98	99	100	101	102	103	104
95	2.0	2.0	1.9	1.8	1.8	1.7	1.6	1.6	1.5	1.4
96	2.0	1.9	1.9	1.8	1.7	1.7	1.6	1.5	1.5	1.4
97	1.9	1.9	1.8	1.7	1.7	1.6	1.6	1.5	1.4	1.3
98	1.8	1.8	1.7	1.7	1.6	1.6	1.5	1.5	1.4	1.3
99	1.8	1.7	1.7	1.6	1.6	1.5	1.5	1.4	1.4	1.3
100	1.7	1.7	1.6	1.6	1.5	1.5	1.4	1.4	1.3	1.3

TABLE VIA—ANNUITIES FOR JOINT LIFE ONLY; TWO LIVES—EXPECTED RETURN MULTIPLES—Continued

Ages	95	96	97	98	99	100	101	102	103	104
101	1.6	1.6	1.6	1.5	1.5	1.4	1.4	1.3	1.3	1.2
102	1.6	1.5	1.5	1.5	1.4	1.4	1.3	1.3	1.2	1.2
103	1.5	1.5	1.4	1.4	1.4	1.3	1.3	1.2	1.2	1.1
104	1.4	1.4	1.3	1.3	1.3	1.3	1.2	1.2	1.1	1.1
105	1.3	1.3	1.3	1.2	1.2	1.2	1.2	1.1	1.1	1.0
106	1.2	1.2	1.2	1.2	1.1	1.1	1.1	1.1	1.0	1.0
107	1.1	1.1	1.1	1.1	1.1	1.0	1.0	1.0	1.0	9
108	1.0	1.0	1.0	1.0	1.0	1.0	1.0	.9	.9	.9
109	1.0	.9	.9	.9	.9	.9	.9	.9	.8	.8
110	.9	.9	.8	.8	.8	.8	.8	.8	.8	.8
111	.8	.8	.8	.8	.8	.7	.7	.7	.7	.7
112	.7	.7	.7	.7	.7	.7	.7	.7	.6	.6
113	.6	.6	.6	.6	.6	.6	.6	.6	.6	.6
114	.5	.5	.5	.5	.5	.5	.5	.5	.5	.5
115	.5	.5	.5	.5	.5	.5	.5	.5	.5	.5

TABLE VIAA—ANNUITIES FOR JOINT LIFE ONLY; TWO LIVES—EXPECTED RETURN MULTIPLES

Ages	105	106	107	108	109	110	111	112	113	114	115
105	1.0	1.0	.9	.9	.8	.7	.7	.6	.6	.5	.5
106	1.0	.9	.9	.8	.8	.7	.7	.6	.6	.5	.5
107	.9	.9	.8	.8	.7	.7	.7	.6	.6	.5	.5
108	.9	.8	.8	.8	.7	.7	.6	.6	.5	.5	.5
109	.8	.8	.7	.7	.7	.7	.6	.6	.5	.5	.5
110	.7	.7	.7	.7	.7	.6	.6	.6	.5	.5	.5
111	.7	.7	.7	.6	.6	.6	.6	.5	.5	.5	.5
112	.6	.6	.6	.6	.6	.6	.5	.5	.5	.5	.5
113	.6	.6	.6	.5	.5	.5	.5	.5	.5	.5	.5
114	.5	.5	.5	.5	.5	.5	.5	.5	.5	.5	.5
115	.5	.5	.5	.5	.5	.5	.5	.5	.5	.5	.5

TABLE VII—PERCENT VALUE OF REFUND FEATURE; DURATION OF GUARANTEED AMOUNT

Age	Years—									
	1	2	3	4	5	6	7	8	9	10
5	0	0	0	0	0	0	0	0	0	0
6	0	0	0	0	0	0	0	0	0	0
7	0	0	0	0	0	0	0	0	0	0
8	0	0	0	0	0	0	0	0	0	0
9	0	0	0	0	0	0	0	0	0	0
10	0	0	0	0	0	0	0	0	0	0
11	0	0	0	0	0	0	0	0	0	0
12	0	0	0	0	0	0	0	0	0	0
13	0	0	0	0	0	0	0	0	0	0
14	0	0	0	0	0	0	0	0	0	0
15	0	0	0	0	0	0	0	0	0	0
16	0	0	0	0	0	0	0	0	0	0
17	0	0	0	0	0	0	0	0	0	0
18	0	0	0	0	0	0	0	0	0	0
19	0	0	0	0	0	0	0	0	0	0
20	0	0	0	0	0	0	0	0	0	0
21	0	0	0	0	0	0	0	0	0	0
22	0	0	0	0	0	0	0	0	0	0
23	0	0	0	0	0	0	0	0	0	0
24	0	0	0	0	0	0	0	0	0	0
25	0	0	0	0	0	0	0	0	0	0
26	0	0	0	0	0	0	0	0	0	0
27	0	0	0	0	0	0	0	0	0	0
28	0	0	0	0	0	0	0	0	0	0
29	0	0	0	0	0	0	0	0	0	0
30	0	0	0	0	0	0	0	0	0	0
31	0	0	0	0	0	0	0	0	0	0
32	0	0	0	0	0	0	0	0	0	0
33	0	0	0	0	0	0	0	0	0	0
34	0	0	0	0	0	0	0	0	0	0
35	0	0	0	0	0	0	0	0	0	0

TABLE VII—PERCENT VALUE OF REFUND FEATURE; DURATION OF GUARANTEED AMOUNT—Continued

Age	Years—									
	1	2	3	4	5	6	7	8	9	10
36	0	0	0	0	0	0	0	0	0	0
37	0	0	0	0	0	0	0	0	0	1
38	0	0	0	0	0	0	0	0	0	1
39	0	0	0	0	0	0	0	0	1	1
40	0	0	0	0	0	0	0	1	1	1
41	0	0	0	0	0	0	0	1	1	1
42	0	0	0	0	0	0	1	1	1	1
43	0	0	0	0	0	0	1	1	1	1
44	0	0	0	0	0	1	1	1	1	1
45	0	0	0	0	0	1	1	1	1	1
46	0	0	0	0	1	1	1	1	1	1
47	0	0	0	0	1	1	1	1	1	1
48	0	0	0	0	1	1	1	1	1	1
49	0	0	0	1	1	1	1	1	1	2
50	0	0	0	1	1	1	1	1	1	2
51	0	0	0	1	1	1	1	1	2	2
52	0	0	0	1	1	1	1	1	2	2
53	0	0	1	1	1	1	1	2	2	2
54	0	0	1	1	1	1	1	2	2	2
55	0	0	1	1	1	1	2	2	2	2
56	0	0	1	1	1	1	2	2	2	3
57	0	0	1	1	1	2	2	2	3	3
58	0	1	1	1	1	2	2	2	3	3
59	0	1	1	1	1	2	2	3	3	4
60	0	1	1	1	2	2	2	3	3	4
61	0	1	1	1	2	2	3	3	4	4
62	0	1	1	2	2	2	3	4	4	5
63	0	1	1	2	2	3	3	4	5	5
64	0	1	1	2	2	3	4	4	5	6
65	0	1	2	2	3	3	4	5	6	6
66	1	1	2	2	3	4	5	5	6	7
67	1	1	2	3	3	4	5	6	7	8
68	1	1	2	3	4	5	6	7	8	9
69	1	1	2	3	4	5	6	7	8	10
70	1	2	3	4	5	6	7	8	9	11
71	1	2	3	4	5	6	8	9	10	12
72	1	2	3	4	6	7	8	10	11	13
73	1	2	4	5	6	8	9	11	13	14
74	1	3	4	5	7	9	10	12	14	16
75	1	3	4	6	8	9	11	13	15	17
76	2	3	5	7	9	10	12	15	17	19
77	2	4	5	7	9	12	14	16	18	21
78	2	4	6	8	10	13	15	18	20	23
79	2	4	7	9	11	14	17	19	22	25
80	2	5	7	10	13	15	18	21	24	27
81	3	5	8	11	14	17	20	23	26	29
82	3	6	9	12	15	19	22	25	28	32
83	3	7	10	13	17	20	24	27	31	34
84	4	7	11	15	19	22	26	30	33	37
85	4	8	12	16	20	24	28	32	36	40
86	4	9	13	18	22	27	31	35	39	42
87	5	10	15	20	24	29	33	37	41	45
88	5	11	16	21	26	31	36	40	44	48
89	6	12	18	23	28	33	38	43	47	50
90	7	13	19	25	31	36	41	45	49	53
91	7	14	21	27	33	38	43	48	52	55
92	8	15	22	29	35	40	45	50	54	58
93	9	17	24	31	37	43	48	52	56	60
94	9	18	26	33	39	45	50	54	58	62
95	10	19	27	35	41	47	52	57	60	64
96	11	20	29	36	43	49	54	59	62	66
97	11	21	30	38	45	51	56	61	64	68
98	12	23	32	40	47	53	58	63	66	69
99	13	24	34	42	49	55	60	65	68	71
100	14	26	36	44	52	58	63	67	70	73
101	14	27	38	47	54	60	65	69	72	75
102	15	29	40	49	56	62	67	71	74	77
103	17	31	42	52	59	65	69	73	76	78
104	18	33	45	55	62	67	72	75	78	80

TABLE VII—PERCENT VALUE OF REFUND FEATURE; DURATION OF GUARANTEED AMOUNT—Continued

Age	Years—									
	1	2	3	4	5	6	7	8	9	10
105	19	36	48	58	65	70	74	77	80	82
106	21	38	51	61	68	73	77	79	82	84
107	23	42	55	64	71	75	79	81	84	85
108	25	45	58	67	73	78	81	83	85	87
109	28	49	62	71	76	80	83	85	87	88
110	31	52	66	74	79	82	85	87	88	89
111	34	57	70	77	82	85	87	88	90	91
112	37	61	73	80	84	87	88	90	91	92
113	41	66	77	83	86	88	90	91	92	93
114	45	70	80	85	88	90	92	93	93	94
115	50	75	83	88	90	92	93	94	94	95

TABLE VII—PERCENT VALUE OF REFUND FEATURE; DURATION OF GUARANTEED AMOUNT

Age	Years—									
	11	12	13	14	15	16	17	18	19	20
5	0	0	0	0	0	0	0	0	0	0
6	0	0	0	0	0	0	0	0	0	0
7	0	0	0	0	0	0	0	0	0	0
8	0	0	0	0	0	0	0	0	0	0
9	0	0	0	0	0	0	0	0	0	0
10	0	0	0	0	0	0	0	0	0	0
11	0	0	0	0	0	0	0	0	0	0
12	0	0	0	0	0	0	0	0	0	0
13	0	0	0	0	0	0	0	0	0	0
14	0	0	0	0	0	0	0	0	0	0
15	0	0	0	0	0	0	0	0	0	0
16	0	0	0	0	0	0	0	0	0	0
17	0	0	0	0	0	0	0	0	0	0
18	0	0	0	0	0	0	0	0	0	0
19	0	0	0	0	0	0	0	0	0	0
20	0	0	0	0	0	0	0	0	0	1
21	0	0	0	0	0	0	0	0	0	1
22	0	0	0	0	0	0	0	0	1	1
23	0	0	0	0	0	0	0	1	1	1
24	0	0	0	0	0	0	0	1	1	1
25	0	0	0	0	0	0	1	1	1	1
26	0	0	0	0	0	0	1	1	1	1
27	0	0	0	0	0	1	1	1	1	1
28	0	0	0	0	1	1	1	1	1	1
29	0	0	0	0	1	1	1	1	1	1
30	0	0	0	1	1	1	1	1	1	1
31	0	0	0	1	1	1	1	1	1	1
32	0	0	1	1	1	1	1	1	1	1
33	0	0	1	1	1	1	1	1	1	1
34	0	1	1	1	1	1	1	1	1	1
35	0	1	1	1	1	1	1	1	1	1
36	1	1	1	1	1	1	1	1	1	1
37	1	1	1	1	1	1	1	1	1	1
38	1	1	1	1	1	1	1	1	1	2
39	1	1	1	1	1	1	1	1	2	2
40	1	1	1	1	1	1	1	2	2	2
41	1	1	1	1	1	1	2	2	2	2
42	1	1	1	1	1	2	2	2	2	2
43	1	1	1	1	2	2	2	2	2	3
44	1	1	1	2	2	2	2	2	3	3
45	1	1	2	2	2	2	2	3	3	3
46	1	2	2	2	2	2	3	3	3	3
47	1	2	2	2	2	2	3	3	3	4
48	2	2	2	2	2	3	3	3	4	4
49	2	2	2	2	3	3	3	4	4	4
50	2	2	2	3	3	3	3	4	4	5
51	2	2	3	3	3	3	4	4	4	5
52	2	2	3	3	3	4	4	5	5	5
53	2	3	3	3	4	4	5	5	5	6
54	3	3	3	4	4	4	5	5	6	7
55	3	3	4	4	4	5	5	6	7	7

TABLE VII—PERCENT VALUE OF REFUND FEATURE; DURATION OF GUARANTEED AMOUNT—Continued

Age	Years—									
	11	12	13	14	15	16	17	18	19	20
56	3	3	4	4	5	5	6	7	7	8
57	3	4	4	5	5	6	6	7	8	9
58	4	4	5	5	6	6	7	8	9	9
59	4	5	5	6	6	7	8	9	9	10
60	4	5	6	6	7	8	9	10	10	11
61	5	6	6	7	8	9	10	10	11	13
62	5	6	7	8	9	10	11	12	13	14
63	6	7	8	9	10	11	12	13	14	15
64	7	8	8	9	10	12	13	14	15	17
65	7	8	9	10	12	13	14	15	17	18
66	8	9	10	12	13	14	15	17	18	20
67	9	10	11	13	14	15	17	18	20	22
68	10	11	13	14	15	17	19	20	22	24
69	11	12	14	15	17	19	20	22	24	26
70	12	14	15	17	19	20	22	24	26	28
71	13	15	17	18	20	22	24	26	28	30
72	15	17	18	20	22	24	26	28	30	32
73	16	18	20	22	24	26	28	31	33	35
74	18	20	22	24	26	28	31	33	35	37
75	19	22	24	26	28	31	33	35	38	40
76	21	24	26	28	31	33	36	38	40	43
77	23	26	28	31	33	36	38	41	43	45
78	25	28	31	33	36	38	41	43	46	48
79	28	30	33	36	38	41	44	46	48	51
80	30	33	36	38	41	44	46	49	51	53
81	32	35	38	41	44	47	49	51	54	56
82	35	38	41	44	47	49	52	54	56	58
83	38	41	44	47	49	52	54	57	59	61
84	40	44	47	49	52	55	57	59	61	63
85	43	46	49	52	55	57	59	62	63	65
86	46	49	52	55	57	60	62	64	66	67
87	48	52	55	57	60	62	64	66	68	69
88	51	54	57	60	62	64	66	68	70	71
89	54	57	60	62	65	67	68	70	72	73
90	56	59	62	64	67	69	70	72	74	75
91	59	62	64	67	69	71	72	74	75	76
92	61	64	66	69	71	72	74	75	77	78
93	63	66	68	70	72	74	75	77	78	79
94	65	68	70	72	74	75	77	78	79	80
95	67	69	72	74	75	77	78	79	81	82
96	69	71	73	75	77	78	80	81	82	83
97	70	73	75	77	78	80	81	82	83	84
98	72	74	76	78	79	81	82	83	84	85
99	74	76	78	79	81	82	83	84	85	86
100	75	78	79	81	82	83	84	85	86	86
101	77	79	81	82	83	84	85	86	87	87
102	79	81	82	83	84	85	86	87	88	88
103	80	82	83	85	86	87	87	88	89	89
104	82	84	85	86	87	88	88	89	90	90
105	84	85	86	87	88	89	89	90	90	91
106	85	86	87	88	89	90	90	91	91	92
107	87	88	89	89	90	91	91	92	92	93
108	88	89	90	90	91	92	92	93	93	93
109	89	90	91	92	92	93	93	93	94	94
110	90	91	92	92	93	93	94	94	94	95
111	92	92	93	93	94	94	95	95	95	95
112	93	93	94	94	95	95	95	96	96	96
113	94	94	95	95	95	96	96	96	96	97
114	95	95	95	96	96	96	97	97	97	97
115	95	96	96	96	97	97	97	97	97	98

TABLE VII—PERCENT VALUE OF REFUND FEATURE; DURATION OF GUARANTEED AMOUNT

Age	Years—									
	21	22	23	24	25	26	27	28	29	30
5	0	0	0	0	0	0	0	0	0	0
6	0	0	0	0	0	0	0	0	0	0

TABLE VII—PERCENT VALUE OF REFUND FEATURE; DURATION OF GUARANTEED AMOUNT—Continued

Age	Years—									
	21	22	23	24	25	26	27	28	29	30
7	0	0	0	0	0	0	0	0	0	0
8	0	0	0	0	0	0	0	0	0	1
9	0	0	0	0	0	0	0	0	1	1
10	0	0	0	0	0	0	0	1	1	1
11	0	0	0	0	0	0	1	1	1	1
12	0	0	0	0	0	0	1	1	1	1
13	0	0	0	0	0	1	1	1	1	1
14	0	0	0	0	1	1	1	1	1	1
15	0	0	0	1	1	1	1	1	1	1
16	0	0	1	1	1	1	1	1	1	1
17	0	0	1	1	1	1	1	1	1	1
18	0	1	1	1	1	1	1	1	1	1
19	1	1	1	1	1	1	1	1	1	1
20	1	1	1	1	1	1	1	1	1	1
21	1	1	1	1	1	1	1	1	1	1
22	1	1	1	1	1	1	1	1	1	1
23	1	1	1	1	1	1	1	1	1	1
24	1	1	1	1	1	1	1	1	1	1
25	1	1	1	1	1	1	1	1	1	1
26	1	1	1	1	1	1	1	1	1	1
27	1	1	1	1	1	1	1	1	1	2
28	1	1	1	1	1	1	1	1	2	2
29	1	1	1	1	1	1	1	2	2	2
30	1	1	1	1	1	1	2	2	2	2
31	1	1	1	1	1	2	2	2	2	2
32	1	1	1	1	2	2	2	2	2	2
33	1	1	1	2	2	2	2	2	2	2
34	1	1	2	2	2	2	2	2	2	3
35	1	2	2	2	2	2	2	2	3	3
36	2	2	2	2	2	2	2	3	3	3
37	2	2	2	2	2	2	3	3	3	3
38	2	2	2	2	2	3	3	3	3	4
39	2	2	2	2	3	3	3	3	4	4
40	2	2	3	3	3	3	3	4	4	4
41	2	3	3	3	3	3	4	4	4	5
42	3	3	3	3	3	4	4	4	5	5
43	3	3	3	4	4	4	4	5	5	6
44	3	3	4	4	4	4	5	5	6	6
45	3	4	4	4	5	5	5	6	6	7
46	4	4	4	5	5	5	6	6	7	7
47	4	4	5	5	5	6	6	7	7	8
48	4	5	5	5	6	6	7	7	8	9
49	5	5	5	6	6	7	8	8	9	10
50	5	5	6	6	7	8	8	9	10	10
51	5	6	6	7	8	8	9	10	11	11
52	6	7	7	8	8	9	10	11	11	12
53	7	7	8	8	9	10	11	12	13	14
54	7	8	8	9	10	11	12	13	14	15
55	8	9	9	10	11	12	13	14	15	16
56	9	9	10	11	12	13	14	15	16	18
57	9	10	11	12	13	14	15	17	18	19
58	10	11	12	13	14	16	17	18	19	21
59	11	12	13	15	16	17	18	20	21	22
60	12	14	15	16	17	19	20	21	23	24
61	14	15	16	17	19	20	22	23	25	26
62	15	16	18	19	20	22	23	25	27	28
63	16	18	19	21	22	24	25	27	29	30
64	18	19	21	23	24	26	28	29	31	33
65	20	21	23	25	26	28	30	31	33	35
66	21	23	25	27	28	30	32	34	35	37
67	23	25	27	29	31	32	34	36	38	40
68	25	27	29	31	33	35	37	38	40	42
69	28	29	31	33	35	37	39	41	43	44
70	30	32	34	36	38	40	42	43	45	47
71	32	34	36	38	40	42	44	46	47	49
72	35	37	39	41	43	45	46	48	50	51
73	37	39	41	43	45	47	49	51	52	54
74	40	42	44	46	48	50	51	53	54	56
75	42	44	46	48	50	52	54	55	57	58

TABLE VII—PERCENT VALUE OF REFUND FEATURE; DURATION OF GUARANTEED AMOUNT—Continued

Age	Years—									
	21	22	23	24	25	26	27	28	29	30
76	45	47	49	51	53	54	56	58	59	60
77	47	50	51	53	55	57	58	60	61	62
78	50	52	54	56	57	59	61	62	63	64
79	53	55	56	58	60	61	63	64	65	66
80	55	57	59	60	62	63	65	66	67	68
81	58	59	61	63	64	66	67	68	69	70
82	60	62	63	65	66	68	69	70	71	72
83	62	64	66	67	68	70	71	72	73	74
84	65	66	68	69	70	71	72	73	74	75
85	67	68	70	71	72	73	74	75	76	77
86	69	70	72	73	74	75	76	77	77	78
87	71	72	73	75	76	76	77	78	79	80
88	73	74	75	76	77	78	79	80	80	81
89	74	76	77	78	79	79	80	81	81	82
90	76	77	78	79	80	81	81	82	83	83
91	78	79	79	80	81	82	83	83	84	84
92	79	80	81	82	82	83	84	84	85	85
93	80	81	82	83	83	84	85	85	86	86
94	81	82	83	84	84	85	85	86	86	87
95	82	83	84	85	85	86	86	87	87	88
96	83	84	85	86	86	87	87	88	88	88
97	84	85	86	86	87	87	88	88	89	89
98	85	86	87	87	88	88	89	89	89	90
99	86	87	87	88	88	89	89	90	90	90
100	87	88	88	89	89	90	90	90	91	91
101	88	89	89	90	90	90	91	91	91	92
102	89	89	90	90	91	91	91	92	92	92
103	90	90	91	91	91	92	92	92	93	93
104	91	91	91	92	92	92	93	93	93	93
105	91	92	92	92	93	93	93	94	94	94
106	92	93	93	93	93	94	94	94	94	95
107	93	93	94	94	94	94	95	95	95	95
108	94	94	94	94	95	95	95	95	95	96
109	94	95	95	95	95	95	96	96	96	96
110	95	95	95	96	96	96	96	96	96	96
111	96	96	96	96	96	96	97	97	97	97
112	96	96	96	97	97	97	97	97	97	97
113	97	97	97	97	97	97	97	98	98	98
114	97	97	97	98	98	98	98	98	98	98
115	98	98	98	98	98	98	98	98	98	98

TABLE VII—PERCENT VALUE OF REFUND FEATURE; DURATION OF GUARANTEED AMOUNT

Age	Years—									
	31	32	33	34	35	36	37	38	39	40
5	0	1	1	1	1	1	1	1	1	1
6	0	1	1	1	1	1	1	1	1	1
7	1	1	1	1	1	1	1	1	1	1
8	1	1	1	1	1	1	1	1	1	1
9	1	1	1	1	1	1	1	1	1	1
10	1	1	1	1	1	1	1	1	1	1
11	1	1	1	1	1	1	1	1	1	1
12	1	1	1	1	1	1	1	1	1	1
13	1	1	1	1	1	1	1	1	1	1
14	1	1	1	1	1	1	1	1	1	1
15	1	1	1	1	1	1	1	1	1	1
16	1	1	1	1	1	1	1	1	1	1
17	1	1	1	1	1	1	1	1	1	1
18	1	1	1	1	1	1	1	1	1	2
19	1	1	1	1	1	1	1	1	2	2
20	1	1	1	1	1	1	1	2	2	2
21	1	1	1	1	1	1	2	2	2	2
22	1	1	1	1	1	2	2	2	2	2
23	1	1	1	2	2	2	2	2	2	2
24	1	1	2	2	2	2	2	2	2	2
25	1	2	2	2	2	2	2	2	2	3
26	2	2	2	2	2	2	2	2	3	3

TABLE VII—PERCENT VALUE OF REFUND FEATURE; DURATION OF GUARANTEED AMOUNT—Continued

Age	Years—									
	31	32	33	34	35	36	37	38	39	40
27	2	2	2	2	2	2	2	3	3	3
28	2	2	2	2	2	2	3	3	3	3
29	2	2	2	2	2	3	3	3	3	4
30	2	2	2	3	3	3	3	3	4	4
31	2	2	3	3	3	3	3	4	4	4
32	2	3	3	3	3	3	4	4	4	5
33	3	3	3	3	3	4	4	4	5	5
34	3	3	3	3	4	4	4	5	5	5
35	3	3	3	4	4	4	5	5	5	6
36	3	4	4	4	4	5	5	5	6	6
37	4	4	4	4	5	5	6	6	6	7
38	4	4	5	5	5	6	6	7	7	8
39	4	5	5	5	6	6	7	7	8	8
40	5	5	5	6	6	7	7	8	8	9
41	5	5	6	6	7	7	8	9	9	10
42	6	6	6	7	7	8	9	9	10	11
43	6	7	7	8	8	9	9	10	11	12
44	7	7	8	8	9	10	10	11	12	13
45	7	8	8	9	10	10	11	12	13	14
46	8	9	9	10	11	11	12	13	14	15
47	9	9	10	11	12	12	13	14	15	16
48	9	10	11	12	13	14	15	16	17	18
49	10	11	12	13	14	15	16	17	18	19
50	11	12	13	14	15	16	17	18	20	21
51	12	13	14	15	16	17	19	20	21	22
52	13	14	15	17	18	19	20	21	23	24
53	15	16	17	18	19	20	22	23	24	26
54	16	17	18	19	21	22	23	25	26	28
55	17	18	20	21	22	24	25	27	28	30
56	19	20	21	23	24	26	27	29	30	32
57	20	22	23	25	26	28	29	31	32	34
58	22	24	25	27	28	30	31	33	34	36
59	24	25	27	28	30	32	33	35	36	38
60	26	27	29	31	32	34	35	37	38	40
61	28	29	31	33	34	36	37	39	40	42
62	30	32	33	35	36	38	40	41	42	44
63	32	34	35	37	39	40	42	43	45	46
64	34	36	38	39	41	42	44	45	47	48
65	37	38	40	42	43	45	46	47	49	50
66	39	41	42	44	45	47	48	50	51	52
67	41	43	45	46	48	49	50	52	53	54
68	44	45	47	48	50	51	52	54	55	56
69	46	48	49	51	52	53	54	56	57	58
70	48	50	51	53	54	55	57	58	59	60
71	51	52	54	55	56	57	59	60	61	62
72	53	54	56	57	58	59	60	62	62	63
73	55	57	58	59	60	61	62	63	64	65
74	57	59	60	61	62	63	64	65	66	67
75	59	61	62	63	64	65	66	67	68	69
76	62	63	64	65	66	67	68	69	69	70
77	64	65	66	67	68	69	70	70	71	72
78	66	67	68	69	70	70	71	72	73	73
79	67	68	69	70	71	72	73	73	74	75
80	69	70	71	72	73	74	74	75	76	76
81	71	72	73	74	74	75	76	76	77	78
82	73	74	74	75	76	77	77	78	78	79
83	74	75	76	77	77	78	79	79	80	80
84	76	77	77	78	79	79	80	80	81	81
85	78	78	79	79	80	81	81	82	82	83
86	79	80	80	81	81	82	82	83	83	84
87	80	81	81	82	83	83	83	84	84	85
88	82	82	83	83	84	84	85	85	85	86
89	83	83	84	84	85	85	85	86	86	87
90	84	84	85	85	86	86	86	87	87	87
91	85	85	86	86	87	87	87	88	88	88
92	86	86	87	87	87	88	88	88	89	89
93	87	87	87	88	88	88	89	89	89	90
94	87	88	88	88	89	89	89	90	90	90
95	88	88	89	89	89	90	90	90	91	91

TABLE VII—PERCENT VALUE OF REFUND FEATURE; DURATION OF GUARANTEED AMOUNT—Continued

Age	Years—									
	31	32	33	34	35	36	37	38	39	40
96	89	89	89	90	90	90	91	91	91	91
97	89	90	90	90	91	91	91	91	92	92
98	90	90	91	91	91	91	92	92	92	92
99	91	91	91	92	92	92	92	92	93	93
100	91	92	92	92	92	92	93	93	93	93
101	92	92	92	93	93	93	93	93	94	94
102	92	93	93	93	93	94	94	94	94	94
103	93	93	93	94	94	94	94	94	94	95
104	94	94	94	94	94	95	95	95	95	95
105	94	94	95	95	95	95	95	95	95	95
106	95	95	95	95	95	95	96	96	96	96
107	95	95	96	96	96	96	96	96	96	96
108	96	96	96	96	96	96	96	96	97	97
109	96	96	96	97	97	97	97	97	97	97
110	97	97	97	97	97	97	97	97	97	97
111	97	97	97	97	97	97	98	98	98	98
112	97	97	98	98	98	98	98	98	98	98
113	98	98	98	98	98	98	98	98	98	98
114	98	98	98	98	98	98	98	98	98	99
115	98	98	98	99	99	99	99	99	99	99

TABLE VIII—TEMPORARY LIFE ANNUITIES; [1] ONE LIFE—EXPECTED RETURN MULTIPLES

[See footnote at end of tables]

Temporary Period—Maximum Duration of Annuity

Age	Years—									
	1	2	3	4	5	6	7	8	9	10
5	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	9.0	10.0
6	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	9.0	10.0
7	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	9.0	10.0
8	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	9.0	10.0
9	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	9.0	10.0
10	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	9.0	10.0
11	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	9.0	10.0
12	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	9.0	10.0
13	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	9.0	10.0
14	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	9.0	10.0
15	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	9.0	10.0
16	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	9.0	10.0
17	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	9.0	10.0
18	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	9.0	10.0
19	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	9.0	10.0
20	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	9.0	10.0
21	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	9.0	10.0
22	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	9.0	10.0
23	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	9.0	10.0
24	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	9.0	10.0
25	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	9.0	10.0
26	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	9.0	10.0
27	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	9.0	10.0
28	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	9.0	10.0
29	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	9.0	10.0
30	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	9.0	10.0
31	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	9.0	10.0
32	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	9.0	10.0
33	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	9.0	10.0
34	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	9.0	10.0
35	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	9.0	10.0
36	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	9.0	10.0
37	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	9.0	9.9
38	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	9.0	9.9
39	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	9.0	9.9
40	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	8.9	9.9
41	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	8.9	9.9
42	1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.0	8.9	9.9
43	1.0	2.0	3.0	4.0	5.0	6.0	7.0	7.9	8.9	9.9

TABLE VIII—TEMPORARY LIFE ANNUITIES; [1] ONE LIFE—EXPECTED RETURN MULTIPLES—Continued

[See footnote at end of tables]

Temporary Period—Maximum Duration of Annuity

Age	Years—									
	1	2	3	4	5	6	7	8	9	10
44	1.0	2.0	3.0	4.0	5.0	6.0	7.0	7.9	8.9	9.9
45	1.0	2.0	3.0	4.0	5.0	6.0	7.0	7.9	8.9	9.9
46	1.0	2.0	3.0	4.0	5.0	6.0	6.9	7.9	8.9	9.9
47	1.0	2.0	3.0	4.0	5.0	6.0	6.9	7.9	8.9	9.9
48	1.0	2.0	3.0	4.0	5.0	6.0	6.9	7.9	8.9	9.9
49	1.0	2.0	3.0	4.0	5.0	6.0	6.9	7.9	8.9	9.8
50	1.0	2.0	3.0	4.0	5.0	5.9	6.9	7.9	8.9	9.8
51	1.0	2.0	3.0	4.0	5.0	5.9	6.9	7.9	8.9	9.8
52	1.0	2.0	3.0	4.0	5.0	5.9	6.9	7.9	8.8	9.8
53	1.0	2.0	3.0	4.0	5.0	5.9	6.9	7.9	8.8	9.8
54	1.0	2.0	3.0	4.0	4.9	5.9	6.9	7.9	8.8	9.8
55	1.0	2.0	3.0	4.0	4.9	5.9	6.9	7.8	8.8	9.7
56	1.0	2.0	3.0	4.0	4.9	5.9	6.9	7.8	8.8	9.7
57	1.0	2.0	3.0	4.0	4.9	5.9	6.9	7.8	8.8	9.7
58	1.0	2.0	3.0	4.0	4.9	5.9	6.9	7.8	8.7	9.7
59	1.0	2.0	3.0	4.0	4.9	5.9	6.8	7.8	8.7	9.6
60	1.0	2.0	3.0	3.9	4.9	5.9	6.8	7.8	8.7	9.6
61	1.0	2.0	3.0	3.9	4.9	5.9	6.8	7.7	8.7	9.6
62	1.0	2.0	3.0	3.9	4.9	5.8	6.8	7.7	8.6	9.5
63	1.0	2.0	3.0	3.9	4.9	5.8	6.8	7.7	8.6	9.5
64	1.0	2.0	3.0	3.9	4.9	5.8	6.7	7.6	8.5	9.4
65	1.0	2.0	3.0	3.9	4.9	5.8	6.7	7.6	8.5	9.3
66	1.0	2.0	2.9	3.9	4.8	5.8	6.7	7.6	8.4	9.3
67	1.0	2.0	2.9	3.9	4.8	5.7	6.6	7.5	8.4	9.2
68	1.0	2.0	2.9	3.9	4.8	5.7	6.6	7.5	8.3	9.1
69	1.0	2.0	2.9	3.9	4.8	5.7	6.6	7.4	8.2	9.0
70	1.0	2.0	2.9	3.9	4.8	5.6	6.5	7.3	8.1	8.9
71	1.0	2.0	2.9	3.8	4.7	5.6	6.5	7.3	8.1	8.8
72	1.0	2.0	2.9	3.8	4.7	5.6	6.4	7.2	8.0	8.7
73	1.0	2.0	2.9	3.8	4.7	5.5	6.3	7.1	7.9	8.6
74	1.0	1.9	2.9	3.8	4.6	5.5	6.3	7.0	7.7	8.4
75	1.0	1.9	2.9	3.8	4.6	5.4	6.2	6.9	7.6	8.3
76	1.0	1.9	2.8	3.7	4.6	5.4	6.1	6.8	7.5	8.1
77	1.0	1.9	2.8	3.7	4.5	5.3	6.0	6.7	7.3	7.9
78	1.0	1.9	2.8	3.7	4.5	5.2	5.9	6.6	7.2	7.7
79	1.0	1.9	2.8	3.6	4.4	5.1	5.8	6.4	7.0	7.5
80	1.0	1.9	2.8	3.6	4.4	5.1	5.7	6.3	6.8	7.3
81	1.0	1.9	2.8	3.6	4.3	5.0	5.6	6.1	6.6	7.0
82	1.0	1.9	2.7	3.5	4.2	4.9	5.4	6.0	6.4	6.8
83	1.0	1.9	2.7	3.5	4.1	4.8	5.3	5.8	6.2	6.5
84	1.0	1.8	2.7	3.4	4.1	4.6	5.2	5.6	6.0	6.3
85	1.0	1.8	2.6	3.3	4.0	4.5	5.0	5.4	5.7	6.0
86	1.0	1.8	2.6	3.3	3.9	4.4	4.8	5.2	5.5	5.7
87	.9	1.8	2.5	3.2	3.8	4.3	4.7	5.0	5.3	5.5
88	.9	1.8	2.5	3.1	3.7	4.1	4.5	4.8	5.0	5.2
89	.9	1.8	2.5	3.1	3.6	4.0	4.3	4.6	4.8	4.9
90	.9	1.7	2.4	3.0	3.4	3.8	4.1	4.4	4.5	4.7
91	.9	1.7	2.4	2.9	3.3	3.7	4.0	4.2	4.3	4.4
92	.9	1.7	2.3	2.8	3.2	3.5	3.8	4.0	4.1	4.2
93	.9	1.7	2.3	2.7	3.1	3.4	3.6	3.8	3.9	4.0
94	.9	1.6	2.2	2.7	3.0	3.3	3.5	3.6	3.7	3.8
95	.9	1.6	2.2	2.6	2.9	3.1	3.3	3.4	3.5	3.6
96	.9	1.6	2.1	2.5	2.8	3.0	3.2	3.3	3.3	3.4
97	.9	1.6	2.1	2.4	2.7	2.9	3.0	3.1	3.2	3.2
98	.9	1.5	2.0	2.4	2.6	2.8	2.9	3.0	3.0	3.0
99	.9	1.5	2.0	2.3	2.5	2.6	2.7	2.8	2.8	2.8
100	.9	1.5	1.9	2.2	2.4	2.5	2.6	2.6	2.6	2.7
101	.8	1.4	1.8	2.1	2.3	2.4	2.4	2.5	2.5	2.5
102	.8	1.4	1.8	2.0	2.1	2.2	2.3	2.3	2.3	2.3
103	.8	1.4	1.7	1.9	2.0	2.1	2.1	2.1	2.1	2.1
104	.8	1.3	1.6	1.8	1.9	1.9	1.9	1.9	1.9	1.9
105	.8	1.3	1.5	1.7	1.7	1.8	1.8	1.8	1.8	1.8
106	.8	1.2	1.4	1.5	1.6	1.6	1.6	1.6	1.6	1.6
107	.7	1.1	1.3	1.4	1.4	1.4	1.4	1.4	1.4	1.4
108	.7	1.1	1.2	1.3	1.3	1.3	1.3	1.3	1.3	1.3
109	.7	1.0	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1
110	.7	.9	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0
111	.6	.8	.9	.9	.9	.9	.9	.9	.9	.9

TABLE VIII—TEMPORARY LIFE ANNUITIES; [1] ONE LIFE—EXPECTED RETURN MULTIPLES—Continued

[See footnote at end of tables]

Temporary Period—Maximum Duration of Annuity

Age	Years—									
	1	2	3	4	5	6	7	8	9	10
112	.6	.7	.8	.8	.8	.8	.8	.8	.8	.8
113	.6	.6	.7	.7	.7	.7	.7	.7	.7	.7
114	.5	.6	.6	.6	.6	.6	.6	.6	.6	.6
115	.5	.5	.5	.5	.5	.5	.5	.5	.5	.5

TABLE VIII—TEMPORARY LIFE ANNUITIES;[1] ONE LIFE—EXPECTED RETURN MULTIPLES

[See footnote at end of tables]

Temporary Period—Maximum Duration of Annuity

Age	Years—									
	11	12	13	14	15	16	17	18	19	20
5	11.0	12.0	13.0	14.0	15.0	16.0	17.0	18.0	19.0	19.9
6	11.0	12.0	13.0	14.0	15.0	16.0	17.0	18.0	19.0	19.9
7	11.0	12.0	13.0	14.0	15.0	16.0	17.0	18.0	19.0	19.9
8	11.0	12.0	13.0	14.0	15.0	16.0	17.0	18.0	18.9	19.9
9	11.0	12.0	13.0	14.0	15.0	16.0	17.0	18.0	18.9	19.9
10	11.0	12.0	13.0	14.0	15.0	16.0	17.0	18.0	18.9	19.9
11	11.0	12.0	13.0	14.0	15.0	16.0	17.0	17.9	18.9	19.9
12	11.0	12.0	13.0	14.0	15.0	16.0	17.0	17.9	18.9	19.9
13	11.0	12.0	13.0	14.0	15.0	16.0	17.0	17.9	18.9	19.9
14	11.0	12.0	13.0	14.0	15.0	16.0	16.9	17.9	18.9	19.9
15	11.0	12.0	13.0	14.0	15.0	16.0	16.9	17.9	18.9	19.9
16	11.0	12.0	13.0	14.0	15.0	16.0	16.9	17.9	18.9	19.9
17	11.0	12.0	13.0	14.0	15.0	15.9	16.9	17.9	18.9	19.9
18	11.0	12.0	13.0	14.0	15.0	15.9	16.9	17.9	18.9	19.9
19	11.0	12.0	13.0	14.0	15.0	15.9	16.9	17.9	18.9	19.9
20	11.0	12.0	13.0	14.0	14.9	15.9	16.9	17.9	18.9	19.9
21	11.0	12.0	13.0	14.0	14.9	15.9	16.9	17.9	18.9	19.9
22	11.0	12.0	13.0	14.0	14.9	15.9	16.9	17.9	18.9	19.9
23	11.0	12.0	13.0	13.9	14.9	15.9	16.9	17.9	18.9	19.9
24	11.0	12.0	13.0	13.9	14.9	15.9	16.9	17.9	18.9	19.9
25	11.0	12.0	13.0	13.9	14.9	15.9	16.9	17.9	18.9	19.9
26	11.0	12.0	12.9	13.9	14.9	15.9	16.9	17.9	18.9	19.9
27	11.0	12.0	12.9	13.9	14.9	15.9	16.9	17.9	18.9	19.9
28	11.0	12.0	12.9	13.9	14.9	15.9	16.9	17.9	18.9	19.8
29	11.0	12.0	12.9	13.9	14.9	15.9	16.9	17.9	18.9	19.8
30	11.0	11.9	12.9	13.9	14.9	15.9	16.9	17.9	18.8	19.8
31	11.0	11.9	12.9	13.9	14.9	15.9	16.9	17.9	18.8	19.8
32	11.0	11.9	12.9	13.9	14.9	15.9	16.9	17.8	18.8	19.8
33	11.0	11.9	12.9	13.9	14.9	15.9	16.9	17.8	18.8	19.8
34	10.9	11.9	12.9	13.9	14.9	15.9	16.8	17.8	18.8	19.8
35	10.9	11.9	12.9	13.9	14.9	15.9	16.8	17.8	18.8	19.7
36	10.9	11.9	12.9	13.9	14.9	15.8	16.8	17.8	18.8	19.7
37	10.9	11.9	12.9	13.9	14.9	15.8	16.8	17.8	18.7	19.7
38	10.9	11.9	12.9	13.9	14.8	15.8	16.8	17.8	18.7	19.7
39	10.9	11.9	12.9	13.9	14.8	15.8	16.8	17.7	18.7	19.6
40	10.9	11.9	12.9	13.8	14.8	15.8	16.7	17.7	18.7	19.6
41	10.9	11.9	12.9	13.8	14.8	15.8	16.7	17.7	18.6	19.6
42	10.9	11.9	12.8	13.8	14.8	15.7	16.7	17.6	18.6	19.5
43	10.9	11.9	12.8	13.8	14.8	15.7	16.7	17.6	18.6	19.5
44	10.9	11.8	12.8	13.8	14.7	15.7	16.6	17.6	18.5	19.4
45	10.9	11.8	12.8	13.8	14.7	15.7	16.6	17.5	18.5	19.4
46	10.9	11.8	12.8	13.7	14.7	15.6	16.6	17.5	18.4	19.3
47	10.8	11.8	12.8	13.7	14.7	15.6	16.5	17.5	18.4	19.3
48	10.8	11.8	12.7	13.7	14.6	15.6	16.5	17.4	18.3	19.2
49	10.8	11.8	12.7	13.7	14.6	15.5	16.4	17.4	18.3	19.2
50	10.8	11.7	12.7	13.6	14.6	15.5	16.4	17.3	18.2	19.1
51	10.8	11.7	12.7	13.6	14.5	15.4	16.3	17.2	18.1	19.0
52	10.8	11.7	12.6	13.6	14.5	15.4	16.3	17.2	18.0	18.9
53	10.7	11.7	12.6	13.5	14.4	15.3	16.2	17.1	18.0	18.8
54	10.7	11.6	12.6	13.5	14.4	15.3	16.2	17.0	17.9	18.7
55	10.7	11.6	12.5	13.4	14.3	15.2	16.1	16.9	17.8	18.6
56	10.7	11.6	12.5	13.4	14.3	15.1	16.0	16.8	17.6	18.4
57	10.6	11.5	12.4	13.3	14.2	15.1	15.9	16.7	17.5	18.3
58	10.6	11.5	12.4	13.3	14.1	15.0	15.8	16.6	17.4	18.1

TABLE VIII—TEMPORARY LIFE ANNUITIES;[1] ONE LIFE—EXPECTED RETURN MULTIPLES—Continued

[See footnote at end of tables]

Temporary Period—Maximum Duration of Annuity

Age	Years—									
	11	12	13	14	15	16	17	18	19	20
59	10.6	11.4	12.3	13.2	14.0	14.9	15.7	16.4	17.2	17.9
60	10.5	11.4	12.3	13.1	13.9	14.7	15.5	16.3	17.0	17.7
61	10.5	11.3	12.2	13.0	13.8	14.6	15.4	16.1	16.8	17.5
62	10.4	11.3	12.1	12.9	13.7	14.5	15.2	15.9	16.6	17.2
63	10.3	11.2	12.0	12.8	13.6	14.3	15.0	15.7	16.3	17.0
64	10.3	11.1	11.9	12.7	13.4	14.1	14.8	15.5	16.1	16.7
65	10.2	11.0	11.8	12.5	13.2	13.9	14.6	15.2	15.8	16.3
66	10.1	10.9	11.6	12.4	13.1	13.7	14.4	14.9	15.5	16.0
67	10.0	10.8	11.5	12.2	12.9	13.5	14.1	14.7	15.2	15.6
68	9.9	10.6	11.4	12.0	12.7	13.3	13.8	14.3	14.8	15.3
69	9.8	10.5	11.2	11.8	12.4	13.0	13.5	14.0	14.4	14.8
70	9.6	10.3	11.0	11.6	12.2	12.7	13.2	13.7	14.0	14.4
71	9.5	10.2	10.8	11.4	11.9	12.4	12.9	13.3	13.6	13.9
72	9.4	10.0	10.6	11.2	11.7	12.1	12.5	12.9	13.2	13.5
73	9.2	9.8	10.4	10.9	11.4	11.8	12.1	12.5	12.7	13.0
74	9.0	9.6	10.1	10.6	11.0	11.4	11.7	12.0	12.3	12.5
75	8.8	9.4	9.9	10.3	10.7	11.0	11.3	11.6	11.8	12.0
76	8.6	9.1	9.6	10.0	10.3	10.6	10.9	11.1	11.3	11.4
77	8.4	8.9	9.3	9.7	10.0	10.2	10.5	10.6	10.8	10.9
78	8.2	8.6	9.0	9.3	9.6	9.8	10.0	10.2	10.3	10.4
79	7.9	8.3	8.7	9.0	9.2	9.4	9.5	9.7	9.8	9.8
80	7.7	8.0	8.3	8.6	8.8	9.0	9.1	9.2	9.3	9.3
81	7.4	7.7	8.0	8.2	8.4	8.5	8.6	8.7	8.8	8.8
82	7.1	7.4	7.6	7.8	8.0	8.1	8.2	8.2	8.3	8.3
83	6.8	7.1	7.3	7.4	7.5	7.6	7.7	7.8	7.8	7.8
84	6.5	6.7	6.9	7.0	7.1	7.2	7.3	7.3	7.3	7.4
85	6.2	6.4	6.6	6.7	6.7	6.8	6.8	6.9	6.9	6.9
86	5.9	6.1	6.2	6.3	6.4	6.4	6.4	6.5	6.5	6.5
87	5.6	5.8	5.9	5.9	6.0	6.0	6.0	6.1	6.1	6.1
88	5.3	5.4	5.5	5.6	5.6	5.6	5.7	5.7	5.7	5.7
89	5.1	5.1	5.2	5.3	5.3	5.3	5.3	5.3	5.3	5.3
90	4.8	4.9	4.9	4.9	5.0	5.0	5.0	5.0	5.0	5.0
91	4.5	4.6	4.6	4.6	4.7	4.7	4.7	4.7	4.7	4.7
92	4.3	4.3	4.3	4.4	4.4	4.4	4.4	4.4	4.4	4.4
93	4.0	4.1	4.1	4.1	4.1	4.1	4.1	4.1	4.1	4.1
94	3.8	3.8	3.9	3.9	3.9	3.9	3.9	3.9	3.9	3.9
95	3.6	3.6	3.6	3.6	3.7	3.7	3.7	3.7	3.7	3.7
96	3.4	3.4	3.4	3.4	3.4	3.4	3.4	3.4	3.4	3.4
97	3.2	3.2	3.2	3.2	3.2	3.2	3.2	3.2	3.2	3.2
98	3.0	3.0	3.0	3.0	3.0	3.0	3.0	3.0	3.0	3.0
99	2.8	2.8	2.8	2.8	2.8	2.8	2.8	2.8	2.8	2.8
100	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.7
101	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
102	2.3	2.3	2.3	2.3	2.3	2.3	2.3	2.3	2.3	2.3
103	2.1	2.1	2.1	2.1	2.1	2.1	2.1	2.1	2.1	2.1
104	1.9	1.9	1.9	1.9	1.9	1.9	1.9	1.9	1.9	1.9
105	1.8	1.8	1.8	1.8	1.8	1.8	1.8	1.8	1.8	1.8
106	1.6	1.6	1.6	1.6	1.6	1.6	1.6	1.6	1.6	1.6
107	1.4	1.4	1.4	1.4	1.4	1.4	1.4	1.4	1.4	1.4
108	1.3	1.3	1.3	1.3	1.3	1.3	1.3	1.3	1.3	1.3
109	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1
110	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0
111	.9	.9	.9	.9	.9	.9	.9	.9	.9	.9
112	.8	.8	.8	.8	.8	.8	.8	.8	.8	.8
113	.7	.7	.7	.7	.7	.7	.7	.7	.7	.7
114	.6	.6	.6	.6	.6	.6	.6	.6	.6	.6
115	.5	.5	.5	.5	.5	.5	.5	.5	.5	.5

TABLE VIII—TEMPORARY LIFE ANNUITIES;[1] ONE LIFE—EXPECTED RETURN MULTIPLES

[See footnote at end of tables]

Temporary Period—Maximum Duration of Annuity

Age	Years—									
	21	22	23	24	25	26	27	28	29	30
5	20.9	21.9	22.9	23.9	24.9	25.9	26.9	27.9	28.9	29.9

TABLE VIII—TEMPORARY LIFE ANNUITIES; [1] ONE LIFE—EXPECTED RETURN MULTIPLES—Continued

[See footnote at end of tables]

Temporary Period—Maximum Duration of Annuity

Age	Years—									
	21	22	23	24	25	26	27	28	29	30
6	20.9	21.9	22.9	23.9	24.9	25.9	26.9	27.9	28.9	29.9
7	20.9	21.9	22.9	23.9	24.9	25.9	26.9	27.9	28.9	29.9
8	20.9	21.9	22.9	23.9	24.9	25.9	26.9	27.9	28.9	29.8
9	20.9	21.9	22.9	23.9	24.9	25.9	26.9	27.9	28.9	29.8
10	20.9	21.9	22.9	23.9	24.9	25.9	26.9	27.9	28.8	29.8
11	20.9	21.9	22.9	23.9	24.9	25.9	26.9	27.9	28.8	29.8
12	20.9	21.9	22.9	23.9	24.9	25.9	26.9	27.8	28.8	29.8
13	20.9	21.9	22.9	23.9	24.9	25.9	26.9	27.8	28.8	29.8
14	20.9	21.9	22.9	23.9	24.9	25.9	26.8	27.8	28.8	29.8
15	20.9	21.9	22.9	23.9	24.9	25.9	26.8	27.8	28.8	29.8
16	20.9	21.9	22.9	23.9	24.9	25.8	26.8	27.8	28.8	29.8
17	20.9	21.9	22.9	23.9	24.9	25.8	26.8	27.8	28.8	29.8
18	20.9	21.9	22.9	23.9	24.8	25.8	26.8	27.8	28.8	29.7
19	20.9	21.9	22.9	23.9	24.8	25.8	26.8	27.8	28.8	29.7
20	20.9	21.9	22.9	23.8	24.8	25.8	26.8	27.8	28.7	29.7
21	20.9	21.9	22.9	23.8	24.8	25.8	26.8	27.8	28.7	29.7
22	20.9	21.9	22.8	23.8	24.8	25.8	26.8	27.7	28.7	29.7
23	20.9	21.9	22.8	23.8	24.8	25.8	26.7	27.7	28.7	29.7
24	20.9	21.8	22.8	23.8	24.8	25.8	26.7	27.7	28.7	29.6
25	20.9	21.8	22.8	23.8	24.8	25.7	26.7	27.7	28.6	29.6
26	20.8	21.8	22.8	23.8	24.8	25.7	26.7	27.7	28.6	29.6
27	20.8	21.8	22.8	23.8	24.7	25.7	26.7	27.6	28.6	29.5
28	20.8	21.8	22.8	23.7	24.7	25.7	26.6	27.6	28.6	29.5
29	20.8	21.8	22.8	23.7	24.7	25.7	26.6	27.6	28.5	29.5
30	20.8	21.8	22.7	23.7	24.7	25.6	26.6	27.5	28.5	29.4
31	20.8	21.8	22.7	23.7	24.6	25.6	26.6	27.5	28.4	29.4
32	20.8	21.7	22.7	23.7	24.6	25.6	26.5	27.5	28.4	29.3
33	20.8	21.7	22.7	23.6	24.6	25.5	26.5	27.4	28.4	29.3
34	20.7	21.7	22.7	23.6	24.6	25.5	26.4	27.4	28.3	29.2
35	20.7	21.7	22.6	23.6	24.5	25.5	26.4	27.3	28.2	29.2
36	20.7	21.6	22.6	23.5	24.5	25.4	26.3	27.3	28.2	29.1
37	20.7	21.6	22.6	23.5	24.4	25.4	26.3	27.2	28.1	29.0
38	20.6	21.6	22.5	23.4	24.4	25.3	26.2	27.1	28.0	28.9
39	20.6	21.5	22.5	23.4	24.3	25.2	26.1	27.0	27.9	28.8
40	20.6	21.5	22.4	23.3	24.3	25.2	26.1	27.0	27.8	28.7
41	20.5	21.4	22.4	23.3	24.2	25.1	26.0	26.9	27.7	28.6
42	20.5	21.4	22.3	23.2	24.1	25.0	25.9	26.8	27.6	28.5
43	20.4	21.3	22.2	23.2	24.0	24.9	25.8	26.6	27.5	28.3
44	20.4	21.3	22.2	23.1	24.0	24.8	25.7	26.5	27.3	28.2
45	20.3	21.2	22.1	23.0	23.9	24.7	25.6	26.4	27.2	28.0
46	20.2	21.1	22.0	22.9	23.8	24.6	25.4	26.2	27.0	27.8
47	20.2	21.1	21.9	22.8	23.6	24.5	25.3	26.1	26.8	27.6
48	20.1	21.0	21.8	22.7	23.5	24.3	25.1	25.9	26.6	27.4
49	20.0	20.9	21.7	22.6	23.4	24.2	25.0	25.7	26.4	27.1
50	19.9	20.8	21.6	22.4	23.2	24.0	24.8	25.5	26.2	26.9
51	19.8	20.7	21.5	22.3	23.1	23.8	24.6	25.3	25.9	26.6
52	19.7	20.6	21.4	22.1	22.9	23.6	24.3	25.0	25.7	26.3
53	19.6	20.4	21.2	22.0	22.7	23.4	24.1	24.7	25.3	25.9
54	19.5	20.3	21.0	21.8	22.5	23.2	23.8	24.4	25.0	25.6
55	19.3	20.1	20.8	21.6	22.2	22.9	23.5	24.1	24.6	25.2
56	19.2	19.9	20.6	21.3	22.0	22.6	23.2	23.7	24.3	24.7
57	19.0	19.7	20.4	21.1	21.7	22.3	22.8	23.4	23.8	24.3
58	18.8	19.5	20.2	20.8	21.4	21.9	22.5	22.9	23.4	23.8
59	18.6	19.3	19.9	20.5	21.1	21.6	22.0	22.5	22.9	23.2
60	18.4	19.0	19.6	20.2	20.7	21.2	21.6	22.0	22.4	22.7
61	18.1	18.7	19.3	19.8	20.3	20.7	21.1	21.5	21.8	22.1
62	17.8	18.4	18.9	19.4	19.9	20.3	20.6	21.0	21.2	21.5
63	17.5	18.1	18.5	19.0	19.4	19.8	20.1	20.4	20.6	20.8
64	17.2	17.7	18.1	18.6	18.9	19.3	19.5	19.8	20.0	20.2
65	16.8	17.3	17.7	18.1	18.4	18.7	18.9	19.2	19.3	19.5
66	16.5	16.9	17.3	17.6	17.9	18.1	18.3	18.5	18.7	18.8
67	16.1	16.4	16.8	17.1	17.3	17.5	17.7	17.9	18.0	18.1
68	15.6	16.0	16.3	16.5	16.7	16.9	17.1	17.2	17.3	17.4
69	15.2	15.5	15.7	16.0	16.1	16.3	16.4	16.5	16.6	16.7
70	14.7	15.0	15.2	15.4	15.5	15.7	15.8	15.8	15.9	15.9
71	14.2	14.4	14.6	14.8	14.9	15.0	15.1	15.2	15.2	15.2
72	13.7	13.9	14.1	14.2	14.3	14.4	14.4	14.5	14.5	14.5
73	13.2	13.3	13.5	13.6	13.7	13.7	13.8	13.8	13.8	13.9

TABLE VIII—TEMPORARY LIFE ANNUITIES; [1] ONE LIFE—EXPECTED RETURN MULTIPLES—Continued

[See footnote at end of tables]

Temporary Period—Maximum Duration of Annuity

Age	Years—									
	21	22	23	24	25	26	27	28	29	30
74	12.6	12.8	12.9	13.0	13.0	13.1	13.1	13.1	13.2	13.2
75	12.1	12.2	12.3	12.4	12.4	12.5	12.5	12.5	12.5	12.5
76	11.5	11.6	11.7	11.8	11.8	11.8	11.8	11.9	11.9	11.9
77	11.0	11.1	11.1	11.2	11.2	11.2	11.2	11.2	11.2	11.2
78	10.4	10.5	10.5	10.6	10.6	10.6	10.6	10.6	10.6	10.6
79	9.9	9.9	10.0	10.0	10.0	10.0	10.0	10.0	10.0	10.0
80	9.4	9.4	9.4	9.4	9.5	9.5	9.5	9.5	9.5	9.5
81	8.8	8.9	8.9	8.9	8.9	8.9	8.9	8.9	8.9	8.9
82	8.3	8.4	8.4	8.4	8.4	8.4	8.4	8.4	8.4	8.4
83	7.8	7.9	7.9	7.9	7.9	7.9	7.9	7.9	7.9	7.9
84	7.4	7.4	7.4	7.4	7.4	7.4	7.4	7.4	7.4	7.4
85	6.9	6.9	6.9	6.9	6.9	6.9	6.9	6.9	6.9	6.9
86	6.5	6.5	6.5	6.5	6.5	6.5	6.5	6.5	6.5	6.5
87	6.1	6.1	6.1	6.1	6.1	6.1	6.1	6.1	6.1	6.1
88	5.7	5.7	5.7	5.7	5.7	5.7	5.7	5.7	5.7	5.7
89	5.3	5.3	5.3	5.3	5.3	5.3	5.3	5.3	5.3	5.3
90	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0
91	4.7	4.7	4.7	4.7	4.7	4.7	4.7	4.7	4.7	4.7
92	4.4	4.4	4.4	4.4	4.4	4.4	4.4	4.4	4.4	4.4
93	4.1	4.1	4.1	4.1	4.1	4.1	4.1	4.1	4.1	4.1
94	3.9	3.9	3.9	3.9	3.9	3.9	3.9	3.9	3.9	3.9
95	3.7	3.7	3.7	3.7	3.7	3.7	3.7	3.7	3.7	3.7
96	3.4	3.4	3.4	3.4	3.4	3.4	3.4	3.4	3.4	3.4
97	3.2	3.2	3.2	3.2	3.2	3.2	3.2	3.2	3.2	3.2
98	3.0	3.0	3.0	3.0	3.0	3.0	3.0	3.0	3.0	3.0
99	2.8	2.8	2.8	2.8	2.8	2.8	2.8	2.8	2.8	2.8
100	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.7
101	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
102	2.3	2.3	2.3	2.3	2.3	2.3	2.3	2.3	2.3	2.3
103	2.1	2.1	2.1	2.1	2.1	2.1	2.1	2.1	2.1	2.1
104	1.9	1.9	1.9	1.9	1.9	1.9	1.9	1.9	1.9	1.9
105	1.8	1.8	1.8	1.8	1.8	1.8	1.8	1.8	1.8	1.8
106	1.6	1.6	1.6	1.6	1.6	1.6	1.6	1.6	1.6	1.6
107	1.4	1.4	1.4	1.4	1.4	1.4	1.4	1.4	1.4	1.4
108	1.3	1.3	1.3	1.3	1.3	1.3	1.3	1.3	1.3	1.3
109	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1
110	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0
111	.9	.9	.9	.9	.9	.9	.9	.9	.9	.9
112	.8	.8	.8	.8	.8	.8	.8	.8	.8	.8
113	.7	.7	.7	.7	.7	.7	.7	.7	.7	.7
114	.6	.6	.6	.6	.6	.6	.6	.6	.6	.6
115	.5	.5	.5	.5	.5	.5	.5	.5	.5	.5

TABLE VIII—TEMPORARY LIFE ANNUITIES; [1] ONE LIFE—EXPECTED RETURN MULTIPLES

[See footnote at end of tables]

Temporary Period—Maximum Duration of Annuity

Age	Years—									
	31	32	33	34	35	36	37	38	39	40
5	30.8	31.8	32.8	33.8	34.8	35.8	36.8	37.7	38.7	39.7
6	30.8	31.8	32.8	33.8	34.8	35.8	36.8	37.7	38.7	39.7
7	30.8	31.8	32.8	33.8	34.8	35.8	36.7	37.7	38.7	39.7
8	30.8	31.8	32.8	33.8	34.8	35.7	36.7	37.7	38.7	39.7
9	30.8	31.8	32.8	33.8	34.8	35.7	36.7	37.7	38.7	39.6
10	30.8	31.8	32.8	33.8	34.7	35.7	36.7	37.7	38.6	39.6
11	30.8	31.8	32.8	33.8	34.7	35.7	36.7	37.7	38.6	39.6
12	30.8	31.8	32.8	33.7	34.7	35.7	36.7	37.6	38.6	39.6
13	30.8	31.8	32.7	33.7	34.7	35.7	36.6	37.6	38.6	39.5
14	30.8	31.8	32.7	33.7	34.7	35.7	36.6	37.6	38.6	39.5
15	30.8	31.7	32.7	33.7	34.7	35.6	36.6	37.6	38.5	39.5
16	30.8	31.7	32.7	33.7	34.6	35.6	36.6	37.5	38.5	39.4
17	30.7	31.7	32.7	33.7	34.6	35.6	36.5	37.5	38.5	39.4
18	30.7	31.7	32.7	33.6	34.6	35.6	36.5	37.5	38.4	39.4
19	30.7	31.7	32.6	33.6	34.6	35.5	36.5	37.4	38.4	39.3
20	30.7	31.7	32.6	33.6	34.5	35.5	36.4	37.4	38.3	39.3

TABLE VIII—TEMPORARY LIFE ANNUITIES;[1] ONE LIFE—EXPECTED RETURN MULTIPLES—Continued

[See footnote at end of tables]

Temporary Period—Maximum Duration of Annuity

Age	Years—									
	31	32	33	34	35	36	37	38	39	40
21	30.7	31.6	32.6	33.6	34.5	35.5	36.4	37.4	38.3	39.2
22	30.6	31.6	32.6	33.5	34.5	35.4	36.4	37.3	38.2	39.2
23	30.6	31.6	32.5	33.5	34.4	35.4	36.3	37.3	38.2	39.1
24	30.6	31.5	32.5	33.5	34.4	35.3	36.3	37.2	38.1	39.0
25	30.6	31.5	32.5	33.4	34.3	35.3	36.2	37.1	38.1	39.0
26	30.5	31.5	32.4	33.4	34.3	35.2	36.2	37.1	38.0	38.9
27	30.5	31.4	32.4	33.3	34.2	35.2	36.1	37.0	37.9	38.8
28	30.5	31.4	32.3	33.3	34.2	35.1	36.0	36.9	37.8	38.7
29	30.4	31.4	32.3	33.2	34.1	35.0	35.9	36.8	37.7	38.6
30	30.4	31.3	32.2	33.1	34.1	35.0	35.8	36.7	37.6	38.5
31	30.3	31.2	32.2	33.1	34.0	34.9	35.8	36.6	37.5	38.3
32	30.3	31.2	32.1	33.0	33.9	34.8	35.6	36.5	37.4	38.2
33	30.2	31.1	32.0	32.9	33.8	34.7	35.5	36.4	37.2	38.0
34	30.1	31.0	31.9	32.8	33.7	34.6	35.4	36.2	37.1	37.9
35	30.1	31.0	31.8	32.7	33.6	34.4	35.3	36.1	36.9	37.7
36	30.0	30.9	31.7	32.6	33.5	34.3	35.1	35.9	36.7	37.4
37	29.9	30.8	31.6	32.5	33.3	34.1	34.9	35.7	36.5	37.2
38	29.8	30.7	31.5	32.3	33.2	34.0	34.7	35.5	36.2	37.0
39	29.7	30.5	31.4	32.2	33.0	33.8	34.5	35.3	36.0	36.7
40	29.6	30.4	31.2	32.0	32.8	33.6	34.3	35.0	35.7	36.4
41	29.4	30.2	31.0	31.8	32.6	33.3	34.1	34.7	35.4	36.0
42	29.3	30.1	30.9	31.6	32.4	33.1	33.8	34.4	35.1	35.7
43	29.1	29.9	30.7	31.4	32.1	32.8	33.5	34.1	34.7	35.3
44	28.9	29.7	30.5	31.2	31.9	32.5	33.2	33.8	34.3	34.9
45	28.8	29.5	30.2	30.9	31.6	32.2	32.8	33.4	33.9	34.4
46	28.5	29.3	30.0	30.6	31.3	31.9	32.4	33.0	33.5	33.9
47	28.3	29.0	29.7	30.3	30.9	31.5	32.0	32.5	33.0	33.4
48	28.1	28.7	29.4	30.0	30.6	31.1	31.6	32.1	32.5	32.9
49	27.8	28.4	29.0	29.6	30.2	30.7	31.1	31.5	31.9	32.3
50	27.5	28.1	28.7	29.2	29.7	30.2	30.6	31.0	31.4	31.7
51	27.2	27.8	28.3	28.8	29.3	29.7	30.1	30.4	30.7	31.0
52	26.8	27.4	27.9	28.4	28.8	29.2	29.5	29.8	30.1	30.3
53	26.5	27.0	27.4	27.9	28.3	28.6	28.9	29.2	29.4	29.6
54	26.1	26.5	27.0	27.4	27.7	28.0	28.3	28.5	28.7	28.9
55	25.6	26.1	26.5	26.8	27.1	27.4	27.6	27.8	28.0	28.1
56	25.2	25.6	25.9	26.2	26.5	26.7	26.9	27.1	27.2	27.3
57	24.7	25.0	25.3	25.6	25.8	26.0	26.2	26.3	26.5	26.5
58	24.1	24.4	24.7	25.0	25.2	25.3	25.5	25.6	25.7	25.7
59	23.6	23.8	24.1	24.3	24.4	24.6	24.7	24.8	24.9	24.9
60	23.0	23.2	23.4	23.6	23.7	23.8	23.9	24.0	24.0	24.1
61	22.3	22.5	22.7	22.9	23.0	23.1	23.1	23.2	23.2	23.3
62	21.7	21.9	22.0	22.1	22.2	22.3	22.3	22.4	22.4	22.4
63	21.0	21.1	21.3	21.4	21.4	21.5	21.5	21.6	21.6	21.6
64	20.3	20.4	20.5	20.6	20.6	20.7	20.7	20.7	20.8	20.8
65	19.6	19.7	19.8	19.8	19.9	19.9	19.9	19.9	19.9	20.0
66	18.9	19.0	19.0	19.1	19.1	19.1	19.1	19.1	19.1	19.1
67	18.2	18.2	18.3	18.3	18.3	18.3	18.3	18.3	18.4	18.4
68	17.4	17.5	17.5	17.5	17.5	17.6	17.6	17.6	17.6	17.6
69	16.7	16.7	16.8	16.8	16.8	16.8	16.8	16.8	16.8	16.8
70	16.0	16.0	16.0	16.0	16.0	16.0	16.0	16.0	16.0	16.0
71	15.3	15.3	15.3	15.3	15.3	15.3	15.3	15.3	15.3	15.3
72	14.6	14.6	14.6	14.6	14.6	14.6	14.6	14.6	14.6	14.6
73	13.9	13.9	13.9	13.9	13.9	13.9	13.9	13.9	13.9	13.9
74	13.2	13.2	13.2	13.2	13.2	13.2	13.2	13.2	13.2	13.2
75	12.5	12.5	12.5	12.5	12.5	12.5	12.5	12.5	12.5	12.5
76	11.9	11.9	11.9	11.9	11.9	11.9	11.9	11.9	11.9	11.9
77	11.2	11.2	11.2	11.2	11.2	11.2	11.2	11.2	11.2	11.2
78	10.6	10.6	10.6	10.6	10.6	10.6	10.6	10.6	10.6	10.6
79	10.0	10.0	10.0	10.0	10.0	10.0	10.0	10.0	10.0	10.0
80	9.5	9.5	9.5	9.5	9.5	9.5	9.5	9.5	9.5	9.5
81	8.9	8.9	8.9	8.9	8.9	8.9	8.9	8.9	8.9	8.9
82	8.4	8.4	8.4	8.4	8.4	8.4	8.4	8.4	8.4	8.4
83	7.9	7.9	7.9	7.9	7.9	7.9	7.9	7.9	7.9	7.9
84	7.4	7.4	7.4	7.4	7.4	7.4	7.4	7.4	7.4	7.4
85	6.9	6.9	6.9	6.9	6.9	6.9	6.9	6.9	6.9	6.9
86	6.5	6.5	6.5	6.5	6.5	6.5	6.5	6.5	6.5	6.5
87	6.1	6.1	6.1	6.1	6.1	6.1	6.1	6.1	6.1	6.1
88	5.7	5.7	5.7	5.7	5.7	5.7	5.7	5.7	5.7	5.7

TABLE VIII—TEMPORARY LIFE ANNUITIES;[1] ONE LIFE—EXPECTED RETURN MULTIPLES—Continued

[See footnote at end of tables]

Temporary Period—Maximum Duration of Annuity

Age	Years—									
	31	32	33	34	35	36	37	38	39	40
89	5.3	5.3	5.3	5.3	5.3	5.3	5.3	5.3	5.3	5.3
90	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0
91	4.7	4.7	4.7	4.7	4.7	4.7	4.7	4.7	4.7	4.7
92	4.4	4.4	4.4	4.4	4.4	4.4	4.4	4.4	4.4	4.4
93	4.1	4.1	4.1	4.1	4.1	4.1	4.1	4.1	4.1	4.1
94	3.9	3.9	3.9	3.9	3.9	3.9	3.9	3.9	3.9	3.9
95	3.7	3.7	3.7	3.7	3.7	3.7	3.7	3.7	3.7	3.7
96	3.4	3.4	3.4	3.4	3.4	3.4	3.4	3.4	3.4	3.4
97	3.2	3.2	3.2	3.2	3.2	3.2	3.2	3.2	3.2	3.2
98	3.0	3.0	3.0	3.0	3.0	3.0	3.0	3.0	3.0	3.0
99	2.8	2.8	2.8	2.8	2.8	2.8	2.8	2.8	2.8	2.8
100	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.7
101	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
102	2.3	2.3	2.3	2.3	2.3	2.3	2.3	2.3	2.3	2.3
103	2.1	2.1	2.1	2.1	2.1	2.1	2.1	2.1	2.1	2.1
104	1.9	1.9	1.9	1.9	1.9	1.9	1.9	1.9	1.9	1.9
105	1.8	1.8	1.8	1.8	1.8	1.8	1.8	1.8	1.8	1.8
106	1.6	1.6	1.6	1.6	1.6	1.6	1.6	1.6	1.6	1.6
107	1.4	1.4	1.4	1.4	1.4	1.4	1.4	1.4	1.4	1.4
108	1.3	1.3	1.3	1.3	1.3	1.3	1.3	1.3	1.3	1.3
109	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1
110	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0
111	.9	.9	.9	.9	.9	.9	.9	.9	.9	.9
112	.8	.8	.8	.8	.8	.8	.8	.8	.8	.8
113	.7	.7	.7	.7	.7	.7	.7	.7	.7	.7
114	.6	.6	.6	.6	.6	.6	.6	.6	.6	.6
115	.5	.5	.5	.5	.5	.5	.5	.5	.5	.5

[1] The multiples in this table are not applicable to annuities for a term certain; for such cases see paragraph (c) of § 1.72–5.

If (a) the terms of the contract involve a life or lives, and are such that the above tables cannot be correctly applied, and (b) the amounts received under the contract are at least partly "amounts received as an annuity" under a contract to which section 72 applies, the taxpayer may submit with his return an actuarial computation based upon the applicable annuity table (described below) with ages set back one year, showing the appropriate factors applied in his case, subject to the approval of the Commissioner upon examination of such return. The applicable annuity table is the 1937 Standard Annuity Table (if the investment in the contract does not include a post-June 1986 investment in the contract) or the gender-neutral version of the 1983 Basic Table (if the investment in the contract includes a post-June 1986 investment in the contract). In the case of a contract to which §1.72–6(d) (relating to contracts in which amounts were invested both before July 1, 1986, and after June 30, 1986) applies, the actuarial computation shall be based on both tables in accordance with the principles of §1.72–6(d). Computations involving factors to compensate for the effects of contingencies other than mortality, such as marriage or remarriage, re-employment, recovery from disability, or the like, will not be approved.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960; 25 FR 14021, Dec. 21, 1960, as amended by T.D. 8115, 51 FR 45706, Dec. 19, 1986; 60 FR 16381, Mar. 30, 1995]

§ 1.72–10 Effect of transfer of contracts on investment in the contract.

(a) If a contract to which section 72 applies, or any interest therein, is transferred for a valuable consideration, by assignment or otherwise, only the actual value of the consideration given for such transfer and the amount of premiums or other consideration subsequently paid by the transferee shall be included in the transferee's aggregate of premiums or other consideration paid. In accordance with the provisions of section 72(g)(3) and paragraph (b) of §1.72–4, an annuity starting date shall be determined for the transferee without regard to the annuity starting date, if any, of the transferor. In determining the transferee's investment in the contract, the aggregate amount of premiums or other consideration paid shall be reduced by all amounts received by the transferee before the receipt of an amount as an annuity or before the annuity starting date, whichever is the later, to the extent that such amounts were excludable from his gross income under the applicable income tax law at the time of receipt. For the treatment of amounts received by the transferee subsequent to both the annuity starting date and the date of receipt of a payment as an annuity, but not received as annuity payments, see §1.72–11. For a limitation on adjustments to the basis of annuity contracts sold, see section 1021.

(b) In the case of a transfer of such a contract without valuable consideration, the annuity starting date and the expected return under the contract shall be determined as though no such transfer had taken place. See paragraph (b) of §1.72–4. The transferee shall include the aggregate of premiums or other consideration paid or deemed to have been paid by his transferor in the aggregate of premiums or other consideration as though paid by him. In determining the transferee's investment in the contract, the transferee's aggregate amount of premiums or other consideration paid (as so found) shall be reduced by all amounts either received or deemed to have been received by himself or his transferor before the annuity starting date, or before the date on which an amount is first received as an annuity, whichever is the later, to the extent that such amounts were excludable from the gross income of the actual recipient under the applicable income tax law at the time of receipt. For treatment of amounts received subsequent to both the above dates by such transferee, but not received as annuity payments, see §1.72–11.

§1.72–11 Amounts not received as annuity payments.

(a) *Introductory.* (1) This section applies to amounts received under a contract to which section 72 applies if either:

(i) Paragraph (b) of §1.72–2 is inapplicable to such amounts.

(ii) Paragraph (b) of §1.72–2 is applicable but the annuity payments received differ either in amount, duration, or both, from those originally provided under the contract, or

(iii) Paragraph (b) of §1.72 is applicable, but such annuity payments are received by a beneficiary after the death of an annuitant (or annuitants) in full discharge of the obligation under the contract and solely because of a guarantee.

The payments referred to in subdivision (i) of this subparagraph include all amounts other than "amounts received as an annuity" as that term is defined in paragraphs (b) (2) and (3) of §1.72–2. If such amounts are received as dividends or payments in the nature of dividends, or as a return of premiums, see paragraph (b) of this section. If such amounts are paid in full discharge of the obligation under the contract and are in the nature of a refund of the consideration, see paragraph (c) of this section. If such amounts are paid upon the surrender, redemption, or maturity of the contract, see paragraph (d) of this section. The payments referred to in subdivision (ii) of this subparagraph include all annuity payments which are paid as the result of a modification or an exchange of the annuity obligations originally provided under a contract for different annuity obligations (whether or not such modification or exchange is accompanied by the payment of an amount to which subdivision (i) of this subparagraph applies). If the duration of the new annuity obligations differs from the duration of the old annuity obligations, paragraph (e) of this section applies to the new annuity obligations and paragraph (d) of this section applies to any lump sum payment received. If, however, the duration of the new annuity obligations is the same as the duration of the old obligations, paragraph (f) of this section applies to the new obligations and to any lump sum received in connection therewith. The annuity payments referred to in subdivision (iii) of this subparagraph are annuity payments which are made to a beneficiary after the death of annuitant (or annuitants) in full discharge of the obligations under a contract because of a provision in the contract requiring the payment of a guaranteed amount or minimum number of payments for a fixed period; see paragraph (c) of this section.

(2) The principles of this section apply, to the extent appropriate thereto, to amounts paid which are taxable under section 72 (except, for taxable years beginning before January 1, 1964, section 72(e)(3)) in accordance with sections 402 and 403 and the regulations thereunder. However, if contributions used to purchase the contract include amounts for which a deduction was allowed under section 404 as contributions on behalf of an owner-employee, the rules of this section are modified by the rules of paragraph (b) of §1.72–17. Further, in applying the provisions of this section, the aggregate premiums or other consideration paid shall not include contributions on behalf of self-employed individuals to the extent that deductions were allowed under section 404 for such contributions. Nor, shall the aggregate of premiums or other consideration paid include amounts used to purchase life, accident, health, or other insurance protection for an owner-employee. See paragraph (b)(4) of §1.72–16 and paragraph (c) of §1.72–17. The principles of this section also apply to payments made in the manner described in paragraph (b)(3)(i) of §1.72–2.

(b) *Amounts received in the nature of dividends or similar distributions.* (1) If dividends (or payments in the nature of dividends or a return of premiums or other consideration) are received under a contract to which section 72 applies and such payments are received before the annuity starting date or before the date on which an amount is first received as an annuity, whichever is the later, such payments are includible in the gross income of the recipient only to the extent that they, taken together with all previous payments received under the contract which were excludable from the gross income of the recipient under the applicable income tax law, exceed the aggregate of premiums or other consideration paid or deemed to have been paid by the recipient. Such payments shall also be subtracted from the consideration paid (or deemed paid) both for the purpose of determining an exclusion ratio to be applied to subsequent amounts paid as an annuity and for the purpose of determining the applicability of section 72(d) and §1.72–13, relating to employee contributions recoverable in three years.

(2) If dividends or payments in the nature of dividends are paid under a contract to which section 72 applies and such payments are received on or after the annuity starting date or the date on which an amount is first received as an annuity, whichever is later, such payments shall be fully includible in the gross income of the recipient. The receipt of such payments shall not affect the aggregate of premiums or other consideration paid nor the amounts contributed or deemed to have been contributed by an employee as otherwise calculated for purposes of section 72. Since the investment in the contract and the expected return are not affected by a payment which is fully includible in the gross income of the recipient under this rule, the exclusion ratio will not be affected by such payment and will continue to be applied to amounts received as annuity payments in the future as though such payment had not been made. This subparagraph shall apply to amounts received under a contract described in paragraph (b)(3)(i) of §1.72–2 to the extent that the amounts received exceed the portion of the investment in the contract allocable to each taxable year in accordance with paragraph (d)(3) of §1.72–4. Hence, such excess is fully includible in the gross income of the recipient.

(c) *Amounts received in the nature of a refund of the consideration under a contract and in full discharge of the obligation thereof.* (1) Any amount received under a contract to which section 72 applies, if it is at least in part a refund of the consideration paid, including amounts payable to a beneficiary after the death of an annuitant by reason of a provision in the contract for a life annuity with minimum period of payments certain or with a minimum amount which must be paid in any event, shall be considered an amount received in the nature of a refund of the consideration paid for such contract. If such an amount is in full discharge of an obligation to pay a fixed amount (whether in a lump sum or otherwise) or to pay amounts for a fixed number of years (including amounts described in paragraph (b)(3)(i) of § 1.72–2), it shall be included in the gross income of the recipient only to the extent that it, when added to amounts previously received under the contract which were excludable from gross income under the law applicable at the time of receipt, exceeds the aggregate of premiums or other consideration paid. See section 73(e)(2)(A). This paragraph shall not apply if the total of the amounts to be paid in discharge of the obligation can in any event exceed the total of the annuity payments which would otherwise fully discharge the obligation. For rules to be applied in such a case, see paragraph (e) of this section.

(2) The principles of subparagraph (1) of this paragraph may be illustrated by the following examples:

Example 1. A, a male employee, retired on December 31, 1954, at the age of 60. A life annuity of $75 per month was payable to him beginning January 31, 1955. The annuity contract guaranteed that if A did not live for at least ten years after his retirement his beneficiary, B, would receive the monthly payments for any balance of such ten-year period which remained at the date of A's death. Under section 72, A was deemed to have paid $3,600 toward the cost of the annuity. A lived for five years after his retirement receiving a total of $4,500 in annuity payments. After A's death, B began receiving the monthly payments of $75 beginning with the January 31, 1960 payment. B will exclude such payments from his gross income throughout 1960, 1961, and 1962, and will exclude only $18 of the first payment in 1963 from his gross income for that year. Thereafter, B will include the entire amount of all such payments in his gross income for the taxable year of receipt. This result is determined as follows:

A's investment in the contract (unadjusted)		$3,600
Multiple from Table III of § 1.72–9 for male, age 60, where duration of guaranteed amount is 10 years (percent)	11	
Subtract value of the refund feature to the nearest dollar (11 percent of $3,600)		396
Investment in the contract adjusted for the present value of the refund feature without discount for interest		3,204
Aggregate of premiums or other consideration paid		3,600
A's exclusion ratio ($3,204÷$16,380 [$900×18.2]) (percent)	19.6	
Subtract amount excludable during five years A received payments (19.6 percent of $4,500 [$900×5])		882
Remainder of aggregate of premiums or other consideration paid excludable from gross income of B under section 72(e)		2,718

As a result of the above computation, the number of payments to B which will exhaust the remainder of consideration paid which is excludable from gross income of the recipient is $36\frac{6}{25}$ ($2,718÷$75) and B will exclude the payments from his gross income for three years, then exclude only $18 of the first payment for the fourth year from his gross income, and thereafter include the entire amount of all payments he receives in his gross income.

Example 2. The facts are the same as in example (1), except that B, the beneficiary, elects to receive $50 per month for his life in lieu of the payments guaranteed under the original contractual obligation. Since such amounts will be received as an annuity and may, because of the length of time B may live, exceed the amount guaranteed, they are not amounts to which this paragraph applies. See paragraph (e) of this section.

Example 3. The facts are the same as in example (1), except that B, the beneficiary, elects to receive the remaining guaranteed amount in installments which are larger or smaller than the $75 per month provided until, under the terms of the contract, the guaranteed amount is exhausted. The rule of subparagraph (1) of this paragraph and the computation illustrated in example (1) apply to such installments since the total of such installments will not exceed the original amount guaranteed to be paid at A's death in any event.

Example 4. C pays $12,000 for a contract providing that he is to be paid an annuity of $1,000 per year for 15 years. His exclusion ratio is therefore 80 percent ($12,000÷$15,000). He directs that the annuity is to be paid to D, his beneficiary, if he should die before the full 15-year period has expired. C dies after 5 years and D is paid $1,000 in 1960. D will include $200 ($1,000 − $800 [80 percent of $1,000]) in his gross income for the taxable year in which he receives the $1,000 since section 72(e) and this section do not apply to the annuity payments made in accordance with the provisions and during the term of the contract. D will continue with the same exclusion ratio used by C (80 percent).

Example 5. In 1954, E paid $50,000 into a fund and was promised an annual income for life the amount of which would depend in part upon the earnings realized from the investment of the fund in accordance with an agreed formula. The contract also specified that if E should die before ten years had elapsed, his beneficiary, F, would be paid the amounts determined annually under the formula until ten payments had been received by E and F together. E died in 1960, having received five payments totaling $30,000. Assuming that $22,000 of this amount was properly excludable from E's gross income prior to his death, F will exclude from his gross income the payments he receives until the taxable year in which his total receipts from the fund exceed $28,000 ($50,000 − $22,000). F will include any excess over the $28,000 in his gross income for that taxable year. Thereafter, F will include in his gross income the entire amount of any payments made to him from the fund.

Example 6. Assume the facts are the same as in example (1), except that the total investment in the contract is made after June 30, 1986, that A is to receive payments under the life annuity contract beginning on January 31, 1987, and that B will begin to receive the monthly payments on January 31, 1992. B will exclude the $75 monthly payments from gross income throughout 1992, 1993, and 1994. B will exclude only the first two monthly payments and $21 of the third monthly payment in 1995. This is determined as follows:

A's investment in the contract (unadjusted)	$3,600
Multiple from Table VII, age 60, 10 years (percent)	4
Subtract value of the refund feature (4 percent of $3,600	$144
Investment in the contract adjusted for the present value of the refund feature without discount for interest	$3,456
Aggregate of premiums or other consideration paid	$3,600.00
A's exclusion ratio ($3,456÷$21,780 [$900×24.2]) (percent)	15.9
Subtract amount excludable during five years A received payments (15.9 percent of $4,500 [$900×5])	$715.50
Remainder of aggregate of premiums or other consideration paid excludable from gross income of B under section 72(e)	$2,884.50

As a result of the above computation, the number of payments to B which will exhaust the remainder of consideration paid which is excludable from gross income of the recipient is $38\frac{23}{50}$ ($2,884.50÷75) and B will exclude the payments from gross income for three years, then exclude only the first two monthly payments and $34.50 of the third. Thereafter B shall include the entire amount of all payments received in gross income.

(3) For the purpose of applying the rule contained in subparagraph (1) of this paragraph, it is immaterial whether the recipient of the amount received in full discharge of the obligation is the same person as the recipient of amounts previously received under the contract which were excludable from gross income, except in the case of a contract transferred for a valuable consideration, with respect to which see paragraph (a) of §1.72–10. For the limit on the tax, for taxable years beginning before January 1, 1964, attributable to the receipt of a lump sum to which this paragraph applies, see paragraph (g) of this section.

(d) *Amounts received upon the surrender, redemption, or maturity of a contract*. (1) Any amount received upon the surrender, redemption, or maturity of a contract to which section 72 applies, which is not received as an annuity under the regulations of paragraph (b) of §1.72–2, shall be included in the gross income of the recipient to the extent that it, when added to amounts previously received under the contract and which were excludable from the gross income of the recipient under the law applicable at the time of receipt, exceeds the aggregate of premiums or other consideration paid. See section 72(e)(2)(B). If amounts are to be received as an annuity, whether in lieu of or in addition to amounts described in the preceding sentence, such amounts shall be included in the gross income of the recipient in accordance with the provisions of paragraph (e) or (f) of this section, whichever is applicable. The rule stated in the first sentence of this paragraph shall not apply to payments received as an annuity or otherwise after the date of the first receipt of an amount as an annuity subsequent to the maturity, redemption, or surrender of the original contract. If amounts are so received and are other than amounts received as an annuity, they are includible in the gross income of the recipient. See section 72(e)(1)(A) and paragraph (b)(2) of this section.

(2) For the purpose of applying the rule contained in subparagraph (1) of this paragraph, it is immaterial whether the recipient of the amount received upon the surrender, redemption, or maturity of the contract is the same as the recipient of amounts previously received under the contract which were excludable from gross income, except in the case of a contract transferred for a valuable consideration, with respect to which see paragraph (a) of §1.72–10. For the limit on the amount of tax, for taxable years beginning before January 1, 1964, attributable to the receipt of

certain lump sums to which this paragraph applies, see paragraph (g) of this section.

(e) *Periodic payments received for a different term.* If, after the date on which an amount is first received as an annuity under a contract to which section 72 applies, the terms of the contract are modified or the annuity obligations are exchanged so that periodic payments are to be received for a different term than originally provided under the contract (whether or not accompanied by the receipt of a lump sum to which paragraph (d) of this section applies), the rules of this paragraph shall apply to such payments. Hence, the provisions of section 72(e) and paragraphs (b), (c), (d), and (f) of this section are inapplicable for the purpose of determining the includibility of such payments in gross income and the general principles of section 72 with respect to the use of an exclusion ratio shall be applied to such payments as if they were provided under a new contract received in exchange for the contract providing the original annuity payments. If such payments are received as the result of the surrender, redemption, or discharge of a contract to which section 72 applies, they shall be considered to be received as an annuity under a contract exchanged for the contract whose redemption, surrender, or discharge was involved. For the purpose of determining the extent to which the payments so received are to be included in the gross income of the recipient, an exclusion ratio shall be determined for such contract as of the later of January 1, 1954, or the first day of the first period for which an amount is received as an annuity thereunder, whichever is the later. See paragraph (b) of §1.72–4. In determining the investment in the contract for this purpose, any lump sum amount received at the time of the exchange shall not be considered an amount to which paragraph (a)(2) of §1.72–6 applies. However, such lump sum shall be subtracted from the aggregate of premiums or other consideration paid to the extent it is excludable as an amount not received as an annuity under this section as if it were an amount received before the annuity starting date of the contract obtained in exchange.

(f) *Periodic payments received for the same term after a lump sum withdrawal.* (1) If, after the date of the first receipt of a payment as an annuity, the annuitant receives a lump sum and is thereafter to receive annuity payments in a reduced amount under the contract for the same term, life, or lives as originally specified in the contract, a portion of the contract shall be considered to have been surrendered or redeemed in consideration of the payment of such lump sum and the exclusion ratio originally determined for the contract shall continue to apply to the amounts received as an annuity without regard to the fact that such amounts are less than the original amounts which were to be paid periodically. The lump sum shall be includible in the gross income of the recipient in accordance with the provisions of subparagraph (2) of this paragraph. However, except in the case of amounts to which sections 402 and 403 apply, the tax, for taxable years beginning before January 1, 1964, attributable to the inclusion of all or part of the lump sum in gross income shall not exceed the amount determined under section 72(e)(3) and paragraph (g) of this section. For taxable years beginning after December 31, 1963, such amounts may be taken into account in computations under sections 1301 through 1305 (relating to income averaging).

(2) There shall be excluded from gross income that portion of the lump sum which bears the same ratio to the aggregate premiums or other consideration paid for the contract, as reduced by all amounts previously received under the contract and excludable from the gross income of the recipient under the applicable income tax law, as:

(i) In the case of payments to be made in the manner described in paragraph (b)(2) of §1.72–2, the amount of the reduction in the annuity payments to be made thereafter bears to the annuity payments originally provided under the contract, or

(ii) In the case of a contract providing for payments to be made in the manner described in paragraph (b)(3)(i) of §1.72–2, the amount of the reduction in the number of units per period to be paid thereafter bears to the number of units per period payable under the contract immediately before the lump sum withdrawal.

(3) This paragraph may be illustrated by the following examples:

Example 1. Taxpayer A pays $20,000 for an annuity contract providing for payments to him of $100 per month for his life. At the annuity starting date he has a life expectancy of 20 years. His expected return is therefore $24,000 and the exclusion ratio is five-sixths. He continues to receive the original annuity payments for 5 years, receiving a total of $6,000, and properly excludes a total of $5,000 from his gross income in his income tax returns for those years. At the beginning of the next year, A agrees with the insurer to take a reduced annuity of $75 per month and a lump sum payment of $4,000 in cash. Of the lump sum he receives, he will include $250 and exclude $3,750 from his gross income for his taxable year of receipt, determined as follows:

Aggregate of premiums or other consideration paid	$20,000
Less amounts received as an annuity to the extent they were excludable from A's income	$5,000
Remainder of the consideration	$15,000
Ratio of the reduction in the amount of the annuity payments to the original annuity payments	25/$100 or ¼
Lump sum received	$4,000
Less one-fourth of the remainder of the consideration (¼ of $15,000)	$3,750
Portion of the lump sum includible in gross income	$250

For taxable years beginning before January 1, 1964, the limit on tax of section 72(e)(3), as in effect before such date, applies to the portion of the lump sum includible in gross income. For taxable years beginning after December 31, 1963, such portion may be taken into account in computations under sections 1301 through 1305 (relating to income averaging). If, in this example, the annuity were a pension payable to A as a retired employee, but the facts were otherwise the same (assuming that, for instance, the $20,000 aggregate of premiums or other consideration paid were A's contributions as determined under section 72(f) and §1.72–8) the result would be the same except that the tax attributable to the inclusion of the $250 in A's gross income, for taxable years beginning before January 1, 1964, would not be limited by section 72(e)(3), as in effect before such date. If such a lump sum is received in a taxable year beginning after December 31, 1963, the portion of such sum includible in gross income may be taken into account in computations under sections 1301 through 1305 (relating to income averaging).

Example 2. Taxpayer B pays $30,000 for a contract providing for monthly payments to be made to him for 15 years with respect to the principal and earnings of 10 units of an investment fund. B receives $12,000 during the first 5 years of participation and of this amount he has properly excluded a total of $10,000 from his gross income in his income returns for the taxable years, since $2,000 of $2,400 he received in each such year represented his investment divided by the term of the annuity ($30,000÷15). At the beginning of the 6th year, B agrees to take $11,000 in a lump sum and thereafter to accept the payments arising with respect to five units for the remaining 10 years of payments in full discharge of the original obligations of the contract. B shall include $1,000 in his gross income for the 6th year as the result of the lump sum he receives and allocates $1,000 of his original investment in the contract to each of the remaining 10 years with respect to the payments which will continue, determined as follows:

Aggregate of premiums or other consideration paid	$30,000
Total amount received and excludable from gross income	$10,000
Remainder of the consideration	$20,000
Ratio of units discontinued to the total units originally provided	5/10 or ½
Lump sum received at the time of reduction in the number of units to be paid	$11,000
Less one-half of the remainder of the consideration (½ of $20,000)	$10,000
Portion of the lump sum received and includible in gross income	$1,000
Remainder of the consideration less the portion of such remainder attributable to the excludable portion of the lump sum ($20,000 − $10,000)	$10,000
Remainder of the consideration properly allocable to each taxable year for the remaining 10 years ($10,000÷10)	$1,000

For the taxable years beginning before January 1, 1964, the limit on tax of section 72(e)(3), as in effect before such date, applies to the portion of the lump sum received and includible in gross income. For taxable years beginning after December 31, 1963, such portion may be taken into account in computations under sections 1301 through 1305 (relating to income averaging).

(g) *Limit on tax attributable to the receipt of a lump sum.* (1) For taxable years beginning before January 1, 1964, if the entire amount of the proceeds received upon the redemption, maturity, surrender, or discharge of a contract to which section 72 applies is received in a lump sum and paragraph (c), (d), or (f) of this section is applicable in determining the portion of such amount which is includible in gross income, the tax attributable to such portion shall not exceed the tax which would have been attributable thereto had such portion been received ratably in the taxable year in which received and the 2 preceding taxable years. The amount of tax attributable to the includible portion of the lump sum received shall be the lesser of:

(i) The difference between the amount of tax for the taxable year of receipt computed by including such portion in gross income and the amount of tax for such taxable year computed by excluding such portion from gross income; or

(ii) The difference between the total amount of tax for the taxable year of receipt and the 2 preceding taxable years computed by including one-third of such portion in gross income for each of the 3 taxable years, and the total amount of the tax for the taxable year of receipt and the 2 preceding taxable years computed by entirely excluding such portion from the gross income of all 3 taxable years.

For the definition of ''taxable year'', see section 441(b). This subparagraph shall not apply, for taxable years beginning before January 1, 1964, to payments excepted from the application of section 72(e)(3), as in effect before such date, under the provisions of section 402 or 403. See paragraph (a) of §1.72–2 and paragraph (d) of §1.72–14.

(2) For taxable years beginning after December 31, 1963, any amount includible in gross income to which this section relates may be taken into account in computations under sections 1301 through 1305 (relating to income averaging).

(h) *Amounts deemed to be paid or received by a transferee.* Amounts deemed to have been paid or received by a transferee for the purposes of §1.72–10 shall also be deemed to have been so paid or received by such transferee for the purposes of this section. Thus, if a donee is deemed to have paid the premiums or other consideration actually paid by his transferor for the purposes of section 72(g) and paragraph (b) of §1.72–10, such consideration shall be deemed premiums or other consideration paid by the donee for the purposes of this section.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6885, 31 FR 7798, June 2, 1966; T.D. 8115, 51 FR 45734, Dec. 19, 1986]

§ 1.72–12 Effect of taking an annuity in lieu of a lump sum upon the maturity of a contract.

If a contract to which section 72 applies provides for the payment of a lump sum in full discharge of the obligation thereunder and the obligee entitled thereto, prior to receiving any portion of such lump sum and within 60 days after the date on which such lump sum first becomes payable, exercises an option or irrevocably agrees with the obligor to take, in lieu thereof, payments which will constitute ''amounts received as an annuity'', as that term is defined in paragraph (b) of §1.72–2, no part of such lump sum shall be deemed to have been received by the obligee at the time he was first entitled thereto merely because he would have been entitled to such amount had he not exercised the option or made such an agreement with the obligor.

§ 1.72–13 Special rule for employee contributions recoverable in three years.

(a) *Amounts received as an annuity.* (1) Section 72(d) provides a special rule for the treatment of amounts received as an annuity by an employee (or by the beneficiary or beneficiaries of an employee) under a contract to which section 72 applies. This special rule is applicable only in the event that:

(i) At least part of the consideration paid for the contract is contributed by the employer, and

(ii) The aggregate amount receivable as an annuity under such contract by the employee (or by his beneficiary or beneficiaries if the employee died before any amount was received as an annuity under the contract) within the 3-year period beginning on the date (whether or not before January 1, 1954) on which an amount is first received as an annuity equals or exceeds the total consideration contributed (or deemed contributed under section 72(f) and §1.72–8) by the employee as of such date as reduced by all amounts previously received and excludable from the gross income of the recipient under the applicable income tax law.

In such an event, section 72(d) provides that all amounts received as an annuity under the contract during a taxable year to which the Code applies shall be excluded from gross income until the total of the amounts excluded under that section plus all amounts excluded under prior income tax laws equals or exceeds the consideration contributed (or deemed contributed) by the employee. The excess, if any, and all amounts received by any recipient thereafter (whether or not received as an annuity), shall be fully included in gross income. See paragraph (b) of this section.

(2) If the aggregate amount receivable as an annuity under the contract within three years from the date on which an amount is first received as an annuity thereunder will not equal or exceed the consideration contributed (or deemed contributed) by the employee in accordance with the provisions of § 1.72–8, computed as of such date, the special rule of section 72(d) shall not apply to amounts received as an annuity under the contract and the general rules of section 72 shall apply thereto.

(3) The aggregate of the amounts receivable as an annuity within the prescribed 3-year period shall be the total of all annuity payments anticipatable by an employee (or a beneficiary or beneficiaries of an employee, if the employee died before any amount was received as an annuity) under the contract as a whole as defined in paragraph (a) of § 1.72–2. See paragraph (a)(3) of § 1.72–2 for rules for determining what constitutes ''the contract'' in the case of distributions from an employees' trust or plan.

(4) If subparagraphs (1) and (3) of this paragraph apply to amounts received as an annuity under a contract, the rule prescribed in subparagraph (1) of this paragraph shall apply to all amounts so received thereunder regardless of the fact that they may be payable (i) to more than one beneficiary, (ii) for the same or different intervals, (iii) in different sums, or (iv) for a different period certain, life, or lives.

(5) For purposes of section 72(d), contributions which are made with respect to a self-employed individual and which are allowed as a deduction under section 404(a) are not considered contributions by the employee, but such contributions are considered contributions by the employer. A contribution which is deemed paid in a prior taxable year under the provisions of section 404(a)(6) shall be considered made with respect to a self-employed individual if the individual on whose behalf the contribution is made was self-employed for the taxable year in which the contribution is deemed paid, whether or not such individual is self-employed at the time the contribution is actually paid. Contributions with respect to a self-employed individual who is an owner-employee used to purchase life, accident, health, or other insurance protection for such owner-employee shall not be treated as consideration for the contract contributed by the employee in computing the employee contributions for purposes of section 72(d).

(b) *Amounts not received as an annuity.* If the rule of paragraph (a) of this section applies to a contract and, after the date on which an annuity payment is first received, amounts are received other than as an annuity under such contract in a taxable year to which the Code applies, they shall be included in the gross income of the recipient in accordance with the provisions of § 1.72–11. Thus, if such amounts are received as a dividend or a similar distribution after the date on which an amount is first received as an annuity under the contract, they shall be included in the gross income of the recipient (in accordance with section 72(e)(1)(A) and paragraph (b)(2) of § 1.72–11. All other amounts not received as an annuity shall be included in the gross income of the recipient in accordance with the provisions of section 72(e)(1)(B) and paragraph (c), (d), or (f), whichever is applicable, of § 1.72–11. See section 72(e)(2).

(c) *Amounts received after the exhaustion of employee contributions.* (1) Amounts received under a contract to which the rule of paragraph (a) of this section applies (whether or not such amounts are received as an annuity) shall be included in the gross income of the recipient if such amounts are received after the date on which the aggregate of all amounts excluded from gross income by the recipients under section 72(d) and prior income tax laws equalled or exceeded the consideration contributed (or deemed contributed) by the employee.

(2) If the rule of paragraph (a) of this section applies to amounts received by an employee (or his beneficiary or beneficiaries) under a joint and survivor annuity contract, payments made to a prior annuitant may entirely exhaust the amounts excludable from gross income. In such case, amounts paid to the surviving annuitant (or annuitants) shall be included in gross income by such recipients.

(d) *Application of section 72(d) to a contract, trust, or plan providing for payments in a manner described in paragraph (b)(3)(i) of §1.72–2.* For the purpose of applying section 72(d) and this section, any amount received in the nature of a periodic payment under a contract, trust, or plan which provides for the payment of amounts in a manner described in paragraph (b)(3)(i) of §1.72–2 shall be considered an amount received as an annuity notwithstanding the provisions of any other section of the regulations under section 72. The special exclusion rule of section 72(d) and paragraph (a) of this section shall apply to all amounts so received if the first amount received, when multiplied by the number of periodic payments to be made within the three years beginning on the date of its receipt, results in an amount in excess of the aggregate premiums or other consideration contributed (or deemed contributed) by the employee as of that date. If more than one series of periodic payments is to be paid under the same contract, trust, or plan, all payments anticipatable, whether because fixed in amount or determinable in the manner described in the preceding sentence, shall be aggravated for the purpose of determining the applicability of section 72 (d) to the contract, trust, or plan as a whole.

(e) *Inapplicability of section 72(d) and this section.* Section 72(d) and this section do not apply to:

(1) Amounts received as proceeds of a life insurance contract to which section 101(a) applies, nor to

(2) Amounts paid to a surviving annuitant under a joint and survivor annuity contract to which paragraph (b)(3) of §1.72–5 applies, nor to

(3) Amounts paid to an annuitant under Chapter 73 of title 10 of the United States Code with respect to which section 72(o) and §1.122–1 apply.

See also paragraph (d) of §1.72–14.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6497, 25 FR 10021, Oct. 20, 1960; T.D. 6676, 28 FR 10135, Sept. 17, 1963; T.D. 7043, 35 FR 8477, June 2, 1970]

§1.72–14 Exceptions from application of principles of section 72.

(a) *Payments of interest.* If any amount is received under an agreement to pay interest on a sum or sums held by the obligor, such amount shall not be excludable from the gross income of the recipient under the provisions of section 72 to the extent that it is an actual interest payment. See section 72(j). An amount shall be considered to be held under an agreement to pay interest thereon if the amount payable after the term of the annuity (whether for a term certain or for a life or lives) is substantially equal to or larger than the aggregate amount of premiums or other consideration paid therefor. For this purpose, however, the aggregate amount of premiums or other consideration paid shall include all contributions made by an employer and not merely those to which section 72(f) applies.

(b) *Alimony payments.* To the extent that payments made to a wife are includable in her gross income by reason of either or both section 71 and 682, they shall not be excluded from the wife's gross income under the principles of section 72 although made under a contract to which that section applies. However, section 72 shall apply in the case of amounts received under such a contract if a husband and wife are entitled to make and do make a single return jointly.

(c) *Certain "face-amount certificates."* The principles of section 72 do not apply to "face-amount certificates" described in section 72(1) which were issued before January 1, 1955.

(d) *Employer plans.* The provisions of §§1.72–1 to 1.72–13, inclusive, shall be disregarded to the extent that they are inconsistent with the treatment of amounts received provided in section 402 (relating to the taxability of a beneficiary of an employees' trust), section 403 (relating to the taxation of employee annuities), or the regulations under either of such sections.

§ 1.72–15 Applicability of section 72 to accident or health plans.

(a) *Applicability of section.* This section provides the rules for determining the taxation of amounts received from an employer-established plan which provides for distributions that are taxable under section 72 (or for distributions that are taxable under section 402 (a)(2) or (e), or section 403(a)(2), in the case of lump sum distributions) and which also provides for distributions that may be excludable from gross income under section 104 or 105 as accident or health benefits. For example, this section will apply to a pension plan described in section 401 and exempt under section 501 which provides for the payment of pensions at retirement and the payment of an earlier pension in the event of permanent disability. This section will also apply to a profit-sharing plan described in section 401 and exempt under section 501 which provides for periodic distribution of the amount standing to the account of a participant during any period that the participant is absent from work due to a personal injury or sickness and for the distribution of any balance standing to the account of the participant upon his separation from service. For purposes of this section, the term ''contributions of the employee'' includes contributions by the employer which were includible in the employee's gross income. For special rules for taxable years ending before January 27, 1975, relating to certain accident or health benefits which were treated as distributions to which section 72 applied, see paragraph (i) of this section.

(b) *General rule.* Section 72 does not apply to any amount received as an accident or health benefit, and the tax treatment of any such amount shall be determined under sections 104 and 105. See paragraphs (c) and (d) of this section, paragraph (d) of § 1.104–1, and §§ 1.105–1 through 1.105–5. Section 72 (or, in the case of certain total distributions, section 402(a)(2) or section 403(a)(2)) does apply to any amount which is received under a plan to which this section applies and which is not an accident or health benefit. See paragraph (e) of this section.

(c) *Accident or health benefits attributable to employee contributions.* (1) If a plan to which this section applies provides that any portion of the accident or health benefits is attributable to the contributions of the employee to such plan, then such portion of such benefits is excludable from gross income under section 104(a)(3) and paragraph (d) of § 1.104–1. Neither section 72 nor section 105 applies to any accident or health benefits (whether paid before or after retirement) attributable to contributions of the employee. Since such portion is excludable under section 104(a)(3), such portion is not subject to the dollar limitation of section 105(d) and if such portion is payable after the retirement of the employee, it is excludable without regard to the provisions of § 1.105–4 and section 72.

(2) In determining the taxation of any amounts received as accident or health benefits from a plan to which this section applies, the first step is to determine the portion, if any, of the contributions of the employee which is used to provide the accident or health benefits and the portion of the accident or health benefits attributable to such portion of the employee's contributions. If such a plan expressly provides that the accident or health benefits are provided in whole or in part by employee contributions and the portion of employee contributions to be used for such purpose, the contributions so used will be treated as used to provide accident or health benefits. However, if the plan does not expressly provide that the accident or health benefits are to be provided with employee contributions and the portion of employee contributions to be used for such purpose, it will be presumed that none of the employee contributions is used to provide such benefits. Thus, in the case of a contributory pension plan, it will be presumed that the disability pension is provided by employer contributions, unless the plan expressly provides otherwise, or in the case of a contributory profit-sharing plan providing that a

portion of the amount standing to the account of each participant will be used to purchase accident or health insurance, it will be presumed that such insurance is purchased with employer contributions, unless the plan expressly provides otherwise. Similarly, unless the plan expressly provides otherwise, it will be presumed that if a contributory profit-sharing plan provides for periodic distributions from the account of a participant during any absence from work because of a personal injury or sickness, all such distributions which do not exceed the contributions of the employer plus earnings thereon are provided by employer contributions.

(3) Any employee contributions that are treated under subparagraph (2) of this paragraph as used to provide accident or health benefits shall not be included for any purpose under section 72 as employee contributions or as aggregate premiums or other consideration paid. Thus, in the case of a pension plan, or in the case of a profit-sharing plan providing that a portion of the amount standing to the account of each participant will be used to purchase accident or health insurance, any employee whose contributions are so used must make the adjustment provided by this subparagraph irrespective of whether such employee receives any accident or health benefits under such plan. However, in the case of a profit-sharing plan providing for periodic distributions from the account of a participant during any absence from work because of a personal injury or sickness, an adjustment under this subparagraph is required only when an employee receives distributions in excess of the employer contributions and earnings thereon or receives distributions consisting in whole or in part of his own contributions.

(4) If any of the employee contributions are treated under subparagraph (2) of this paragraph as used to provide any of the accident or health benefits, the portion of the benefits attributable to employee contributions shall be determined in accordance with §1.105–1. Any accident or health benefits that are excludable under section 104(a)(3) shall not be included in the expected return for purposes of section 72.

(d) *Accident or health benefits attributable to employer contributions.* Any amounts received as accident or health benefits and not attributable to contributions of the employee are includable in gross income except to the extent that such amounts are excludable from gross income under section 105 (b), (c), or (d) and the regulations thereunder. Thus, such amounts may be excludable under section 105(d) as payments under a wage continuation plan. However, if such payments, when added to other such payments attributable to employer contributions, exceed the limitations of section 105(d), then the excess is includable in gross income under section 105(a). Such excess is not excludable under section 72. See, however, paragraph (i) of this section, for special rules for taxable years ending before January 27, 1975, relating to certain accident or health benefits which were treated as distributions to which section 72 applied.

(e) *Other benefits under the plan.* The taxability of amounts that are received under a plan to which this section applies and that are not accident or health benefits is determined under section 72 (or, in the case of certain total distributions, under section 402(a)(2) or section 403(a)(2)) without regard to any exclusion or inclusion of accident or health benefits under sections 104 and 105. For example, the investment in the contract or aggregate premiums paid is determined without regard to the exclusion of any amount under section 104 or 105, and the annuity starting date is determined without regard to the receipt of any accident or health benefits. However, if any employee contributions are used to provide any accident or health benefits, the investment in the contract or aggregate premiums paid must be adjusted as provided in paragraph (c)(3) of this section.

(f) *Examples.* The principles of this section may be illustrated by the following examples:

Example 1. A, an employee, is a participant in a contributory pension plan described in section 401(a) and exempt under section 501(a). Such plan provides for the payment of a pension to each participant when he retires at age 65 or when he retires earlier if the retirement is due to permanent and total disability. In 1964, A, who was age 52, became totally and permanently disabled because of an injury, was hospitalized, and commenced to receive a pension of $74 a week under this plan. The weekly amounts received by A do not exceed 75 percent of his ''regular weekly rate of wages'' under section 105(d). A had contributed $11,500 to the plan. The plan does not expressly provide that any portion of the disability pension is purchased with employee contributions. Accordingly, it is presumed that no portion of the disability pension is purchased with A's contributions. The disability pension which A receives qualifies as payments under a wage continuation plan for purposes of section 105(d) and §1.105–4, and if such payments are the only accident or health benefits which are attributable to the contributions of his employer, such payments are entirely excludable under section 105(d) until A reaches age 65, his mandatory retirement age under the plan. The payments which A receives after he becomes age 65 are taxable under section 72. The payments which A receives do constitute an annuity as defined in paragraph (b) of §1.72–2, but since the amounts which he will receive during the first three years after attaining age 65 exceed his contributions, he shall exclude under §1.72–13 the entire amount of all payments that he receives as an annuity after attaining age 65 until such amounts equal his contributions to the plan, or $11,500. Thereafter, the payments that he receives under the plan are includible in gross income.

Example 2. B, an employee, is a participant in a contributory profit-sharing plan described in section 401(a) and exempt under section 501(a). Such plan provides that, in the event a participant is absent from work because of a personal injury or sickness, he will be paid $125 a week out of his account in such plan. Such weekly amount does not exceed 75 percent of B's ''regular weekly rate of wages'' under section 105(d). Any amount standing to the account of a participant at the time of his separation from service will be paid to him at such time. During 1964, B incurred a personal injury, was hospitalized, and as a result was absent from work for nine weeks. He received nine weekly payments of $125, or a total of $1,125, on account of such absence from work. At the time B was injured, he had contributed $5,000 to the plan. The plan did not expressly provide that a participant's contributions are to be used to provide for the distributions during disability. Accordingly, it is presumed that B's contributions were not used to provide the accident or health benefits under the plan. Since these weekly payments are paid because of B's absence from work due to the injury, and since such payments are considered as attributable to contributions of his employer, such payments are required under section 105(a) to be included in B's gross income except to the extent that they are excludable under section 105(d). If B receives no other payments under a wage continuation plan attributable to contributions of his employer, during the first 30 days in the period of absence $75 of each weekly payment is excludable from gross income under section 105(d), but $50 of each weekly payment is includable in gross income under section 105(a). Amounts attributable to the period of absence in excess of 30 days are excludable from gross income under section 105(d) to the extent of $100 a week and includible in gross income under section 105(a) to the extent of $25 a week. The excludable portion of payments does not reduce B's investment in the contract or the amount of premiums considered to have been paid by B for purposes of any subsequent computations under section 72.

Example 3. The facts are the same as in example (2) except that B was absent from work for 130 weeks. At the time B was injured, his employer had contributed $10,000 to the plan on his account, and $6,000 of earnings of the plan had been allocated to his account. Thus, at the time he was injured, B's account included $21,000, and $14,000 of such amount consists of employer contributions of $10,000 plus earnings of $4,000 thereon. The first 112 weekly payments (totaling $14,000) which B receives are treated in the manner set forth in example (2). However, since the remaining payments exceed the employer contributions plus earnings thereon, such remaining payments are considered to be distributions of B's contributions plus earnings thereon. Since the total of such payments, or $2,250, is less than B's contributions to the plan, $5,000, the entire amount of such payments is excludable from B's gross income, but a corresponding adjustment with respect to the return of B's contributions shall be made to his consideration in determining the taxation of any lump sum paid to B upon separation from service.

(g) *Payments to or on behalf of a self-employed individual.* A self-employed individual is not considered an employee for purposes of section 105, relating to amounts received by employees under accident and health plans, nor for purposes of excluding under section 104(a)(3) amounts received by him under an accident and health plan as referred to in section 105(e). See section 105(g) and paragraph (a) of §1.105–1. Therefore, the other paragraphs of this section are not applicable to amounts received by or on behalf of a self-employed individual. Except where accident or health benefits are provided through an insurance contract or an arrangement having the effect of insurance, all amounts received by or on behalf of a self-employed individual from a plan described in section 401(a) and exempt under section 501(a) or a plan described in section 403(a) shall be taxed as otherwise provided in section 72, 402, or 403. If the accident or health benefits are paid under an insurance contract or under an arrangement having the effect of insurance, section 104(a)(3) shall apply. Section 72 shall not apply to any amounts received under such circumstances. For the treatment of the amounts paid for such accident or health benefits, see section 404(e)(3) and paragraph (f) of § 1.404(e)–1.

(h) *Medical benefits for retired employees, etc.* Employer contributions to provide medical benefits described in section 401(h) under a qualified pension or annuity plan are not includible in the gross income of the employee on whose behalf such contributions were made. Similarly, if the trustee of a trust forming a part of a qualified pension plan applies employer contributions which have been contributed to provide medical benefits described in section 401(h) or earnings thereon, to purchase insurance contracts which provide such benefits, the amount so applied is not includible in the gross income of the employee on whose behalf such insurance was purchased. The payment of medical benefits described in section 401(h) as defined in paragraph (a) of § 1.401–14 under a plan established by an employer shall be treated in the same manner as the payment of any other accident or health benefits under an employer-established plan. See paragraphs (b), (c), and (d) of this section.

(i) *Special rules.* (1) Special rule for taxable years ending before January 27, 1975. A taxpayer who has reached retirement age, as defined in § 1.79–2(b)(3) (hereinafter referred to as ''initial retirement age''), before January 27, 1975, and who has received payments under a plan described in paragraph (a) of this section, which are wage continuation benefits to which section 105(d) and this section apply, or which are treated as such by reason of the employee having so agreed under § 1.105–6, shall be entitled to an exclusion, in taxable years ending before January 27, 1975, with respect to payments received after initial retirement age but before mandatory retirement age, as defined in § 1.105–4(a)(3)(i)(B), which is the greater of:

(i) The amount actually excluded on an original return under section 72 (b) or (d) with respect to payments received after initial retirement age, to the extent such amount does not exceed an amount properly excludable under section 72 (b) or (d) if this paragraph and paragraph (b) of this section did not apply; or

(ii) The amount that would have been properly excludable under section 105(d) during the same period.

(2) *Investment in the annuity contract.* A taxpayer described in paragraph (i)(1) of this section, shall redetermine his investment in, consideration for, or basis of his annuity contract (hereinafter referred to in this paragraph as the ''investment in the contract'') in accordance with the applicable rules of section 72 and the regulations thereunder, and the rules of this paragraph. In making such redetermination the taxpayer's investment in his contract shall be decreased, by the excess (if any) of the amount which the taxpayer is entitled to exclude under paragraph (i)(1) of this section over the amount which could have been excluded under section 105(d) (subject to the limitations contained in such provision). Such investment in the contract shall be decreased only by the excess of the amount excluded under section 72 in taxable years ending before January 27, 1975, over the amount which could have been excluded under section 105(d) during the same period. For example, the investment in the contract shall not be decreased in the case of an individual who was retired from work on account of injury or sickness or a full taxable year, if the amount excluded under section 72 was less than $5,200, since the entire amount could have been excluded under section 105(d). On the other hand, if the amount excluded under section 72 was equal to or greater than $5,200 for a full taxable year, for example, $6,000 for the full taxable year, then $5,200 shall be treated as excluded under section 105(d) and the investment in the contract shall be reduced by $800 ($6,000 − $5,200).

(3) *Surviving annuitants and beneficiaries.* (i) The rights of a surviving annuitant or beneficiary, with respect

to the application of the rules of section 72, shall be based on the employee's investment in his annuity contract, as adjusted in accordance with the provisions of this paragraph. Thus, where an employee dies after having recomputed his investment as provided in paragraph (i)(2) of this section, and his contract provided a survivorship element, the survivor would assume the employee's recomputed investment for purposes of determining excludability of amounts under section 72.

(ii) Where a beneficiary failed to increase the amount treated as an employee's contribution toward his annuity contract to reflect the employee death benefit under section 101(b) and §1.72–8(b), because the employee had treated his initial retirement age as his annuity starting date, such beneficiary may apply section 101(b) as if the appropriate addition to basis had been made in the year of the employee's death, but only if the employee had not reached his mandatory retirement age (as defined in section §1.105–4(a)(3)(i)(B)). For purposes of this paragraph, the amount treated as the section 101(b) death benefit would be valued as of the date of the employee's death.

(4) *Records.* (i) For purposes of section 72 (b) and (d), and this section, the taxpayer shall maintain such records as are necessary to substantiate the amount treated as his investment in his annuity contract.

(ii) The Commissioner may prescribe a form and instructions with respect to the taxpayer's past and current treatment of amounts received under section 72 or 105, and the taxpayer's computation, or recomputation, of his investment in his annuity contract. Such form may be required to be filed with the taxpayer's returns for years in which amounts are excluded under section 72 or 105.

(5) *Cross references.* (i) See section 72(b)(4) and §1.72–4(b) with respect to annuity starting dates.

(ii) See §§1.72–8(b) and 1.101–2(a)(2) with respect to treating certain amounts received by an estate or beneficiary as employee death benefits.

(iii) See §1.105–4(a)(3)(i)(B) for the definition of ''mandatory retirement age.''

(iv) See §1.105–6 with respect to the application of section 105(d) to certain amounts received as retirement annuities before January 27, 1975, where the employee would otherwise have been eligible for benefits to which section 105(d) applies.

(6) *Examples.* The provisions of this paragraph may be illustrated by the following examples. In such examples assume that the plan does not expressly provide that any portion of the disability pension is purchased with employee contributions. Accordingly, it is presumed that no portion of the disability pension is purchased with employee contributions. Also, assume that in each case the taxpayer retired only after he had been absent from work for at least 30 days on account of personal injuries or sickness:

Example 1. A, a calendar year taxpayer, retired because of disability on January 1, 1968, his 58th birthday, receiving $80 per week ($4,160 per year) under a plan which qualifies as a wage continuation plan under section 105(d) and §1.105–4. Under the plan, A's initial retirement age is age 60 (January 1, 1970), and his mandatory retirement age is 65 (January 1, 1975). A's consideration for the contract was $10,000. For payments received in 1968 and 1969 A excluded the entire amount under section 105(d). Payments received with respect to periods after A's initial retirement age (January 1, 1970) were excluded under section 72(d) until his entire $10,000 consideration for his contract had been excluded. Thus, A applied section 72(d) to exclude $4,160 each year for taxable years 1970 and 1971, and $1,680 ($10,000 − ($4,160+$4,160)) for 1972. In late 1974 A realized that he was entitled to treat the full amount received under his annuity as excludable under section 105(d) rather than section 72 for the taxable years 1970 through 1974. Consequently, A filed amended returns for 1972 and 1973 excluding an additional $2,480 ($4,160 − $1,680) and $4,160, respectively, claiming refunds based upon such additional exclusions. Moreover, A's annuity starting date is January 1, 1975 (A's mandatory retirement age), and he excludes under section 72(d) for 1975, 1976, and 1977, $4,160, $4,160 and $1,680 ($10,000 − ($4,160+$4,160)), respectively.

Example 2. B, a calendar year taxpayer retired because of disability, July 1, 1970, on his 58th birthday, receiving $1,000 per month under a plan which qualifies as a wage continuation plan for purposes of section 105(d) and §1.105–4. Under the plan, B's initial retirement age is age 60 (July 1, 1972), and his mandatory retirement age is 65 (July 1, 1977). B's consideration for the contract was

$25,000. For payments received in 1970 and 1971 B excluded under section 105(d) $2,600 and $5,200, respectively, of the $6,000 (6×$1,000) and $12,000 (12×$1,000) received under the plan. For the period January 1, 1972, through June 30, 1972, B excluded an additional $2,600 under section 105(d). For the period July 1, 1972, through December 31, 1972, B excluded under section 72(d)(1) the entire $6,000 in payments received under the plan. Similarly, under section 72(d)(1), B excluded the entire $12,000 in payments received under the plan in 1973, and in 1974 B excluded the remaining $7,000 of his annuity basis. In 1975, B realized that he will be entitled to take full advantage of the exclusion under section 105(d) for periods through June 30, 1977, when he would reach age 65. B need not file amended returns for 1972, 1973, and 1974, even though the amounts he excluded under section 72(d) (exceeded the amount he was entitled to exclude under section 105(d)). He must, however, recompute the amount that will be treated as his investment in his annuity contract. Thus, on July 1, 1977, B's annuity starting date, his investment in his annuity contract would be $13,000, recomputed as follows:

B's original investment	$25,000
Less amounts excluded under section 72 to the extent they exceed amounts that would have been excludable during the same period under section 105(d):	
1972 ($6,000 − 2,600)	3,400
1973 ($12,000 − 5,200)	6,800
1974 ($7,000 − 5,200)	1,800
Total	12,000
B's recomputed investment in his annuity contract	$13,000

Example 3. Assume the same facts as in example (2) except that B's investment in his annuity contract is $37,000, and he excluded under section 72(b) 16.9 percent, or $2,028, of the $12,000 received per year. Thus, for the period July 1, 1972, through December 31, 1972, B excluded under section 72(b) $1,014 (16.9 percent of $6,000), and $2,028 in both 1973 and 1974. B files amended returns for 1972, 1973 and 1974 claiming the exclusion under section 105(d). Thus, B restored to income $1,014 for 1972, and $2,028 for both 1973 and 1974, claiming $2,600 ($5,200 − $2,600) exclusion under section 105(d) for 1972 and a $5,200 exclusion in both 1973 and 1974. Thus, for 1972 B is entitled to an additional exclusion of $1,586 ($2,600 − $1,014), and, for both 1973 and 1974, an additional exclusion of $3,172 ($5,200 − $2,028). On July 1, 1977, B's investment in the contract is $37,000.

Example 4. C, a calendar year taxpayer, retired because of disability on January 1, 1965, his 58th birthday, receiving payments of $500 per month under a plan which qualifies as a wage continuation plan for purposes of section 105(d) and §1.105–4. C had contributed $18,000 toward the cost of his annuity contract. Under the plan, C's initial retirement age is age 60 (January 1, 1967) and C's mandatory retirement age is age 70 (January 1, 1977). For taxable years 1965 and 1966 C excluded from gross income under section 105(d) $5,200 of the $6,000 (12×$500) he received from his employer as wage continuation benefits. On January 1, 1967, C began excluding all of the benefits C received in accordance with the rules of section 72(d). Thus, for 1967, 1968 and 1969, C excluded 100 percent of the annuity payments. For his taxable years 1970 through 1973, C included in his gross income all annuity payments. In 1974, C realized that he will be entitled to use the exclusion under section 105(d) through December 31, 1976 (until he reaches age 70). In 1974, C filed a timely claim for refund for his taxable years 1971, 1972, and 1973 (refunds for taxable year 1970 and prior years were barred by the statute of limitations), and continues to claim the exclusion under section 105(d) for 1974, 1975, and 1976. For 1977, C treats January 1, 1977, as the annuity starting date, and treats $15,600 as the investment in the contract. The $15,600 represents the $18,000 original investment in the contract reduced by the excess, $2,400, of the amount excluded under section 72 for 1967, 1968 and 1969 ($18,000) over the amount excludable under section 105(d) ($5,200×3) for such years.

Example 5. (i) D, a calendar year taxpayer, retired because of disability on June 30, 1965, receiving $100 per month under a plan which qualifies as a wage continuation plan for purposes of section 105(d) and §1.105–4. Under the plan, the initial retirement age of D, whose birthday is January 1, is age 60 (January 1, 1967), and D's mandatory retirement age is age 70 (January 1, 1977). D had contributed $6,000 toward the cost of the annuity contract under such plan. For 1965 and 1966, D excluded under section 105(d) the entire amount received under the plan ($1600 and $1,200 respectively). For 1967 through 1973, D excluded $330 per year under section 72(b), or 27.5 percent of the $1,200 payment received under the plan per year.

(ii) In 1974, D realized that he will be entitled to use the exclusion provided in section 105(d) up until January 1, 1977, when he reaches his mandatory retirement age, and that he improperly applied section 72 to payments received in the years 1967 through 1973. In 1974, D filed a timely claim for refund with respect to the section 105(d) wage continuation benefits, for 1971, 1972 and 1973 (refunds for taxable year 1970 and prior years were barred by the statute of limitations), and continues to claim the section 105(d) exclusion for 1974, 1975 and 1976. D is entitled to an additional exclusion of $870 ($1,200 − $330) for each of the years 1971, 1972 and 1973.

(iii) Upon reaching mandatory retirement age on January 1, 1977, D treats such date as the annuity starting date, and treats $6,000 as the investment in the contract. The investment in the contract is not reduced, because the amount excluded under section 72(b) for 1967 through 1970 ($330 per year) does not exceed the amount excludable under section 105(d) ($1,200 per year), and the $330 per year excluded for 1971, 1972, and 1973 were restored to the investment in the contract. Therefore, assuming that D would be entitled to exclude 41.3 percent of the payments under the plan if the annuity starting date is January 1, 1977, D would be entitled to exclude $495.60 (41.3 percent of $1,200) per annum.

Example 6. Assume the facts stated in example (5) except that D's investment in his annuity contract is $100,000 and he received payments equaling $10,000 per year. Assume also, that D had excluded under section 72(b) 54.9 percent of the payments received under the plan through 1974. Consequently, he excluded $5,490 (54.9 percent of $10,000) from his gross income for the years 1967 through 1974. D need not file amended returns for 1971, 1972, 1973, and 1974, even though the amount he excluded under section 72(b) exceeded the amounts he was entitled to exclude under section 105(d). He must, however, recompute the amount that will be treated as his investment in his annuity contract. Thus, on January 1, 1977, D's annuity starting date, his investment in his annuity contract would be $97,680. This figure represents the original investment ($100,000) reduced by the amount excluded under section 72(b) for the years 1967–1974 (8×$5,490 = $43,920) over the amount properly excludable during those years under section 105(d) ($5,200×8 = $41,600).

Example 7. Assume the same facts as in example (6) except that D's mandatory retirement age is 63 (January 1, 1970). D would redetermine his exclusion ratio for purposes of section 72(b) as of January 1, 1970, since D's mandatory retirement age is D's annuity starting date. D would treat $99,130 as his investment in his annuity contract as of such date for purposes of section 72(b). Assuming refunds for 1970 and prior taxable years were barred by the statute of limitations, the $99,130 represents the original investment of $100,000 reduced by the excess of the amount excluded under section 72(b) for 1967, 1968, and 1969 ($5,490×3 = $16,470) over the amount otherwise excludable during those years under section 105(d) ($5,200×3 = $15,600). Therefore, assuming that D would be entitled to exclude 61.2 of the payments received under the plan if the annuity starting date is January 1, 1970, D would be entitled to exclude $6,120 (61.2 percent of the $10,000 received under the plan) per annum for 1971 and subsequent years. However, D is not entitled to exclude the additional $630 ($6,120 − $5,490) for 1970, because credit or refund for 1970 and prior years is barred by the statute of limitations.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6676, 28 FR 10135, Sept. 17, 1963; T.D. 6722, 29 FR 5069, Apr. 14, 1964; T.D. 6770, 29 FR 15366, Nov. 17, 1964; T.D. 7352, 40 FR 16664, Apr. 14, 1975]

§ 1.72–16 Life insurance contracts purchased under qualified employee plans.

(a) *Applicability of section.* This section provides rules for the tax treatment of premiums paid under qualified pension, annuity, or profit-sharing plans for the purchase of life insurance contracts and rules for the tax treatment of the proceeds of such a life insurance contract and of annuity contracts purchased under such plans. For purposes of this section, the term ''life insurance contract'' means a retirement income, an endowment, or other contract providing life insurance protection. The rules of this section apply to plans covering only common-law employees as well as to plans covering self-employed individuals.

(b) *Treatment of cost of life insurance protection.* (1) The rules of this paragraph are applicable to any life insurance contract—

(i) Purchased as a part of a plan described in section 403(a), or

(ii) Purchased by a trust described in section 401(a) which is exempt from tax under section 501(a) if the proceeds of such contract are payable directly or indirectly to a participant in such trust or to a beneficiary of such participant.

The proceeds of a contract described in subdivision (ii) of this subparagraph will be considered payable indirectly to a participant or beneficiary of such participant where they are payable to the trustee but under the terms of the plan the trustee is required to pay over all of such proceeds to the beneficiary.

(2) If under a plan or trust described in subparagraph (1) of this paragraph, amounts which were allowed as a deduction under section 404, or earnings of the trust, are applied toward the purchase of a life insurance contract described in subparagraph (1) of this paragraph, the cost of the life insurance protection under such contract shall be included in the gross income of

the participant for the taxable year or years in which such contributions or earnings are so applied.

(3) If the amount payable upon death at any time during the year exceeds the cash value of the insurance policy at the end of the year, the entire amount of such excess is considered current life insurance protection. The cost of such insurance will be considered to be a reasonable net premium cost, as determined by the Commissioner, for such amount of insurance for the appropriate period.

(4) The amount includible in the gross income of the employee under this paragraph shall be considered as premiums or other consideration paid or contributed by the employee only with respect to any benefits attributable to the contract (within the meaning of paragraph (a)(3) of §1.72–2) providing the life insurance protection. However, if under the rules of this paragraph an owner-employee is required to include any amounts in his gross income, such amounts shall not in any case be treated as part of his investment in the contract.

(5) The determination of the cost of life insurance protection may be illustrated by the following example:

Example. An annual premium policy purchased by a qualified trust for a common-law employee provides an annuity of $100 per month upon retirement at age 65, with a minimum death benefit of $10,000. The insurance payable if death occurred in the first year would be $10,000. The cash value at the end of the first year is 0. The net insurance is therefore $10,000 minus 0, or $10,000. Assuming that the Commissioner has determined that a reasonable net premium cost for the employee's age is $5.85 per $1,000, the premium for $10,000 of life insurance is therefore $58.50, and this is the amount to be reported as income by the employee for his taxable year in which the premium is paid. The balance of the premium is the amount contributed for the annuity, which is not taxable to the employee under a plan meeting the requirements of section 401(a), except as provided under section 402(a). Assuming that the cash value at the end of the second year is $500, the net insurance would then be $9,500 for the second year. With a net 1-year term rate of $6.30 for the employee's age in the second year, the amount to be reported as income to the employee would be $59.85.

(6) This paragraph shall not apply if the trust has a right under any circumstances to retain any part of the proceeds of the life insurance contract. But see paragraph (c)(4) of this section relating to the taxability of the distribution of such proceeds to a beneficiary.

(c) *Treatment of proceeds of life insurance and annuity contracts.* (1) If under a qualified pension, annuity, or profit-sharing plan, there is purchased either—

(i) A life insurance contract described in paragraph (b)(1) of this section, and the employee either paid the cost of the insurance or was taxable on the cost of the insurance under paragraph (b) of this section, or

(ii) An annuity contract,

the amounts payable under any such contract by reason of the death of the employee are taxable under the rules of subparagraph (2) of this paragraph, except in the case of a joint and survivor annuity.

(2)(i) In the case of an annuity contract, the death benefit is the accumulation of the premiums (plus earnings thereon) which is intended to fund pension or other deferred benefits under a pension, annuity, or profit-sharing plan. Such death benefits are not in the nature of life insurance and are not excludable from gross income under section 101(a).

(ii) In the case of a life insurance contract under which there is a reserve accumulation which is intended to fund pension or other deferred benefits under a pension, annuity, or profit-sharing plan, such reserve accumulation constitutes the source of the cash value of the contract and approximates the amount of such cash value. The portion of the proceeds paid upon the death of the insured employee which is equal to the cash value immediately before death is not excludable from gross income under section 101(a). The remaining portion, if any, of the proceeds paid to the beneficiary by reason of the death of the insured employee—that is, the amount in excess of the cash value—constitutes current insurance protection and is excludable under section 101(a).

(iii) The death benefit under an annuity contract, or the portion of the death proceeds under a life insurance contract which is equal to the cash value of the contract immediately before death, constitutes a distribution under the plan consisting in whole or in part of deferred compensation and is taxable to the beneficiary in accordance with section 72(m)(3) and the provisions of this paragraph, except to the extent that the limited exclusion from income provided in section 101(b) is applicable.

(iv) In the case of a life insurance contract under which the benefits are paid at a date or dates later than the death of the employee, section 101(d) is applicable only to the portion of the benefits which is attributable to the amount excludable under section 101(a). The portion of such benefits which is attributable to the cash value of the contract immediately before death is taxable under section 72, and in such case, any amount excludable under section 101(b) is treated as additional consideration paid by the employee in accordance with section 101(b)(2)(D).

(3) The application of the rules under subparagraph (2) of this paragraph with respect to the taxability of proceeds of a life insurance contract paid by reason of the death of an insured common-law employee who has paid no contributions under the plan is illustrated by the following examples:

Example 1.

Total face amount of the contract payable in a lump sum at time of death	$25,000
Cash value of the contract immediately before death	11,000
Excess over cash value, excludable under section 101(a)	14,000
Cash value subject to limited exclusion under section 101(b)	11,000
Excludable under section 101(b) (assuming that there is no other death benefit paid by or on behalf of any employer with respect to the employee)	5,000
Balance taxable in accordance with section 402(a)(2) or 403(a)(2) (assuming a total distribution in one taxable year of the distributee)	6,000
Portion of premiums taxed to employee under the provisions of paragraph (b) of this section and considered as contributions of the employee	940
Balance taxable as long-term capital gain	5,060

Example 2. The facts are the same as in example (1), except that the contract provides that the beneficiary may elect within 60 days after the death of the employee either to take the $25,000 or to receive 10 annual installments of $3,000 each, and the beneficiary elects to receive the 10 installments. In addition, the employee's rights to the cash value immediately before his death were forfeitable at least to the extent of $5,000. Section 101(d) is applicable to the amount excludable under section 101(a), that is, $14,000. The portion of each annual installment of $3,000 which is attributable to this $14,000 is determined by allocating each installment in accordance with the ratio which this $14,000 bears to the total amount which was payable at death ($25,000). Accordingly, the portion of each annual installment which is subject to section 101(d) is $1,680 (14/25 of $3,000), of which $1,400 (1/10 of $14,000) is excludable under section 101(a), and the remaining $280 is includible in the gross income of the beneficiary. However, if the beneficiary is a surviving spouse as defined in section 101(d)(3), the exclusion provided by section 101(d)(1)(B) is applicable to such $280. The remaining portion of each annual $3,000 installment, $1,320, is attributable to the cash value of the contract and is treated under section 72, as follows:

Amount actually contributed by the employee	0
Amount considered contributed by employee by reason of section 101(b)	$5,000
Portion of premiums taxed to employee under the provisions of paragraph (b) of this section and considered as contributions of the employee	$940
Investment in the contract	$5,940
Expected return, 10×$1,320	$13,200
Exclusion ratio, $5,940÷$13,200	0.45
Annual exclusion, 0.45×$1,320	$594

Accordingly, $594 of the $1,320 portion of each annual installment is excludable each year under section 72, and the remaining $726 is includible. Thus, if the beneficiary is not a surviving spouse, a total of $1,006 ($280 plus $726) of each annual $3,000 installment is includible in income each year. If the beneficiary is a surviving spouse, and can exclude all of the $280 under section 101(d)(1)(B), the amount includible in gross income each year is $726 of each annual $3,000 installment.

(4) If an employee neither paid the total cost of the life insurance protection provided under a life insurance contract, nor was taxable under paragraph (b) of this section with respect thereto, no part of the proceeds of such a contract which are paid to the beneficiaries of the employee as a death benefit is excludable under section 101(a). The entire distribution is taxable to the beneficiaries under section 402(a) or 403(a) except to the extent that a limited exclusion may be allowable under section 101(b).

[T.D. 6676, 28 FR 10135, Sept. 17, 1963]

§ 1.72–17 Special rules applicable to owner-employees.

(a) *In general.* Under section 401(c) and section 403(a), certain self-employed individuals may participate in qualified pension, annuity, and profit-sharing plans, and the amounts received by such individuals from such plans are taxable under section 72. Section 72(m) and this section contain special rules for the taxation of amounts received from qualified pension, profit-sharing, or annuity plans covering an owner-employee. For purposes of section 72 and the regulations thereunder, the term "employee" shall include the self-employed individual who is treated as an employee by section 401(c)(1) (see paragraph (b) of §1.401–10), and the term "owner-employee" has the meaning assigned to it in section 401(c)(3) (see paragraph (d) of §1.401–10). See also paragraph (a)(2) of §1.401–10 for the rule for determining when a plan covers an owner-employee. For purposes of this section, a self-employed individual may not treat as consideration for the contract contributed by the employee any contributions under the plan for which deductions were allowed under section 404 and which, consequently, are considered employer contributions.

(b) *Certain amounts received before annuity starting date.* (1) The rules of this paragraph are applicable to amounts received from a qualified pension, profit-sharing, or annuity plan by an employee (or his beneficiary) who is or was an owner-employee with respect to such plan when such amounts—

(i) Are received before the annuity starting date; and

(ii) Are not received as an annuity.

For the definition of annuity starting date, see paragraph (b) of §1.72–4 and subparagraph (4) of this paragraph. As to what constitutes amounts not received as an annuity, see paragraphs (c) and (d) of §1.72–11.

(2) Amounts to which this paragraph applies shall be included in the recipient's gross income for the taxable year in which received. However, the sum of the amounts so included under this subparagraph in all taxable years shall not exceed the aggregate deductions allowed under section 404 for premiums or other consideration paid under the plan on behalf of the employee while he was an owner-employee, including any such deductions taken in the taxable year of receipt.

(3) Any amounts to which this paragraph applies and which are not includible in gross income under the rules of subparagraph (2) of this paragraph shall be subject to the provisions of section 72(e) and §1.72–11. However, for taxable years beginning before January 1, 1964, section 72(e)(3), as in effect before such date, shall not apply to such amounts. For taxable years beginning after December 31, 1963, such amounts (other than amounts subject to a penalty under section 72(m)(5) and paragraph (e) of this section) may be taken into account in computations under sections 1301 through 1305 (relating to income averaging).

(4) Under section 401(d)(4), a qualified pension, profit-sharing, or annuity plan may not provide for distributions to an owner-employee before he reaches age 59½ years, except in the case of his earlier disability. Therefore, in the case of a distribution from a qualified plan to an individual for whom contributions have been made to the plan as an owner-employee, the annuity starting date cannot be prior to the time such individual attains the age 59½ years unless he is entitled to benefits before reaching such age because of his disability. For taxable years beginning after December 31, 1966, see section 72(m)(7) and paragraph (f) of this section for the meaning of disabled. For taxable years beginning before January 1, 1967, see section 213(g)(3) for the meaning of disabled.

(5) The rules of this paragraph are not applicable to amounts credited to an individual in his capacity as a policy-holder of an annuity, endowment, or life insurance contract which are in the nature of a dividend or refund of premium, and which are applied in accordance with paragraph (a)(4) of §1.404(a)–8 towards the purchase of benefits under the policy.

(6) The rules of this paragraph may be illustrated by the following example:

Example. B, a self-employed individual, received $8,000 as a distribution under a qualified pension plan before the annuity starting date. At the time of such distribution, $10,000 had been contributed (the whole amount being allowed as a deduction) under the plan on behalf of such individual while he was a common-law employee and $5,000 had been contributed under the plan on his behalf while he was an owner-employee, of which $2,500 was allowed as a deduction. In addition, B had contributed $1,000 on his own behalf as an employee under the plan. Of the $8,000, $2,500 (the amount allowed as a deduction with respect to contributions on behalf of the individual while he was an owner-employee) is includable in gross income under subparagraph (2) of this paragraph. With respect to the remaining $5,500, B has a basis of $3,500, consisting of the $2,500 contributed on his behalf while he was an owner-employee which was not allowed as a deduction and the $1,000 which B contributed as an employee. The difference between the $5,500 and B's basis of $3,500, or $2,000, is includable in gross income under section 72(e).

(c) *Amounts paid for life, accident, health, or other insurance.* Amounts used to purchase life, accident, health, or other insurance protection for an owner-employee shall not be taken into account in computing the following:

(1) The aggregate amount of premiums or other consideration paid for the contract for purposes of determining the investment in the contract under section 72(c)(1)(A) and § 1.72–6;

(2) The consideration for the contract contributed by the employee for purposes of section 72(d)(1) and § 1.72–13, which provide the method of taxing employees' annuities where the employee's contributions will be recoverable within 3 years; and

(3) The aggregate premiums or other consideration paid for purposes of section 72(e)(1)(B) and § 1.72–11, which provide the rules for taxing amounts not received as annuities prior to the annuity starting date.

The cost of such insurance protection will be considered to be a reasonable net premium cost, as determined by the Commissioner, for the appropriate period.

(d) *Amounts constructively received.* (1) If during any taxable year an owner-employee assigns or pledges (or agrees to assign or pledge) any portion of his interest in a trust described in section 401(a) which is exempt from tax under section 501(a), or any portion of the value of a contract purchased as part of a plan described in section 403(a), such portion shall be treated as having been received by such owner-employee as a distribution from the trust or as an amount received under the contract during such taxable year.

(2) If during any taxable year an owner-employee receives, either directly or indirectly, any amount from any insurance company as a loan under a contract purchased by a trust described in section 401(a) which is exempt from tax under section 501(a) or purchased as part of a plan described in section 403(a), and issued by such insurance company, such amount shall be treated as an amount received under the contract during such taxable year. An owner-employee will be considered to have received an amount under a contract if a premium, which is otherwise in default, is paid by the insurance company in the form of a loan against the cash surrender value of the contract. Further, an owner-employee will be considered to have received an amount to which this subparagraph applies if an amount is received from the issuer of a face-amount certificate as a loan under such a certificate purchased as part of a qualified trust or plan.

(e) *Penalties applicable to certain amounts received by owner-employees.* (1)(i) The rules of this paragraph are applicable to amounts, to the extent includable in gross income, received from a trust described in section 401(a) or under a plan described in section 403(a) by or on behalf of an individual who is or has been an owner-employee with respect to such plan or trust—

(*a*) Which are received before the owner-employee reaches the age 59½ years and which are attributable to contributions paid on behalf of such owner-employee (whether or not paid by him) while he was an owner-employee (see subdivision (ii) of this subparagraph),

(*b*) Which are in excess of the benefits provided for such owner-employee under the plan formula (see subdivision (iii) of this subparagraph), or

(*c*) Which are received by reason of a distribution of the owner-employee's entire interest under the provisions of section 401(e)(2)(E), relating to excess contributions on behalf of an owner-employee which are willfully made.

(ii) The amounts referred to in subdivision (i)(*a*) of this subparagraph do not include—

(*a*) Amounts received by reason of the owner-employee becoming disabled, or

(*b*) Amounts received by the owner-employee in his capacity as a policyholder of an annuity, endowment, or life insurance contract which are in the nature of a dividend or similar distribution.

Amounts attributable to contributions paid on behalf of an owner-employee and which are paid to a person other than the owner-employee before the owner-employee dies or reaches the age 59½ shall be considered received by the owner-employee for purposes of this paragraph. For taxable years beginning after December 31, 1966, see section 72(m)(7) and paragraph (f) of this section for the meaning of disabled. For taxable years beginning before January 1, 1967, see section 213(g)(3) for the meaning of disabled. For taxable years beginning after December 31, 1968, if an amount is not included in the amounts referred to in subdivision (i)(*a*) of this subparagraph solely by reason of the owner-employee becoming disabled and if a penalty would otherwise be applicable with respect to all or a portion of such amount, then for the taxable year in which such amount is received, there must be submitted with the owner-employee's income tax return a doctor's statement as to the impairment, and a statement by the owner-employee with respect to the effect of such impairment upon his substantial gainful activity and the date such impairment occurred. For taxable years which are subsequent to the first taxable year beginning after December 31, 1968, with respect to which the statements referred to in the preceding sentence are submitted, the owner-employee may, in lieu of such statements, submit a statement declaring the continued existence (without substantial diminution) of the impairment and its continued effect upon his substantial gainful activity.

(iii) This paragraph applies to amounts described in subdivision (i)(*b*) of this subparagraph (relating to excess benefits) even though a portion of such amounts may be attributable to contributions made on behalf of an individual while he was not an owner-employee and even though the amounts are received by his successor. However, these amounts do not include the portion of a distribution to which section 402(a)(2) or 403(a)(2) (relating to certain total distributions in one taxable year) applies.

(iv)(*a*) For purposes of subdivision (i)(*a*) of this subparagraph, the portion of any distribution or payment attributable to contributions on behalf of an employee-participant while he was an owner-employee includes the contributions made on his behalf while he was an owner-employee and the increments in value attributable to such contributions.

(*b*) The increments in value of an individual's account may be allocated to contributions on his behalf while he was an owner-employee either by maintaining a separate account, or an accounting, which reflects the actual increment attributable to such contributions, or by the method described in (*c*) of this subdivision.

(*c*) Where an individual is covered under the same plan both as an owner-employee and as a nonowner-employee, the portion of the increment in value of his interest attributable to contributions made on his behalf while he was an owner-employee may be determined by multiplying the total increment in value in his account by a fraction. The numerator of the fraction is the total contributions made on behalf of the individual as an owner-employee, weighted for the number of years that each contribution was in the plan. The denominator is the total contributions made on behalf of the individual, whether or not an owner-employee, weighted for the number of years each contribution was in the plan. The contributions are weighted for the number of years in the plan by multiplying each contribution by the number of years it was in the plan. For purposes of this computation, any forfeiture allocated to the account of the individual is treated as a contribution to the account made at the time so allocated.

(*d*) The method described in (*c*) of this subdivision may be illustrated by the following example:

Example. B was a member of the XYZ Partnership and a participant in the partnership's profit-sharing plan which was created in 1963. Until the end of 1967, B's interest in the partnership was less than 10 percent. On January 1, 1968, B obtained an interest in excess of 10 percent in the partnership and continued to participate in the profit-sharing plan until 1972. During 1972, prior to the time he attained the age of 59½ years and during a time when he was not disabled, B withdrew his entire interest in the profit-sharing plan. At that time his interest was $15,000, $9,600 contributions and $5,400 increment attributable to the contributions. The portion of the increment attributable to contributions while B was an owner-employee is $667.80, determined as follows:

	A	B	C
	Contribution	Number of years contribution was in trust—	Contribution weighted for years in trust (A×B)
1972	$1,000	0	0
1971	800	1	800
1970	1,200	2	2,400
1969	600	3	1,800
1968	200	4	800
1967	400	5	2,000
1966	2,000	6	12,000
1965	1,000	7	7,000
1964	1,500	8	12,000
1963	900	9	8,100
Total	$9,600		46,900

Total weighted contributions as owner-employee (1968–1972)—5,800.

Total weighted contributions—46,900.

$5,400×(5,800÷46,900) = $667.80

(2)(i) If the aggregate of the amounts to which this paragraph applies received by any person in his taxable year equals or exceeds $2,500 the tax with respect to such amount shall be the greater of—

(*a*) The increase in tax attributable to the inclusion of the amounts so received in his gross income for the taxable year in which received, or

(*b*) 110 percent of the aggregate increase in taxes, for such taxable year and the four immediately preceding taxable years, which would have resulted if such amounts had been included in such person's gross income ratably over such taxable years. However, if deductions were allowed under section 404 for contributions to the plan on behalf of the individual as an owner-employee for less than four prior taxable years (whether or not consecutive), the number of immediately preceding taxable years taken into account shall be the number of prior taxable years in which such deductions were allowed.

(ii) If the aggregate of the amounts to which this paragraph applies received by any person in his taxable year is less than $2,500, the tax with respect to such amounts shall be 110 percent of the increase in tax which results from including such amounts in the person's gross income for the taxable year in which received.

(3)(i) For purposes of making the ratable inclusion computations of subparagraph (2)(i) of this paragraph, the taxable income of the recipient for each taxable year involved (notwithstanding section 63, relating to definition of taxable income) shall be treated as being not less than the amount required to be treated as includible in the taxable year pursuant to the ratable inclusion.

(ii) For purposes of subparagraph (2)(i)(*a*) and (ii) of this paragraph, the recipient's taxable income (notwithstanding section 63, relating to definition of taxable income) shall be treated as being not less than the aggregate of the amounts to which this paragraph applies reduced by the deductions allowed the recipient for such taxable year under section 151 (relating to deductions for personal exemptions).

(iii) In any case in which the application of subdivision (i) or (ii) of this subparagraph results in an increase in taxable income for any taxable year, the resulting increase in taxes imposed by section 1 or 3 for such taxable year shall be reduced by the credits against tax provided by section 31 (tax withheld on wages) and section 39 (certain uses of gasoline and lubricating oil), but shall not be reduced by any other credits against tax.

(4) The application of the rules of subparagraph (2)(i) and (3) of this paragraph may be illustrated by the following example:

Example. B, a sole proprietor and a calendar-year basis taxpayer, established a qualified pension trust to which he made annual contributions for 10 years of 10 percent of his earned income. B withdrew his entire interest in the trust during 1973 when he was 55 years old and not disabled and for which, without regard to the distribution, he had a net operating loss and for which he is allowed under section 151 a deduction for one personal exemption. The portion of the distribution includible in B's gross income is $25,750. In addition, B had a net operating loss for 1972. The other 3 taxable years involved in the computation under subparagraph (2)(i) of this paragraph were years of substantial income. For purposes of determining B's increase in tax attributable to the receipt of the $25,750 (before the application of the provisions of subparagraph (2)(i)(*b*) of this paragraph), B's taxable income for the year he received the $25,750 is treated, under subparagraph (3)(ii) of this paragraph, as being $25,000 ($25,750 minus $750, the amount of the deduction allowed for each personal exemption under section 151 for 1973). For purposes of determining whether 110 percent of the aggregate increase in taxes which would have resulted if 20 percent of the amount of the withdrawal had been included in B's gross income for the year of receipt and for each of the 4 preceding taxable years is greater (and thus is the amount of his increase in tax attributable to the receipt of the $25,750), B's taxable income for the taxable year of receipt, and for the immediately preceding taxable year, is treated, under subparagraph (3)(i) of this paragraph, as being $5,150 ($25,750 divided by 5).

(f) *Meaning of disabled.* (1) For taxable years beginning after December 31, 1966, section 72(m)(7) provides that an individual shall be considered to be disabled if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration. In determining whether an individual's impairment makes him unable to engage in any substantial gainful activity, primary consideration shall be given to the nature and severity of his impairment. Consideration shall also be given to other factors such as the individual's education, training, and work experience. The substantial gainful activity to which section 72(m)(7) refers is the activity, or a comparable activity, in which the individual customarily engaged prior to the arising of the disability (or prior to retirement if the individual was retired at the time the disability arose).

(2) Whether or not the impairment in a particular case constitutes a disability is to be determined with reference to all the facts in the case. The following are examples of impairments which would ordinarily be considered as preventing substantial gainful activity:

(i) Loss of use of two limbs;

(ii) Certain progressive diseases which have resulted in the physical loss or atrophy of a limb, such as diabetes, multiple sclerosis, or Buerger's disease;

(iii) Diseases of the heart, lungs, or blood vessels which have resulted in major loss of heart or lung reserve as evidenced by X-ray, electrocardiogram, or other objective findings, so that despite medical treatment breathlessness, pain, or fatigue is produced on slight exertion, such as walking several blocks, using public transportation, or doing small chores;

(iv) Cancer which is inoperable and progressive;

(v) Damage to the brain or brain abnormality which has resulted in severe loss of judgment, intellect, orientation, or memory;

(vi) Mental diseases (e.g. psychosis or severe psychoneurosis) requiring continued institutionalization or constant supervision of the individual;

(vii) Loss or diminution of vision to the extent that the affected individual has a central visual acuity of no better than 20/200 in the better eye after best correction, or has a limitation in the fields of vision such that the widest diameter of the visual fields subtends an angle no greater than 20 degrees;

(viii) Permanent and total loss of speech;

(ix) Total deafness uncorrectible by a hearing aid.

The existence of one or more of the impairments described in this subparagraph (or of an impairment of greater severity) will not, however, in and of itself always permit a finding that an individual is disabled as defined in section 72(m)(7). Any impairment, whether of lesser or greater severity, must be evaluated in terms of whether it does in fact prevent the individual from engaging in his customary or any comparable substantial gainful activity.

(3) In order to meet the requirements of section 72(m)(7), an impairment must be expected either to continue for a long and indefinite period or to result in death. Ordinarily, a terminal illness because of disease or injury would result in disability. Indefinite is used in

the sense that it cannot reasonably be anticipated that the impairment will, in the foreseeable future, be so diminished as no longer to prevent substantial gainful activity. For example, an individual who suffers a bone fracture which prevents him from working for an extended period of time will not be considered disabled, if his recovery can be expected in the foreseeable future; if the fracture persistently fails to knit, the individual would ordinarily be considered disabled.

(4) An impairment which is remediable does not constitute a disability within the meaning of section 72(m)(7). An individual will not be deemed disabled if, with reasonable effort and safety to himself, the impairment can be diminished to the extent that the individual will not be prevented by the impairment from engaging in his customary or any comparable substantial gainful activity.

(g) *Years to which this section applies.* This section applies to taxable years ending before September 3, 1974. For taxable years ending after September 2, 1974, see §1.72–17A.

[T.D. 6676, 28 FR 10136, Sept. 17, 1963, as amended by T.D. 6885, 31 FR 7800, June 2, 1966; T.D. 6985, 33 FR 19811, Dec. 27, 1968; T.D. 7114, 36 FR 9018, May 18, 1971; T.D. 7636, 44 FR 47049, Aug. 10, 1979]

§ 1.72–17A Special rules applicable to employee annuities and distributions under deferred compensation plans to self-employed individuals and owner-employees.

(a) *In general.* Section 72(m) and this section contain special rules for the taxation of amounts received from qualified pension, profit-sharing, or annuity plans covering an owner-employee. This section applies to such amounts for taxable years of the recipient ending after September 2, 1974, unless another date is specified. For purposes of this section, the term ''employee'' shall include the self-employed individual who is treated as an employee by section 401(c)(1), and the term ''owner-employee'' has the meaning assigned to it in section 401(c)(3). Paragraph (b) of this section provides rules dealing with the computation of consideration paid by self-employed individuals and paragraph (c) of this section provides rules dealing with such computation when insurance is purchased for owner-employees. Paragraph (d) of this section provides rules for constructive receipt and, for purposes of these rules, treats as an owner-employee an individual for whose benefit an individual retirement account or annuity described in section 408 (a) or (b) is maintained after December 31, 1974. Paragraph (e) of this section provides rules for penalties provided by section 72(m)(5) with respect to certain distributions received by owner-employees or their successors. Paragraph (f) of this section provides rules for determining whether a person is disabled within the meaning of section 72(m)(7). See §1.72–16, relating to life insurance contracts purchased under qualified employee plans, for rules under section 72(m)(3).

(b) *Computation of consideration paid by self-employed individuals.* Under section 72(m)(2), consideration paid or contributed for the contract by any self-employed individual shall for purposes of section 72 be deemed not to include any contributions paid or contributed under a plan described in paragraph (a), or any other plan of deferred compensation described in section 404(a) (whether or not qualified), if the contributions are—

(1) Paid under such plan with respect to a time during which the employee was an employee only by reason of sections 401(c)(1) and 404(a)(8), and

(2) Deductible under section 404 by the employer, including an employer within the meaning of sections 401(c)(4) and 404(a)(8), of such self-employed individual at the time of such payment, or subsequent to such time of payment.

For purposes of this paragraph the term ''consideration paid or contributed for the contract'' has the same meaning as under subparagraphs (1), (2), and (3) of paragraph (c) of this section.

(c) *Amounts paid for life, accident, health, or other insurance.* Under section 72(m)(2), amounts used to purchase life, accident, health, or other insurance protection for an owner-employee shall not be taken into account in computing the following:

(1) The aggregate amount of premiums or other consideration paid for

the contract for purposes of determining the investment in the contract under section 72(c)(1)(A) and § 1.72–6;

(2) The consideration for the contract contributed by the employee for purposes of section 72(d)(1) and § 1.72–13, which provide the method of taxing employee's annuities where the employee's contributions will be recoverable within 3 years; and

(3) The aggregate premiums or other consideration paid for purposes of section 72(e)(1)(B) and § 1.72–11, which provide the rules for taxing amounts not received as annuities prior to the annuity starting date.

The cost of such insurance protection will be considered to be a reasonable net premium cost, as determined by the Commissioner, for the appropriate period.

(d) *Amounts constructively received.* (1) The references in this paragraph (d) to section 72(m)(4) are to that section as in effect on August 13, 1982. Section 236(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982 (96 Stat. 324) repealed section 72(m)(4), generally effective for assignments, pledges and loans made after August 13, 1982, and added section 72(p). See section 72(p) and § 1.72(p)–1 for rules governing the income tax treatment of certain assignments, pledges and loans from qualified employer plans made after August 13, 1982.

(2) Under section 72(m)(4)(A), if during any taxable year an owner-employee assigns or pledges (or agrees to assign or pledge) any portion of his interest in a trust described in section 401(a) which is exempt from tax under section 501(a), or any portion of the value of a contract purchased as part of a plan described in section 403(a), such portion shall be treated as having been received by such owner-employee as a distribution from the trust or as an amount received under the contract during such taxable year.

(3)(i) Under paragraphs (4)(A) and (6) of section 72(m), if after December 31, 1974, during any taxable year an individual for whose benefit an individual retirement account or annuity described in section 408 (a) or (b) is maintained assigns or pledges (or agrees to assign or pledge) any portion of his interest in such account or annuity, such portion shall be treated as having been received by such individual as a distribution from such account or trust during such taxable year. See subsections (d) and (f) of section 408 and the regulations thereunder for the tax treatment of an amount treated as a distribution under this subparagraph.

(ii) Notwithstanding subdivision (i) of this subparagraph, if an individual retirement account or annuity, or portion thereof, is subject to the additional tax imposed by section 408(f), that amount shall be deemed not to be a distribution under section 72(m)(4)(A) and subdivision (i) of this subparagraph.

(4) Under section 72(m)(4)(B), if during any taxable year an owner-employee receives, either directly or indirectly, any amount from any insurance company as a loan under a contract purchased by a trust described in section 401(a) which is exempt from tax under section 501(a) or purchased as part of a plan described in section 403(a), and issued by such insurance company, such amount shall be treated as an amount received under the contract during such taxable year. An owner-employee will be considered to have received an amount under a contract if a premium, which is otherwise in default, is paid by the insurance company in the form of a loan against the cash surrender value of the contract. Further, an owner-employee will be considered to have received an amount to which this subparagraph applies if an amount is received from the issuer of a face-amount certificate as a loan under such a certificate purchased as part of a qualified trust or plan.

(e) *Penalties applicable to certain amounts received with respect to owner-employees under section 72(m)(5).* (1)(i) For taxable years of the recipient beginning after December 31, 1975, if any person receives an amount to which subparagraph (2) of this paragraph applies, his tax under Chapter 1 for the taxable year in which such amount is received shall be increased by an amount equal to 10 percent of the portion of the amount so received which is includible in his gross income for such taxable year.

(ii) For taxable years of the recipient beginning before January 1, 1976, see subparagraph (3) of this paragraph.

(2)(i) This subparagraph is applicable to amounts, to the extent includible in gross income, received from a qualified trust described in section 401(a) or under a plan described in section 403(a) by or on behalf of an individual who is or has been an owner-employee with respect to such trust or plan—

(A) Which are received before the owner-employee reaches the age of 59½ years, and which are attributable to contributions paid on behalf of such owner-employee by his employer (that is employer contributions within the meaning of section 401(c)(5)(A) and the increments in value attributable to such employer contributions) and the increments in value attributable to contributions made by him as an owner-employee while he was an owner-employee (that is, the increments attributable to owner-employee contributions within the meaning of section 401(c)(5)(B), but not such contributions; see subdivision (ii) of this subparagraph).

(B) Which are in excess of the benefits provided for such owner-employee under the plan formula (see subdivision (iii) of this subparagraph), or

(C) Which are subject to the transitional rules with respect to willful excess contributions made on behalf of an owner-employee in his employer's taxable years which begin before January 1, 1976 (see subdivision (v) of this subparagraph).

(ii) The amounts referred to in subdivision (i)(A) of this subparagraph do not include—

(A) Amounts received by reason of the owner-employee becoming disabled (see paragraph (f) of this section).

(B) Amounts received by the owner-employee in his capacity as a policyholder of an annuity, endowment, or life insurance contract which are in the nature of a dividend or similar distribution, or

(C) Amounts attributable to contributions (and increments in value thereon) made for years for which the recipient was not an owner-employee.

If an amount is not included in the amounts referred to in subdivision (i)(A) of this subparagraph solely by reason of the owner-employee's becoming disabled and if a penalty would otherwise be applicable with respect to all or a portion of such amount, then for the owner-employee's taxable year in which such amount is received, there must be submitted with his income tax return a doctor's statement as to the impairment, and a statement by the owner-employee with respect to the effect of such impairment upon his substantial gainful activity and the date such impairment occurred. For taxable years which are subsequent to the first taxable year with respect to which the statements referred to in the preceding sentence are submitted, the owner-employee may, in lieu of such statements, submit a statement declaring the continued existence (without substantial diminution) of the impairment and its continued effect upon his substantial gainful activity.

(iii) This subparagraph applies to amounts described in subdivision (i)(B) of this subparagraph (relating to benefits in excess of the plan formula) even though a portion of such amounts may be attributable to contributions made on behalf of an individual while he was not an owner-employee and even if he is deceased and the amounts are received by his successor.

(iv)(A) The rules described in subdivisions (i)(A) and (iii) of this subparagraph, relating to the treatment under section 72(m)(5)(A)(i) of certain premature distributions, may be illustrated by the following example:

Example. (1) A was a member of the X partnership, consisting of partners A through I, and a participant in the partnership's qualified profit-sharing plan which was established on January 1, 1972. A's taxable years, the X partnership's taxable years, the plan years, and other relevant years are all calendar years at all relevant times. For the three calendar years, 1972 through 1974, A was an owner-employee in the X partnership. On January 1, 1975, new partners J and K became partners in the X partnership, and as of that date, each of partners A through K held a 1/11 interest in the capital and profits of the X partnership. On that date, A became a partner who was not an owner-employee. A continued in this status for the 2 calendar years 1975 and 1976. On January 1, 1977, when A was 50 years old and not disabled, he liquidated his interest in the X partnership and became an employee of an unrelated employer. On that date, A received a distribution representing his entire interest in the X partnership's plan of $54,000 cash in violation of the plan provision required by section 401(d)(4)(B). As of that date, the distribution was attributable to the following sources and times, computed by the plan in a manner consistent with the subparagraph:

Calendar years	A	B	C	D
	X contributions on behalf of A deductible under sec. 404	A's contributions made as an employee	Increments in value attributable to column A yearly contributions	Increments in value attributable to column B yearly contributions
1977	0	0	0	0
1976	$7,500	$2,500	$900	$300
1975	7,500	2,500	4,000	1,300
1974	7,500	2,500	1,800	700
1973	2,500	2,500	1,200	1,200
1972	2,500	2,500	1,300	1,300
Totals	27,500	12,500	9,200	4,800

(*2*) The amount of the $54,000 distribution to which subdivision (i)(A) of this subparagraph applies is $20,000, computed as follows:

X contributions on behalf of A made in years A was an owner-employee:	
1974	$7,500
1973	2,500
1972	2,500
Total	12,500
Increments in value attributable to such contributions:	
1974	1,800
1973	1,200
1972	1,300
Total	4,300
Increments in value attributable to contributions made by A as an employee for years in which he was an owner-employee:	
1974	700
1973	1,200
1972	1,300
Total	3,200
Grand total	20,000

In this example, the $20,000 amount computed above would be includible in A's gross income for 1977 and would be subject to the 10 percent tax described in subparagraph (1)(i) of this paragraph.

(*3*) Subdivision (i)(A) of this subparagraph does not apply to the contributions made by X on behalf of A for 1976 and 1975 ($7,500 each year, totaling $15,000) nor to the increments in value attributable to those contributions ($900 for 1976 and $4,000 for 1975, totaling $4,900), because A was not an owner-employee with respect to these two years, 1976 and 1975, on account of which these employer contributions were made. For the same reason, subdivision (i)(A) of this subparagraph does not apply to the increments in value attributable to A's contributions for 1976 and 1975 ($300 and $1,300, respectively, totaling $1,600).

See section 4972(c) for the amount of employee contributions which is permitted to be contributed by an owner-employee (as an employee) without subjecting an owner-employee to the tax on excess contributions.

(*4*) Subdivision (i)(A) of this subparagraph does not apply to the contributions made by A, as an employee during the years when he was an owner-employee ($2,500 during each of the years 1972, 1973, and 1974, totaling $7,500), because the distribution was received in a taxable year of A ending after September 2, 1974; see subparagraph (3) of this paragraph. Furthermore, because the distribution of the amount of A's contributions ($12,500) constitutes consideration for the contract paid by A for purposes of section 72, the $7,500 amount described in the preceding sentence is not includible in his gross income, and that amount is not subject to the rules of this subparagraph; see subdivision (i) of this subparagraph, and paragraphs (b) and (c) of this section.

(B) The increments in value of an individual's account may be allocated to contributions on his behalf, by his employer or by such individual as an owner-employee, while he was an owner-employee either by maintaining a separate account, or an accounting, which reflects the actual increment attributable to such contributions, or by the method described in (C) of this subdivision.

(C) Where an individual is covered under the same plan both as an owner-employee and as a non-owner-employee, the portion of the increment in value of his interest attributable to contributions made on his behalf while he was an owner-employee may be determined by multiplying the total increment in value in his account by a fraction. The numerator of the fraction is the total contributions made on behalf of the individual as an owner-employee, weighted for the number of years that each contribution was in the plan. The denominator is the total contributions made on behalf of the individual, whether or not as an owner-employee, weighted for the number of years each contribution was in the plan. The contributions are weighted for the number of years in the plan by multiplying each contribution by the number of years it was in the plan. For purposes of this computation, any forfeiture allocated to the account of the individual is treated as a contribution to the account made at the time so allocated. For purposes of this computation, where the individual has received a prior distribution from such account, an appropriate adjustment must be made to reflect such prior distribution.

(D) The method described in (C) of this subdivision may be illustrated by the following example:

Example. B was a member of the XYZ Partnership and a participant in the partnership's profit-sharing plan which was created in 1973. Until the end of 1977, B's interest in the partnership was less than 10 percent. On January 1, 1978, B obtained an interest in excess of 10 percent in the partnership and continued to participate in the profit-sharing plan until 1982. During 1982, prior to the time he attained the age of 59½ years and during a time when he was not disabled, B, who had not received any prior plan distributions, withdrew his entire interest in the profit-sharing plan. At the time his interest was $15,000, $9,600 contributions and $5,400 increment attributable to the contributions. The portion of the increment attributable to contributions while B was an owner-employee is $667.80, determined as follows:

	A	B	C
	Contribution	Number of years contribution was in trust	Contribution weighted for years in trust (A×B)
1982	$1,000	0	0
1981	800	1	800
1980	1,200	2	2,400
1979	600	3	1,800
1978	200	4	800
1977	400	5	2,000
1976	2,000	6	12,000
1975	1,000	7	7,000
1974	1,500	8	12,000
1973	900	9	8,100
Total	9,600		46,900

Total weighted contributions as owner-employee (1978–1982)=$5,800.

Total weighted contributions=$46,900.

$$\$5{,}400 \times (5{,}800 \div 46{,}900) = \$667.80$$

(E)(*1*) The rules set forth in subdivision (iv)(E)(*2*) of this subparagraph shall be used to determine the amounts to which subdivision (i)(A) of this subparagraph applies in the case of a distribution of less than the entire balance of the employee's account from a plan in which he has been covered at different times as owner-employee or as an employee other than an owner-employee.

(*2*) Distributions or payments from a plan for any employee taxable year shall be deemed to be attributable to contributions to the plan, and increments thereon, in the following order—

(*i*) Excess contributions, within the meaning of section 4972 (b), designated as such by the trustee;

(*ii*) Employee contributions;

(*iii*) Employer contributions, other than those described in (*i*), and the increments in value attributable to the employee's own contributions and his employer's contributions on the basis of the taxable years of his employer in succeeding order of time whether or not the employee was an owner-employee for any such year.

For purposes of (*iii*) of this subdivision, the time of contributions made on the basis of any employer taxable year shall take into account the rule specified in section 404(a)(6), relating to time when contributions deemed made.

(v) The amounts referred to in subdivision (i)(C) of this subparagraph are amounts which are received by reason of a distribution of the owner-employee's entire interest under the provisions of section 401(e)(2)(E), as in effect on September 1, 1974, relating to excess contributions on behalf of an owner-employee which are willfully made.

Notwithstanding the preceding sentence, an owner-employee's entire interest in all plans with respect to which he is an owner-employee (within the meaning of subsections (d)(8)(C) and (e)(2)(E)(ii) of section 401, as in effect on September 1, 1974) does not include any distribution or payment attributable to his employer's contributions or his own contributions made with respect to his employer's taxable years beginning after December 31, 1975. However, his entire interest in all plans does include all of the distribution or payment attributable to his employer's contributions and his own contributions made with respect to all of his employer's taxable years beginning before January 1, 1976, if any portion thereof is attributable in whole or in part to such a willful excess contribution and such entire interest is received because of a willful excess contribution pursuant to section 401(e)(2)(E)(ii). A distribution or payment is described in the preceding sentence even though it is received in an owner-employee's taxable year beginning after December 31, 1975. For purposes of computing the increments in value attributable to employer taxable years which begin before January 1, 1976, and such increments attributable to such years beginning after December 31, 1975, the rules specified in subdivision (iv)(B), (C), (D), and (E) of this subparagraph shall be applied to the extent applicable. See §1.401(e)–4(c) for transitional rules with respect to contributions described in this subdivision.

(3)(i) For taxable years of the recipient beginning before January 1, 1976, the tax with respect to amounts to which subparagraph (2) of this paragraph applies shall be computed under subparagraphs (B), (C), (D), and (E) of section 72(m)(5) as such subparagraphs were in effect prior to the amendments made by subsections (g)(1) and (2)(A) of section 2001 of the Employee Retirement Income Security Act of 1974 (88 Stat. 957) except as provided in subdivisions (ii) and (iii) of this subparagraph (see paragraph (e) of §1.72–17). For purposes of the preceding sentence, amounts to which subparagraph (2) of this paragraph applies in the case of an amount described in section 72(m)(5)(A)(i) shall be determined under subdivisions (i)(*a*) and (ii) of §1.72–17(e)(1), except as provided in subdivision (ii) of this subparagraph. For purposes of the first sentence of this subdivision, amounts to which subparagraph (2) of this paragraph applies in the case of an amount described in section 72(m)(5)(A)(ii) shall be determined under subdivisions (i)(*b*) and (iii) of §1.72–17(e)(1), except as provided in subdivision (iii) of this subparagraph.

(ii) For purposes of applying section 72(m)(5)(A)(i), after the amendment made by section 2001(h)(3) of such Act, and subdivisions (i)(*a*) and (ii) of §1.72–17(e)(1), to a distribution or payment received in recipient taxable years ending after September 2, 1974, and beginning before January 1, 1976, with respect to contributions made on behalf of an owner-employee which were made by him as an owner-employee (that is, employee contributions within the meaning of section 401(c)(5)(B)) the portion of any distribution or payment attributable to such contributions shall not include such contributions but shall include the increments in value attributable to such contributions.

(iii) For purposes of applying section 72(m)(5)(D) and subdivisions (i)(*b*) and (iii) of §1.72–17(e)(1) to recipient taxable years beginning after December 31, 1973, and beginning before January 1, 1976, in the case of distributions or payments made after December 31, 1973, the amounts to which section 402 (a)(2) or 403(a)(2) applies after the amendments made by section 2005(b) (1) and (2) of such Act (88 Stat. 990 and 991) (which are amounts to which subdivision (i)(*b*) of §1.72–17(e)(1) does not apply) shall be deemed to be the amount which is treated as a gain from the sale or exchange of a capital asset held for more than 6 months under either of such sections.

(f) *Meaning of disabled.* (1) Section 72(m)(7) provides that an individual shall be considered to be disabled if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration. In determining whether an individual's impairment makes him unable to engage in any substantial gainful activity, primary consideration shall be given to the nature and severity of his impairment. Consideration shall also be given to other factors such as the individual's education, training, and work experience. The substantial gainful activity to which section 72(m)(7) refers is the activity, or a comparable activity, in which the individual customarily engaged prior to the arising of the disability or prior to retirement if the individual was retired at the time the disability arose.

(2) Whether or not the impairment in a particular case constitutes a disability is to be determined with reference to all the facts in the case. The following are examples of impairments which would ordinarily be considered as preventing substantial gainful activity:

(i) Loss of use of two limbs;

(ii) Certain progressive diseases which have resulted in the physical loss or atrophy of a limb, such as diabetes, multiple sclerosis, or Buerger's disease;

(iii) Diseases of the heart, lungs, or blood vessels which have resulted in major loss of heart or lung reserve as evidenced by X-ray, electrocardiogram, or other objective findings, so that despite medical treatment breathlessness, pain, or fatigue is produced on slight exertion, such as walking several blocks, using public transportation, or doing small chores;

(iv) Cancer which is inoperable and progressive;

(v) Damage to the brain or brain abnormality which has resulted in severe loss of judgment, intellect, orientation, or memory;

(vi) Mental diseases (e.g. psychosis or severe psychoneurosis) requiring continued institutionalization or constant supervision of the individual;

(vii) Loss or diminution of vision to the extent that the affected individual has a central visual acuity of no better than 20/200 in the better eye after best correction, or has a limitation in the fields of vision such that the widest diameter of the visual fields subtends an angle no greater than 20 degrees;

(viii) Permanent and total loss of speech;

(ix) Total deafness uncorrectible by a hearing aid.

The existence of one or more of the impairments described in this subparagraph (or of an impairment of greater severity) will not, however, in and of itself always permit a finding that an individual is disabled as defined in section 72(m)(7). Any impairment, whether of lesser or greater severity, must be evaluated in terms of whether it does in fact prevent the individual from engaging in his customary or any comparable substantial gainful activity.

(3) In order to meet the requirements of section 72(m)(7), an impairment must be expected either to continue for a long and indefinite period or to result in death. Ordinarily, a terminal illness because of disease or injury would result in disability. The term ''indefinite'' is used in the sense that it cannot reasonably be anticipated that the impairment will, in the foreseeable future, be so diminished as no longer to prevent substantial gainful activity. For example, an individual who suffers a bone fracture which prevents him from working for an extended period of time will not be considered disabled, if his recovery can be expected in the foreseeable future; if the fracture persistently fails to knit, the individual would ordinarily be considered disabled.

(4) An impairment which is remediable does not constitute a disability within the meaning of section 72(m)(7). An individual will not be deemed disabled if, with reasonable effort and safety to himself, the impairment can be diminished to the extent that the individual will not be prevented by the impairment from engaging in his customary or any comparable substantial gainful activity.

[T.D. 7636, 44 FR 47049, Aug. 10, 1979, as amended by T.D. 8894, 65 FR 46591, July 31, 2000]

§ 1.72–18 Treatment of certain total distributions with respect to self-employed individuals.

(a) *In general.* The Self-Employed Individuals Tax Retirement Act of 1962 permits self-employed individuals to be treated as employees for purposes of participation in pension, profit-sharing, and annuity plans described in sections 401(a) and 403(a). In general, amounts received by a distributee or payee which are attributable to contributions made on behalf of a participant while he was self-employed are taxed in the same manner as amounts which are attributable to contributions made on behalf of a common-law employee. However, such amounts which are paid in one taxable year representing the total distributions payable to a distributee or payee with respect to an employee are not eligible for the capital gains treatment of section 402(a)(2) or 403(a)(2). This section sets forth the treatment of such distributions, except where such a distribution is subject to the penalties of section 72(m)(5) and paragraph (e) of §1.72–17.

(b) *Distributions to which this section applies.* (1)(i) Except as provided in subparagraphs (2) and (3) of this paragraph, this section applies to amounts distributed to a distributee in one taxable year of the distributee in the case of an employees' trust described in section 401(a) which is exempt under section 501(a), or to amounts paid to a payee in one taxable year of the payee in the case of an annuity plan described in section 403(a), which constitute the total distributions payable, or the total amounts payable, to the distributee or payee with respect to an employee.

(ii) For the total distributions or amounts payable to a distributee or payee to be considered paid within one taxable year of the distributee or payee for purposes of this section, all amounts to the credit of the employee-participant through the end of such taxable year which are payable to the distributee or payee must be distributed or paid within such taxable year. Thus, the provisions of this section are not applicable to a distribution or payment to a distributee or payee if the trust or plan retains any amounts after the close of such taxable year which are payable to the same distributee or payee even though the amounts retained may be attributable to contributions on behalf of the employee-participant while he was a common-law employee in the business with respect to which the plan was established.

(iii) For purposes of this section, the total amounts payable to a distributee or the amounts to the credit of the employee do not include United States Retirement Plan Bonds held by a trust to the credit of the employee. Thus, a distribution to a distributee by a qualified trust may constitute a distribution to which this section applies even though the trust retains retirement plan bonds registered in the name of the employee on whose behalf the distribution is made which are to be distributed to the same distributee. Moreover, the proceeds of a retirement bond received as part of a distribution which constitutes the total distributions payable to the distributee are not entitled to the special tax treatment of this section. See section 405(d) and paragraph (a)(1) of §1.405–3.

(iv) If the amounts payable to a distributee from a qualified trust with respect to an employee-participant includes an annuity contract, such contract must be distributed along with all other amounts payable to the distributee in order to have a distribution to which this section applies. However, the proceeds of an annuity contract received in a total distribution will not be entitled to the tax treatment of this section unless the contract is surrendered in the taxable year of the distributee in which the total distribution was received.

(v) In the case of a qualified annuity plan, the term ''total amounts'' means all annuities payable to a payee. If more than one annuity contract is received under the plan by a distributee, this section shall not apply to an amount received on surrender of any such contracts unless all contracts under the plan payable to the payee are surrendered within one taxable year of the payee.

(vi)(*a*) The provisions of this section are applicable where the total amounts payable to a distributee or payee are paid within one taxable year of the distributee or payee whether or not a portion of the employee-participant's interest which is payable to another distributee or payee is paid within the same taxable year. However, a distributee or payee who, in prior taxable years received amounts (except amounts described in (*b*) of this subdivision) after the employee-participant ceases to be eligible for additional contributions to be made on his behalf, does not receive a distribution or payment to which this section applies, even though the total amount remaining to be paid to such distributee or payee with respect to such employee is paid within one taxable year. On the other hand, a distribution to a distributee or payee prior to the time that the employee-participant ceases to be eligible for additional contributions on his behalf does not preclude the application of this section to a later distribution to the same distributee or payee.

(*b*) The receipt of an amount which constitutes—

(*1*) A payment in the nature of a dividend or similar distribution to an individual in his capacity as a policyholder of an annuity, endowment, or life insurance contract, or

(*2*) A return of excess contributions which were not willfully made,

does not prevent the application of this section to a total distribution even though the amount is received after the employee-participant ceases to be eligible for additional contributions and in a taxable year other than the taxable year in which the total amount is received.

(vii) For purposes of this section, the total amounts payable to a distributee or payee, or the amounts to the credit of the employee, do not include any amounts which have been placed in a separate account for the funding of medical benefits described in section 401(h) as defined in paragraph (a) of §1.401–14. Thus, a distribution by a qualified trust or annuity plan may constitute a distribution to which this section applies even though amounts attributable to the funding of section 401(h) medical benefits as defined in paragraph (a) of §1.401–14 are not so distributed.

(2) This section shall apply—

(i) Only if the distribution or payment is made—

(*a*) On account of the employee's death at any time,

(*b*) After the employee has attained the age 59½ years, or

(*c*) After the employee has become disabled; and

(ii) Only to so much of the distribution or payment as is attributable to contributions made on behalf of an employee while he was a self-employed individual in the business with respect to which the plan was established. Any distribution or payment, or any portion thereof, which is not so attributable shall be subject to the rules of taxation which apply to any distribution or payment that is attributable to contributions on behalf of common-law employees.

For taxable years beginning after December 31, 1966, see section 72(m)(7) and paragraph (f) of §1.72–17 for the meaning of disabled. For taxable years beginning before January 1, 1967, see section 213(g)(3) for the meaning of disabled. For taxable years beginning after December 31, 1968, if this section is applicable by reason of the distribution or payment being made after the employee has become disabled, then for the taxable year in which the amounts to which this section applies are distributed or paid, there shall be submitted with the recipient's income tax return a doctor's statement as to the nature and effect of the employee's impairment.

(3) This section shall not apply to—

(i) Distributions or payments to which the penalty provisions of section 72(m)(5) and paragraph (e) of §1.72–17 apply,

(ii) Distributions or payments from a trust or plan made to or on behalf of an individual prior to the time such individual ceases to be eligible for additional contributions (except the contribution attributable to the last year of service) to be made to the trust or plan on his behalf as a self-employed individual, and

(iii) Distributions or payments made to the employee from a plan or trust unless contributions which were allowed as a deduction under section 404 have been made on behalf of such employee as a self-employed individual under such trust or plan for 5 or more taxable years (whether or not consecutive) prior to the taxable year in which such distributions or payments are made. Distributions or payments to which this section does not apply by reason of this subdivision are taxed as otherwise provided in section 72. However, for taxable years beginning before January 1, 1964, section 72(e)(3), as in effect before such date, is not applicable. For taxable years beginning after December 31, 1963, such distributions or payments may be taken into account in computations under sections 1301 through 1305 (relating to income averaging).

(4) The portion of any distribution or payment attributable to contributions on behalf of an employee-participant while he was self-employed includes the contributions made on his behalf while he was self-employed and the increments in value attributable to such contributions. Where the amounts to the credit of an employee-participant include amounts attributable to contributions on his behalf while he was a self-employed individual and amounts attributable to contributions on his behalf while he was a common-law employee, the increment in value attributable to the employee-participant's interest shall be allocated to the contributions on his behalf while he was self-employed either by maintaining a separate account, or an accounting, which reflects the actual increment attributable to such contributions, or by the method described in paragraph (e)(1)(iv)(*c*) of §1.72–17. However, if the latter method is used, the numerator of the fraction is the total contributions made on behalf of the individual as a self-employed individual, weighted for the number of years that each contribution was in the plan.

(c) *Amounts includible in gross income.* (1) Where a total distribution or payment to which this section applies is made to one distributee or payee and includes the total amount remaining to the credit of the employee-participant on whose behalf the distribution or payment was made, the distributee or payee shall include in gross income an amount equal to the portion of the distribution or payment which exceeds the employee-participant's investment in the contract. For purposes of this paragraph, the investment in the contract shall be reduced by any amounts previously received from the plan or trust by or on behalf of the employee-participant which were excludable from gross income as a return of the investment in the contract.

(2) In the case of a distribution to which this section applies and which is made to more than one distributee or payee, each element of the amounts to the credit of an employee-participant shall be allocated among the several distributees or payees on the basis of the ratio of the value of the distributee's or payee's distribution or payment to the total amount to the credit of the employee-participant. The elements to be so allocated include the investment in the contract, the increments in value, and the portion of the amounts to the credit of the employee-participant which is attributable to the contributions on behalf of the employee-participant while he was a self-employed individual.

(d) *Computation of tax.* (1) The tax attributable to the amounts to which this section applies for the taxable year in which such amounts are received is the greater of—

(i) 5 times the increase in tax which would result from the inclusion in gross income of the recipient of 20 percent of so much of the amount so received as is includible in gross income, or

(ii) 5 times the increase which would result if the taxable income of the recipient for such taxable year equaled 20 percent of the excess of the aggregate of the amounts so received and includible in gross income over the amount of the deductions allowed the recipient for such taxable year under section 151 (relating to deduction for personal exemptions).

In any case in which the application of subdivision (ii) of this subparagraph results in an increase in taxable income for any taxable year, the resulting increase in taxes imposed by section 1 or 3 for such taxable year shall be reduced by the credit against tax provided by section 31 (tax withheld on wages), but shall not be reduced by any other credits against tax.

(2) The application of the rules of this paragraph may be illustrated by the following example:

Example. B, a sole proprietor and a calendar-year basis taxpayer, established a qualified pension trust to which he made annual contributions for 10 years of 10 percent of his earned income. B withdrew his entire interest in the trust during 1973, for which year, without regard to the distribution, he had a net operating loss and is allowed under section 151 a deduction for one personal exemption. At the time of the withdrawal, B was 64 years old. The amount of the distribution that is includible in his gross income is $25,750. Because of B's net operating loss, the tax attributable to the distribution is determined under the rule of subparagraph (1)(ii) of this paragraph. For purposes of determining the tax attributable to the $25,750, B's taxable income for 1973 is treated, under subparagraph (1)(ii) of this paragraph, as being 20 percent of $25,000 ($25,750 minus $750, the amount of the deduction allowed for each personal exemption under section 151 for 1973). Thus, under subparagraph (1) of this paragraph, the tax attributable to the $25,750 would be 5 times the increase which would result if the taxable income of B for the taxable year he received such amount equaled $5,000. B has had no amounts withheld from wages and thus is not entitled to reduce the increase in taxes by the credit against tax provided in section 31 and may not reduce the increase in taxes by any other credits against tax.

[T.D. 6676, 28 FR 10138, Sept. 17, 1963, as amended by T.D. 6722, 29 FR 5070, Apr. 14, 1964, T.D. 6885, 31 FR 7800, June 2, 1966, T.D. 6985, 33 FR 19812, Dec. 27, 1968; T.D. 7114, 36 FR 9018, May 18, 1971]

§ 1.72(e)–1T Treatment of distributions where substantially all contributions are employee contributions (temporary).

Q–1: How did the Tax Reform Act (TRA) of 1984 change the law with regard to the treatment of non-annuity distributions (*i.e.*, amounts distributed prior to the annuity starting date and not received as annuities) from a qualified plan that is treated as a single contract under section 72 and under which substantially all of the contributions are employee contributions?

A–1: (a) Prior to the amendment of section 72(e) by the TRA of 1984, non-annuity distributions from such a qualified plan generally were allocable, first, to nondeductible employee contributions and thus were not includible in gross income. After distributions equaled the balance of nondeductible employee contributions, further non-annuity distributions generally were includible in gross income.

(b) Pursuant to section 72(e)(7), as added by the TRA of 1984, non-annuity distributions from such a qualified plan that are allocable to investment in the plan after August 13, 1982 (as determined in accordance with section 72(e)(5)(B)), generally will be treated, first, as allocable to income and, second, as allocable to nondeductible employee contributions. Distributions allocable to income are includible in gross income. Distributions allocable to nondeductible employee contributions are not includible in gross income.

Q–2: To which qualified plans and contracts does section 72(e)(7) apply?

A–2: Section 72(e)(7) applies to any plan or contract under which substantially all of the contributions are employee contributions if—

(a) Such plan is described in section 401(a) and the related trust or trusts are exempt from tax under section 501(a); or

(b) Such contract is—

(1) Purchased by a trust described in (a) above,

(2) Purchased as part of a plan described in section 403(a), or

(3) Described in section 403(b).

Q–3: What is the definition of a qualified plan or contract under which substantially all of the contributions are employee contributions?

A–3: (a) A qualified plan or contract under which substantially all of the contributions are employee contributions is a plan or contract with respect to which 85 percent or more of the total contributions during the ''representative period'' are employee contributions. The ''representative period'' means the five-plan-year period preceding the plan year during which a distribution occurs. However, if less than 85 percent of the total contributions for all plan years during which the plan or contract is in existence prior to the plan year of distribution are employee contributions, then the plan or contract is not one with respect to which substantially all of the contributions are employee contributions.

(b) For purposes of the 85 percent test, contributions made to a predecessor plan or contract are aggregated with contributions made to the plan or contract to which the 85 percent test is being applied (the successor plan or contract). For purposes of the preceding sentence, a predecessor plan or contract is a plan or contract the terms of which are substantially the same as the successor plan or contract.

Q–4: What is the definition of employee contributions for purposes of section 72(e)(7)?

A–4: For purposes of section 72(e)(7), employee contributions are those amounts contributed by the employee and those amounts considered contributed by the employee under section 72(f). For example, amounts contributed to a section 401(k) qualified cash or deferred arrangement, pursuant to an employee's election to defer such amounts, are employer contributions to the extent that such amounts are not currently includible in gross income. In addition, deductible employee contributions under section 72(o) are disregarded in their entirety (*i.e.*, treated as neither employee contributions nor employer contributions) in determining whether substantially all the contributions are employee contributions.

Q–5: How is the 85 percent test of section 72(e)(7) applied to a qualified plan or contract?

A–5: (a) Except as provided in paragraphs (b), (c), and (d), the 85 percent test is applied separately with respect to each contract under section 72.

(b) If a single qualified plan described in section 401(a) or section 403(a) comprises more than one contract under section 72, regardless of whether such plan includes multiple trusts or combinations of profit-sharing and pension features, these contracts are aggregated for purposes of applying the 85 percent test. Thus, if substantially all of the contributions under a qualified plan comprising two contracts under section 72 are employee contributions, section 72(e)(5)(D) shall not apply to non-annuity distributions under either of the contracts.

(c) With respect to the plans maintained by the Federal Government or by instrumentalities of the Federal Government, the 85 percent test shall be applied by aggregating all such plans. This aggregation rule applies only to those plans that are actively administered by the Federal Government or an instrumentality thereof. Thus, if a plan of the Federal Government is administered by a commercial financial institution, it would not be aggregated with other plans of the Federal Government and its instrumentalities for purposes of applying the 85 percent test.

(d) In the case of a contract described in section 403(b), the 85 percent test is applied separately to each such contract.

Q–6: Is a loan from a qualified plan or contract described in section 72(e)(7) treated as a distribution under section 72(e)(4)(A)?

A–6: Yes. Pursuant to section 72(e)(4)(A), if an employee receives, either directly or indirectly, any amount as a loan from a qualified plan or contract described in section 72(e)(7), such amount shall be treated as a distribution from the plan or contract of an amount not received as an annuity. Similarly, if an employee assigns or pledges, or agrees to assign or pledge, any portion of the value of any qualified plan or contract, such portion shall be treated as a distribution from the plan or contract of an amount not received as an annuity.

Q–7: Does the five percent penalty for premature distributions from annuity contracts, as described in section 72(q), apply to distributions from a qualified plan or contract described in section 72(e)(7)?

A–7: No.

Q–8: When is section 72(e)(7) effective?

A–8: Section 72(e)(7) is effective for amounts received or loans made on or after October 17, 1984. For purposes of this effective date provision, loan amounts outstanding on October 16, 1984, which are renegotiated, extended, renewed, or revised after that date generally are treated as loans made on the date of the renegotiation, etc.

[T.D. 8073, 51 FR 4314, Feb. 4, 1986; 51 FR 7262, Mar. 3, 1986]

§ 1.72(p)–1 Loans treated as distributions.

The questions and answers in this section provide guidance under section 72(p) pertaining to loans from qualified employer plans (including government plans and tax-sheltered annuities and employer plans that were formerly qualified). The examples included in the questions and answers in this section are based on the assumption that a bona fide loan is made to a participant from a qualified defined contribution plan pursuant to an enforceable agreement (in accordance with paragraph (b) of Q&A–3 of this section), with adequate security and with an interest rate and repayment terms that are commercially reasonable. (The particular interest rate used, which is solely for illustration, is 8.75 percent compounded annually.) In addition, unless the contrary is specified, it is assumed in the examples that the amount of the loan does not exceed 50 percent of the participant's nonforfeitable account balance, the participant has no other outstanding loan (and had no prior loan) from the plan or any other plan maintained by the participant's employer or any other person required to be aggregated with the employer under section 414(b), (c) or (m), and the loan is not excluded from section 72(p) as a loan made in the ordinary course of an investment program as described in Q&A–18 of this section. The regulations and examples in this section do not provide guidance on whether a loan from a plan would result in a prohibited transaction under section 4975 of the Internal Revenue Code or on whether a loan from a plan covered by title I of the Employee Retirement Income Security Act of 1974 (88 Stat. 829) (ERISA) would be consistent with the fiduciary standards of ERISA or would result in a prohibited transaction under section 406 of ERISA. The questions and answers are as follows:

Q–1: In general, what does section 72(p) provide with respect to loans from a qualified employer plan?

A–1: (a) *Loans.* Under section 72(p), an amount received by a participant or beneficiary as a loan from a qualified employer plan is treated as having been received as a distribution from the plan (a deemed distribution), unless the loan satisfies the requirements of Q&A–3 of this section. For purposes of section 72(p) and this section, a loan made from a contract that has been purchased under a qualified employer plan (including a contract that has been distributed to the participant or beneficiary) is considered a loan made under a qualified employer plan.

(b) *Pledges and assignments.* Under section 72(p), if a participant or beneficiary assigns or pledges (or agrees to assign or pledge) any portion of his or her interest in a qualified employer plan as security for a loan, the portion of the individual's interest assigned or pledged (or subject to an agreement to assign or pledge) is treated as a loan from the plan to the individual, with the result that such portion is subject to the deemed distribution rule described in paragraph (a) of this Q&A–1. For purposes of section 72(p) and this section, any assignment or pledge of (or agreement to assign or to pledge) any portion of a participant's or beneficiary's interest in a contract that has been purchased under a qualified employer plan (including a contract that has been distributed to the participant or beneficiary) is considered an assignment or pledge of (or agreement to assign or pledge) an interest in a qualified employer plan. However, if all or a portion of a participant's or beneficiary's interest in a qualified employer plan is pledged or assigned as security for a loan from the plan to the participant or the beneficiary, only the amount of the loan received by the participant or the beneficiary, not the amount pledged or assigned, is treated as a loan.

Q–2: What is a qualified employer plan for purposes of section 72(p)?

A–2: For purposes of section 72(p) and this section, a qualified employer plan means—

(a) A plan described in section 401(a) which includes a trust exempt from tax under section 501(a);

(b) An annuity plan described in section 403(a);

(c) A plan under which amounts are contributed by an individual's employer for an annuity contract described in section 403(b);

(d) Any plan, whether or not qualified, established and maintained for its employees by the United States, by a State or political subdivision thereof, or by an agency or instrumentality of the United States, a State or a political subdivision of a State; or

(e) Any plan which was (or was determined to be) described in paragraph (a), (b), (c), or (d) of this Q&A–2.

Q–3: What requirements must be satisfied in order for a loan to a participant or beneficiary from a qualified employer plan not to be a deemed distribution?

A–3: (a) *In general.* A loan to a participant or beneficiary from a qualified employer plan will not be a deemed distribution to the participant or beneficiary if the loan satisfies the repayment term requirement of section 72(p)(2)(B), the level amortization requirement of section 72(p)(2)(C), and the enforceable agreement requirement of paragraph (b) of this Q&A–3, but only to the extent the loan satisfies the amount limitations of section 72(p)(2)(A).

(b) *Enforceable agreement requirement.* A loan does not satisfy the requirements of this paragraph unless the loan is evidenced by a legally enforceable agreement (which may include more than one document) and the terms of the agreement demonstrate compliance with the requirements of section 72(p)(2) and this section. Thus, the agreement must specify the amount and date of the loan and the repayment schedule. The agreement does not have to be signed if the agreement is enforceable under applicable law without being signed. The agreement must be set forth either—

(1) In a written paper document; or

(2) In a document that is delivered through an electronic medium under an electronic system that satisfies the requirements of §1.401(a)–21 of this chapter.

Q–4: If a loan from a qualified employer plan to a participant or beneficiary fails to satisfy the requirements of Q&A–3 of this section, when does a deemed distribution occur?

A–4: (a) *Deemed distribution.* For purposes of section 72, a deemed distribution occurs at the first time that the requirements of Q&A–3 of this section are not satisfied, in form or in operation. This may occur at the time the loan is made or at a later date. If the terms of the loan do not require repayments that satisfy the repayment term requirement of section 72(p)(2)(B) or the level amortization requirement of section 72(p)(2)(C), or the loan is not evidenced by an enforceable agreement satisfying the requirements of paragraph (b) of Q&A–3 of this section, the entire amount of the loan is a deemed distribution under section 72(p) at the time the loan is made. If the loan satisfies the requirements of Q&A–3 of this section except that the amount loaned exceeds the limitations of section 72(p)(2)(A), the amount of the loan in excess of the applicable limitation is a deemed distribution under section 72(p) at the time the loan is made. If the loan initially satisfies the requirements of section 72(p)(2)(A), (B) and (C) and the enforceable agreement requirement of paragraph (b) of Q&A–3 of this section, but payments are not made in accordance with the terms applicable to the loan, a deemed distribution occurs as a result of the failure to make such payments. See Q&A–10 of this section regarding when such a deemed distribution occurs and the amount thereof and Q&A–11 of this section regarding the tax treatment of a deemed distribution.

(b) *Examples.* The following examples illustrate the rules in paragraph (a) of this Q&A–4 and are based upon the assumptions described in the introductory text of this section:

Example 1. (i) A participant has a nonforfeitable account balance of $200,000 and receives $70,000 as a loan repayable in level quarterly installments over five years.

(ii) Under section 72(p), the participant has a deemed distribution of $20,000 (the excess of $70,000 over $50,000) at the time of the loan, because the loan exceeds the $50,000 limit in section 72(p)(2)(A)(i). The remaining $50,000 is not a deemed distribution.

Example 2. (i) A participant with a nonforfeitable account balance of $30,000 borrows $20,000 as a loan repayable in level monthly installments over five years.

(ii) Because the amount of the loan is $5,000 more than 50% of the participant's nonforfeitable account balance, the participant has a deemed distribution of $5,000 at the time of the loan. The remaining $15,000 is not a deemed distribution. (Note also that, if the loan is secured solely by the participant's account balance, the loan may be a prohibited transaction under section 4975 because the loan may not satisfy 29 CFR 2550.408b–1(f)(2).)

Example 3. (i) The nonforfeitable account balance of a participant is $100,000 and a $50,000 loan is made to the participant repayable in level quarterly installments over seven years. The loan is not eligible for the section 72(p)(2)(B)(ii) exception for loans used to acquire certain dwelling units.

(ii) Because the repayment period exceeds the maximum five-year period in section 72(p)(2)(B)(i), the participant has a deemed distribution of $50,000 at the time the loan is made.

Example 4. (i) On August 1, 2002, a participant has a nonforfeitable account balance of $45,000 and borrows $20,000 from a plan to be repaid over five years in level monthly installments due at the end of each month. After making monthly payments through July 2003, the participant fails to make any of the payments due thereafter.

(ii) As a result of the failure to satisfy the requirement that the loan be repaid in level monthly installments, the participant has a deemed distribution. See paragraph (c) of Q&A–10 of this section regarding when such a deemed distribution occurs and the amount thereof.

Q–5: What is a principal residence for purposes of the exception in section 72(p)(2)(B)(ii) from the requirement that a loan be repaid in five years?

A–5: Section 72(p)(2)(B)(ii) provides that the requirement in section 72(p)(2)(B)(i) that a plan loan be repaid within five years does not apply to a loan used to acquire a dwelling unit which will within a reasonable time be used as the principal residence of the participant (a principal residence plan loan). For this purpose, a principal residence has the same meaning as a principal residence under section 121.

Q–6: In order to satisfy the requirements for a principal residence plan loan, is a loan required to be secured by the dwelling unit that will within a reasonable time be used as the principal residence of the participant?

A–6: A loan is not required to be secured by the dwelling unit that will within a reasonable time be used as the participant's principal residence in order to satisfy the requirements for a principal residence plan loan.

Q–7: What tracing rules apply in determining whether a loan qualifies as a principal residence plan loan?

A–7: The tracing rules established under section 163(h)(3)(B) apply in determining whether a loan is treated as for the acquisition of a principal residence in order to qualify as a principal residence plan loan.

Q–8: Can a refinancing qualify as a principal residence plan loan?

A–8: (a) *Refinancings.* In general, no, a refinancing cannot qualify as a principal residence plan loan. However, a loan from a qualified employer plan used to repay a loan from a third party will qualify as a principal residence plan loan if the plan loan qualifies as a principal residence plan loan without regard to the loan from the third party.

(b) *Example.* The following example illustrates the rules in paragraph (a) of this Q&A–8 and is based upon the assumptions described in the introductory text of this section:

Example. (i) On July 1, 2003, a participant requests a $50,000 plan loan to be repaid in level monthly installments over 15 years. On August 1, 2003, the participant acquires a principal residence and pays a portion of the purchase price with a $50,000 bank loan. On September 1, 2003, the plan loans $50,000 to the participant, which the participant uses to pay the bank loan.

(ii) Because the plan loan satisfies the requirements to qualify as a principal residence plan loan (taking into account the tracing rules of section 163(h)(3)(B)), the plan loan qualifies for the exception in section 72(p)(2)(B)(ii).

Q–9: Does the level amortization requirement of section 72(p)(2)(C) apply when a participant is on a leave of absence without pay?

A–9: (a) *Leave of absence.* The level amortization requirement of section 72(p)(2)(C) does not apply for a period, not longer than one year (or such longer period as may apply under section 414(u) and paragraph (b) of this Q&A–9), that a participant is on a *bona fide* leave of absence, either without pay from the employer or at a rate of pay (after applicable employment tax withholdings) that is less than the amount of the installment payments required under the terms of the loan. However, the loan (including interest that accrues during the leave of absence) must be repaid by the latest permissible term of the loan and the amount of the installments due after the leave ends must not be less than the amount required under the terms of the original loan.

(b) *Military service.* In accordance with section 414(u)(4), if a plan suspends the obligation to repay a loan made to an employee from the plan for any part of a period during which the employee is performing service in the uniformed services (as defined in 38 U.S.C. chapter 43), whether or not qualified military service, such suspension shall not be taken into account for purposes of section 72(p) or this section. Thus, if a plan suspends loan repayments for any part of a period during which the employee is performing military service described in the preceding sentence, such suspension shall not cause the loan to be deemed distributed even if the suspension exceeds one year and even if the term of the loan is extended. However, the loan will not satisfy the repayment term requirement of section 72(p)(2)(B) and the level amortization requirement of section 72(p)(2)(C) unless loan repayments resume upon the completion of such period of military service and the loan is repaid thereafter by amortization in substantially level installments over a period that ends not later than the latest permissible term of the loan.

(c) *Latest permissible term of a loan.* For purposes of this Q&A–9, the latest permissible term of a loan is the latest date permitted under section 72(p)(2)(B) (*i.e.*, five years from the date of the loan, assuming that the replacement loan does not qualify for the exception at section 72(p)(2)(B)(ii) for principal residence plan loans) plus any additional period of suspension permitted under paragraph (b) of this Q&A–9.

(d) *Examples.* The following examples illustrate the rules of this Q&A–9 and are based upon the assumptions described in the introductory text of this section:

Example 1. (i) On July 1, 2003, a participant with a nonforfeitable account balance of $80,000 borrows $40,000 to be repaid in level monthly installments of $825 each over 5 years. The loan is not a principal residence plan loan. The participant makes 9 monthly payments and commences an unpaid leave of absence that lasts for 12 months. The participant was not performing military service during this period. Thereafter, the participant resumes active employment and resumes making repayments on the loan until the loan is repaid. The amount of each monthly installment is increased to $1,130 in order to repay the loan by June 30, 2008.

(ii) Because the loan satisfies the requirements of section 72(p)(2), the participant does not have a deemed distribution. Alternatively, section 72(p)(2) would be satisfied if the participant continued the monthly installments of $825 after resuming active employment and on June 30, 2008 repaid the full balance remaining due.

Example 2. (i) The facts are the same as in *Example 1*, except the participant was on leave of absence performing service in the uniformed services (as defined in chapter 43 of title 38, United States Code) for two years and the rate of interest charged during this period of military service is reduced to 6 percent compounded annually under 50 App. section 526 (relating to the Soldiers' and Sailors' Civil Relief Act Amendments of 1942). After the military service ends on April 2, 2006, the participant resumes active employment on April 19, 2006, continues the monthly installments of $825 thereafter, and on June 30, 2010, repays the full balance remaining due ($6,487).

(ii) Because the loan satisfies the requirements of section 72(p)(2) and paragraph (b) of this Q&A–9, the participant does not have a deemed distribution. Alternatively, section 72(p)(2) would also be satisfied if the amount of each monthly installment after April 19, 2006, is increased to $930 in order to repay the loan by June 30, 2010 (without any balance remaining due then).

Q–10: If a participant fails to make the installment payments required under the terms of a loan that satisfied the requirements of Q&A–3 of this section when made, when does a deemed distribution occur and what is the amount of the deemed distribution?

A–10: (a) *Timing of deemed distribution.* Failure to make any installment payment when due in accordance with the terms of the loan violates section 72(p)(2)(C) and, accordingly, results in a deemed distribution at the time of such failure. However, the plan administrator may allow a cure period and section 72(p)(2)(C) will not be considered to have been violated if the installment payment is made not later than the end of the cure period, which period cannot continue beyond the last day of the calendar quarter following the calendar quarter in which the required installment payment was due.

(b) *Amount of deemed distribution.* If a loan satisfies Q&A–3 of this section when made, but there is a failure to pay the installment payments required under the terms of the loan (taking into account any cure period allowed under paragraph (a) of this Q&A–10), then the amount of the deemed distribution equals the entire outstanding balance of the loan (including accrued interest) at the time of such failure.

(c) *Example.* The following example illustrates the rules in paragraphs (a) and (b) of this Q&A–10 and is based upon the assumptions described in the introductory text of this section:

Example. (i) On August 1, 2002, a participant has a nonforfeitable account balance of $45,000 and borrows $20,000 from a plan to be repaid over 5 years in level monthly installments due at the end of each month. After making all monthly payments due through July 31, 2003, the participant fails to make the payment due on August 31, 2003 or any other monthly payments due thereafter. The plan administrator allows a three-month cure period.

(ii) As a result of the failure to satisfy the requirement that the loan be repaid in level installments pursuant to section 72(p)(2)(C), the participant has a deemed distribution on November 30, 2003, which is the last day of the three-month cure period for the August 31, 2003 installment. The amount of the deemed distribution is $17,157, which is the outstanding balance on the loan at November 30, 2003. Alternatively, if the plan administrator had allowed a cure period through the end of the next calendar quarter, there would be a deemed distribution on December 31, 2003 equal to $17,282, which is the outstanding balance of the loan at December 31, 2003.

Q–11: Does section 72 apply to a deemed distribution as if it were an actual distribution?

A–11: (a) *Tax basis.* If the employee's account includes after-tax contributions or other investment in the contract under section 72(e), section 72 applies to a deemed distribution as if it were an actual distribution, with the result that all or a portion of the deemed distribution may not be taxable.

(b) *Section 72(t) and (m).* Section 72(t) (which imposes a 10 percent tax on certain early distributions) and section 72(m)(5) (which imposes a separate 10 percent tax on certain amounts received by a 5-percent owner) apply to a deemed distribution under section 72(p) in the same manner as if the deemed distribution were an actual distribution.

Q–12: Is a deemed distribution under section 72(p) treated as an actual distribution for purposes of the qualification requirements of section 401, the distribution provisions of section 402, the distribution restrictions of section 401(k)(2)(B) or 403(b)(11), or the vesting requirements of §1.411(a)–7(d)(5) (which affects the application of a graded vesting schedule in cases involving a prior distribution)?

A–12: No; thus, for example, if a participant in a money purchase plan who is an active employee has a deemed distribution under section 72(p), the plan will not be considered to have made an in-service distribution to the participant in violation of the qualification requirements applicable to money purchase plans. Similarly, the deemed distribution is not eligible to be rolled over to an eligible retirement plan and is not considered an impermissible distribution of an amount attributable to elective contributions in a section 401(k) plan. See also §1.402(c)–2, Q&A–4(d) and §1.401(k)–1(d)(5)(iii).

Q–13: How does a reduction (offset) of an account balance in order to repay a plan loan differ from a deemed distribution?

A–13: (a) *Difference between deemed distribution and plan loan offset amount.* (1) Loans to a participant from a qualified employer plan can give rise to two types of taxable distributions—

(i) A deemed distribution pursuant to section 72(p); and

(ii) A distribution of an offset amount.

(2) As described in Q&A–4 of this section, a deemed distribution occurs when the requirements of Q&A–3 of this section are not satisfied, either when the loan is made or at a later time. A deemed distribution is treated as a distribution to the participant or beneficiary only for certain tax purposes and is not a distribution of the accrued benefit. A distribution of a plan loan offset amount (as defined in §1.402(c)–2, Q&A–9(b)) occurs when, under the terms governing a plan loan, the accrued benefit of the participant or beneficiary is reduced (offset) in order to repay the loan (including the enforcement of the plan's security interest in the accrued benefit). A distribution of a plan loan offset amount could occur in a variety of circumstances, such as where the terms governing the plan loan require that, in the event of the participant's request for a distribution, a loan be repaid immediately or treated as in default.

(b) *Plan loan offset.* In the event of a plan loan offset, the amount of the account balance that is offset against the loan is an actual distribution for purposes of the Internal Revenue Code, not a deemed distribution under section 72(p). Accordingly, a plan may be prohibited from making such an offset under the provisions of section 401(a), 401(k)(2)(B) or 403(b)(11) prohibiting or limiting distributions to an active employee. See §1.402(c)–2, Q&A–9(c), *Example 6*. See also Q&A–19 of this section for rules regarding the treatment of a loan after a deemed distribution.

Q–14: How is the amount includible in income as a result of a deemed distribution under section 72(p) required to be reported?

A–14: The amount includible in income as a result of a deemed distribution under section 72(p) is required to be reported on Form 1099–R (or any other form prescribed by the Commissioner).

Q–15: What withholding rules apply to plan loans?

A–15: To the extent that a loan, when made, is a deemed distribution or an account balance is reduced (offset) to repay a loan, the amount includible in income is subject to withholding. If a deemed distribution of a loan or a loan repayment by benefit offset results in income at a date after the date the loan is made, withholding is required only if a transfer of cash or property (excluding employer securities) is made to the participant or beneficiary from the plan at the same time. See §§35.3405–1, f–4, and 31.3405(c)–1, Q&A–9 and Q&A–11, of this chapter for further guidance on withholding rules.

Q–16: If a loan fails to satisfy the requirements of Q&A–3 of this section and is a prohibited transaction under section 4975, is the deemed distribution of the loan under section 72(p) a correction of the prohibited transaction?

A–16: No, a deemed distribution is not a correction of a prohibited transaction under section 4975. See §§141.4975–13 and 53.4941(e)–1(c)(1) of this chapter for guidance concerning correction of a prohibited transaction.

Q–17: What are the income tax consequences if an amount is transferred from a qualified employer plan to a participant or beneficiary as a loan, but there is an express or tacit understanding that the loan will not be repaid?

A–17: If there is an express or tacit understanding that the loan will not be repaid or, for any reason, the transaction does not create a debtor-creditor relationship or is otherwise not a bona fide loan, then the amount transferred is treated as an actual distribution from the plan for purposes of the Internal Revenue Code, and is not treated as a loan or as a deemed distribution under section 72(p).

Q–18: If a qualified employer plan maintains a program to invest in residential mortgages, are loans made pursuant to the investment program subject to section 72(p)?

A–18: (a) Residential mortgage loans made by a plan in the ordinary course of an investment program are not subject to section 72(p) if the property acquired with the loans is the primary security for such loans and the amount loaned does not exceed the fair market value of the property. An investment program exists only if the plan has established, in advance of a specific investment under the program, that a certain percentage or amount of plan assets will be invested in residential mortgages available to persons purchasing the property who satisfy commercially customary financial criteria. A loan will not be considered as made under an investment program if—

(1) Any of the loans made under the program matures upon a participant's termination from employment;

(2) Any of the loans made under the program is an earmarked asset of a participant's or beneficiary's individual account in the plan; or

(3) The loans made under the program are made available only to participants or beneficiaries in the plan.

(b) Paragraph (a)(3) of this Q&A–18 shall not apply to a plan which, on December 20, 1995, and at all times thereafter, has had in effect a loan program under which, but for paragraph (a)(3) of this Q&A–18, the loans comply with the conditions of paragraph (a) of this Q&A–18 to constitute residential mortgage loans in the ordinary course of an investment program.

(c) No loan that benefits an officer, director, or owner of the employer maintaining the plan, or their beneficiaries, will be treated as made under an investment program.

(d) This section does not provide guidance on whether a residential mortgage loan made under a plan's investment program would result in a prohibited transaction under section 4975, or on whether such a loan made by a plan covered by title I of ERISA would be consistent with the fiduciary standards of ERISA or would result in a prohibited transaction under section 406 of ERISA. See 29 CFR 2550.408b–1.

Q–19: If there is a deemed distribution under section 72(p), is the interest that accrues thereafter on the amount of the deemed distribution an indirect loan for income tax purposes and what effect does the deemed distribution have on subsequent loans?

A–19: (a) *General rule.* Except as provided in paragraph (b) of this Q&A–19, a deemed distribution of a loan is treated as a distribution for purposes of section 72. Therefore, a loan that is deemed to be distributed under section 72(p) ceases to be an outstanding loan for purposes of section 72, and the interest that accrues thereafter under the plan on the amount deemed distributed is disregarded for purposes of applying section 72 to the participant or the beneficiary. Even though interest continues to accrue on the outstanding loan (and is taken into account for purposes of determining the tax treatment of any subsequent loan in accordance with paragraph (b) of this Q&A–19), this additional interest is not treated as an additional loan (and thus, does not result in an additional deemed distribution) for purposes of section 72(p). However, a loan that is deemed distributed under section 72(p) is not considered distributed for all purposes of the Internal Revenue Code. *See* Q&A–11 through Q&A–16 of this section.

(b) *Effect on subsequent loans*—(1) *Application of section 72(p)(2)(A).* A loan that is deemed distributed under section 72(p) (including interest accruing thereafter) and that has not been repaid (such as by a plan loan offset) is considered outstanding for purposes of applying section 72(p)(2)(A) to determine the maximum amount of any subsequent loan to the participant or beneficiary.

(2) *Additional security for subsequent loans.* If a loan is deemed distributed to a participant or beneficiary under section 72(p) and has not been repaid (such as by a plan loan offset), then no payment made thereafter to the participant or beneficiary is treated as a loan for purposes of section 72(p)(2) unless the loan otherwise satisfies section 72(p)(2) and this section and either of the following conditions is satisfied:

(i) There is an arrangement among the plan, the participant or beneficiary, and the employer, enforceable under applicable law, under which repayments will be made by payroll withholding. For this purpose, an arrangement will not fail to be enforceable merely because a party has the right to revoke the arrangement prospectively.

(ii) The plan receives adequate security from the participant or beneficiary that is in addition to the participant's or beneficiary's accrued benefit under the plan.

(3) *Condition no longer satisfied.* If, following a deemed distribution that has not been repaid, a payment is made to a participant or beneficiary that satisfies the conditions in paragraph (b)(2) of this Q&A–19 for treatment as a plan loan and, subsequently, before repayment of the second loan, the conditions in paragraph (b)(2) of this Q&A–19 are no longer satisfied with respect to the second loan (for example, if the loan recipient revokes consent to payroll withholding), the amount then outstanding on the second loan is treated as a deemed distribution under section 72(p).

Q–20: May a participant refinance an outstanding loan or have more than one loan outstanding from a plan?

A–20: (a) *Refinancings and multiple loans*—(1) *General rule.* A participant who has an outstanding loan that satisfies section 72(p)(2) and this section may refinance that loan or borrow additional amounts if, under the facts and circumstances, the loans collectively satisfy the amount limitations of section 72(p)(2)(A) and the prior loan and the additional loan each satisfy the requirements of section 72(p)(2)(B) and (C) and this section. For this purpose, a refinancing includes any situation in which one loan replaces another loan.

(2) *Loans that repay a prior loan and have a later repayment date.* For purposes of section 72(p)(2) and this section (including the amount limitations of section 72(p)(2)(A)), if a loan that satisfies section 72(p)(2) is replaced by a loan (a replacement loan) and the term of the replacement loan ends after the latest permissible term of the loan it replaces (the replaced loan), then the replacement loan and the replaced loan are both treated as outstanding on the date of the transaction. For purposes of the preceding sentence, the latest permissible term of the replaced loan is the latest date permitted under section 72(p)(2)(C) (*i.e.*, five years from the original date of the replaced loan, assuming that the replaced loan does not qualify for the exception at section 72(p)(2)(B)(ii) for principal residence plan loans and that no additional period of suspension applied to the replaced loan under Q&A–9 (b) of this section). Thus, for example, if the term of the replacement loan ends after the latest permissible term of the replaced loan and the sum of the amount of the replacement loan plus the outstanding balance of all other loans on the date of the transaction, including the replaced loan, fails to satisfy the amount limitations of section 72(p)(2)(A), then the replacement loan results in a deemed distribution. This paragraph (a)(2) does not apply to a replacement loan if the terms of the replacement loan would satisfy section 72(p)(2) and this section determined as if the replacement loan consisted of two separate loans, the replaced loan (amortized in substantially level payments over a period ending not later than the last day of the latest permissible term of the replaced loan) and, to the extent the amount of the replacement loan exceeds the amount of the replaced loan, a new loan that is also amortized in substantially level payments over a period ending not later than the last day of the latest permissible term of the replacement loan.

(b) *Examples.* The following examples illustrate the rules of this Q&A–20 and are based on the assumptions described in the introductory text of this section:

Example 1. (i) A participant with a vested account balance that exceeds $100,000 borrows $40,000 from a plan on January 1, 2005, to be repaid in 20 quarterly installments of $2,491 each. Thus, the term of the loan ends on December 31, 2009. On January 1, 2006, when the outstanding balance on the loan is $33,322, the loan is refinanced and is replaced by a new $40,000 loan from the plan to be repaid in 20 quarterly installments. Under the terms of the refinanced loan, the loan is to be repaid in level quarterly installments (of $2,491 each) over the next 20 quarters. Thus, the term of the new loan ends on December 31, 2010.

(ii) Under section 72(p)(2)(A), the amount of the new loan, when added to the outstanding balance of all other loans from the plan, must not exceed $50,000 reduced by the excess of the highest outstanding balance of loans from the plan during the 1-year period ending on December 31, 2005, over the outstanding balance of loans from the plan on January 1, 2006, with such outstanding balance to be determined immediately prior to the new $40,000 loan. Because the term of the new loan ends later than the term of the loan it replaces, under paragraph (a)(2) of this Q&A–20, both the new loan and the loan it replaces must be taken into account for purposes of applying section 72(p)(2), including the amount limitations in section 72(p)(2)(A). The amount of the new loan is $40,000, the outstanding balance on January 1, 2006, of the loan it replaces is $33,322, and the highest outstanding balance of loans from the plan during 2005 was $40,000. Accordingly, under section 72(p)(2)(A), the sum of the new loan and the outstanding balance on January 1, 2006, of the loan it replaces must not exceed $50,000 reduced by $6,678 (the excess of the $40,000 maximum outstanding loan balance during 2005 over the $33,322 outstanding balance on January 1, 2006, determined immediately prior to the new loan) and, thus, must not exceed $43,322. The sum of the new loan ($40,000) and the outstanding balance on January 1, 2006, of the loan it replaces ($33,322) is $73,322. Since $73,322 exceeds the $43,322 limit under section 72(p)(2)(A) by $30,000, there is a deemed distribution of $30,000 on January 1, 2006.

(iii) However, no deemed distribution would occur if, under the terms of the refinanced loan, the amount of the first 16 installments on the refinanced loan were equal to $2,907, which is the sum of the $2,491 originally scheduled quarterly installment payment amount under the first loan, plus $416 (which is the amount required to repay, in level quarterly installments over 5 years beginning on January 1, 2006, the excess of the refinanced loan over the January 1, 2006, balance of the first loan ($40,000 minus $33,322 equals $6,678)), and the amount of the 4 remaining installments was equal to $416. The refinancing would not be subject to paragraph (a)(2) of this Q&A–20 because the terms of the new loan would satisfy section 72(p)(2) and this section (including the substantially level amortization requirements of section 72(p)(2)(B) and (C)) determined as if the new loan consisted of 2 loans, one of which is in the amount of the first loan ($33,322) and is amortized in substantially level payments over a period ending December 31, 2009 (the last day of the term of the first loan) and the other of which is in the additional amount ($6,678) borrowed under the new loan. Similarly, the transaction also would not result in a deemed distribution (and would not be subject to paragraph (a)(2) of this Q&A–20) if the terms of the refinanced loan provided for repayments to be made in level quarterly installments (of $2,990 each) over the next 16 quarters.

Example 2. (i) The facts are the same as in *Example 1*(i), except that the applicable interest rate used by the plan when the loan is refinanced is significantly lower due to a reduction in market rates of interest and, under the terms of the refinanced loan, the amount of the first 16 installments on the refinanced loan is equal to $2,848 and the amount of the next 4 installments on the refinanced loan is equal to $406. The $2,848 amount is the sum of $2,442 to repay the first loan by December 31, 2009 (the term of the first loan), plus $406 (which is the amount to repay, in level quarterly installments over 5 years beginning on January 1, 2006, the $6,678 excess of the refinanced loan over the January 1, 2006, balance of the first loan).

(ii) The transaction does not result in a deemed distribution (and is not subject to paragraph (a)(2) of this Q&A–20) because the terms of the new loan would satisfy section 72(p)(2) and this section (including the substantially level amortization requirements of section 72(p)(2)(B) and (C)) determined as if the new loan consisted of 2 loans, one of which is in the amount of the first loan ($33,322) and is amortized in substantially level payments over a period ending December 31, 2009 (the last day of the term of the first loan), and the other of which is in the additional amount ($6,678) borrowed under the new loan. The transaction would also not result in a deemed distribution (and not be subject to paragraph (a)(2) of this Q&A–20) if the terms of the new loan provided for repayments to be made in level quarterly installments (of $2,931 each) over the next 16 quarters.

Q–21: Is a participant's tax basis under the plan increased if the participant repays the loan after a deemed distribution?

A–21: (a) *Repayments after deemed distribution.* Yes, if the participant or beneficiary repays the loan after a deemed distribution of the loan under section 72(p), then, for purposes of section 72(e), the participant's or beneficiary's investment in the contract (tax basis) under the plan increases by the amount of the cash repayments that the participant or beneficiary makes on the loan after the deemed distribution. However, loan repayments are not treated as after-tax contributions for other purposes, including sections 401(m) and 415(c)(2)(B).

(b) *Example.* The following example illustrates the rules in paragraph (a) of this Q&A–21 and is based on the assumptions described in the introductory text of this section:

Example. (i) A participant receives a $20,000 loan on January 1, 2003, to be repaid in 20 quarterly installments of $1,245 each. On December 31, 2003, the outstanding loan balance ($19,179) is deemed distributed as a result of a failure to make quarterly installment payments that were due on September 30, 2003 and December 31, 2003. On June 30, 2004, the participant repays $5,147 (which is the sum of the three installment payments that were due on September 30, 2003, December 31, 2003, and March 31, 2004, with interest thereon to June 30, 2004, plus the installment payment due on June 30, 2004). Thereafter, the participant resumes making the installment payments of $1,245 from September 30, 2004 through December 31, 2007. The loan repayments made after December 31, 2003 through December 31, 2007 total $22,577.

(ii) Because the participant repaid $22,577 after the deemed distribution that occurred on December 31, 2003, the participant has investment in the contract (tax basis) equal to $22,577 (14 payments of $1,245 each plus a single payment of $5,147) as of December 31, 2007.

Q–22: When is the effective date of section 72(p) and the regulations in this section?

A–22: (a) *Statutory effective date.* Section 72(p) generally applies to assignments, pledges, and loans made after August 13, 1982.

(b) *Regulatory effective date.* This section applies to assignments, pledges, and loans made on or after January 1, 2002.

(c) *Loans made before the regulatory effective date*—(1) *General rule.* A plan is permitted to apply Q&A–19 and Q&A–21 of this section to a loan made before the regulatory effective date in paragraph (b) of this Q&A–22 (and after the statutory effective date in paragraph (a) of this Q&A–22) if there has not been any deemed distribution of the loan before the transition date or if the conditions of paragraph (c)(2) of this

Q&A–22 are satisfied with respect to the loan.

(2) *Consistency transition rule for certain loans deemed distributed before the regulatory effective date.* (i) The rules in this paragraph (c)(2) of this Q&A–22 apply to a loan made before the regulatory effective date in paragraph (b) of this Q&A–22 (and after the statutory effective date in paragraph (a) of this Q&A–22) if there has been any deemed distribution of the loan before the transition date.

(ii) The plan is permitted to apply Q&A–19 and Q&A–21 of this section to the loan beginning on any January 1, but only if the plan reported, in Box 1 of Form 1099–R, for a taxable year no later than the latest taxable year that would be permitted under this section (if this section had been in effect for all loans made after the statutory effective date in paragraph (a) of this Q&A–22), a gross distribution of an amount at least equal to the initial default amount. For purposes of this section, the initial default amount is the amount that would be reported as a gross distribution under Q&A–4 and Q&A–10 of this section and the transition date is the January 1 on which a plan begins applying Q&A–19 and Q&A–21 of this section to a loan.

(iii) If a plan applies Q&A–19 and Q&A–21 of this section to such a loan, then the plan, in its reporting and withholding on or after the transition date, must not attribute investment in the contract (tax basis) to the participant or beneficiary based upon the initial default amount.

(iv) This paragraph (c)(2)(iv) of this Q&A–22 applies if—

(A) The plan attributed investment in the contract (tax basis) to the participant or beneficiary based on the deemed distribution of the loan;

(B) The plan subsequently made an actual distribution to the participant or beneficiary before the transition date; and

(C) Immediately before the transition date, the initial default amount (or, if less, the amount of the investment in the contract so attributed) exceeds the participant's or beneficiary's investment in the contract (tax basis). If this paragraph (c)(2)(iv) of this Q&A–22 applies, the plan must treat the excess (the loan transition amount) as a loan amount that remains outstanding and must include the excess in the participant's or beneficiary's income at the time of the first actual distribution made on or after the transition date.

(3) *Examples.* The rules in paragraph (c)(2) of this Q&A–22 are illustrated by the following examples, which are based on the assumptions described in the introductory text of this section (and, except as specifically provided in the examples, also assume that no distributions are made to the participant and that the participant has no investment in the contract with respect to the plan). *Example 1*, *Example 2*, and *Example 4* of this paragraph (c)(3) of this Q&A–22 illustrate the application of the rules in paragraph (c)(2) of this Q&A–22 to a plan that, before the transition date, did not treat interest accruing after the initial deemed distribution as resulting in additional deemed distributions under section 72(p). Example 3 of this paragraph (c)(3) of this Q&A–22 illustrates the application of the rules in paragraph (c)(2) of this Q&A–22 to a plan that, before the transition date, treated interest accruing after the initial deemed distribution as resulting in additional deemed distributions under section 72(p). The examples are as follows:

Example 1. (i) In 1998, when a participant's account balance under a plan is $50,000, the participant receives a loan from the plan. The participant makes the required repayments until 1999 when there is a deemed distribution of $20,000 as a result of a failure to repay the loan. For 1999, as a result of the deemed distribution, the plan reports, in Box 1 of Form 1099–R, a gross distribution of $20,000 (which is the initial default amount in accordance with paragraph (c)(2)(ii) of this Q&A–22) and, in Box 2 of Form 1099–R, a taxable amount of $20,000. The plan then records an increase in the participant's tax basis for the same amount ($20,000). Thereafter, the plan disregards, for purposes of section 72, the interest that accrues on the loan after the 1999 deemed distribution. Thus, as of December 31, 2001, the total taxable amount reported by the plan as a result of the deemed distribution is $20,000 and the plan's records show that the participant's tax basis is the same amount ($20,000). As of January 1, 2002, the plan decides to apply Q&A–19 of this section to the loan. Accordingly, it reduces the participant's tax basis by the initial default amount of $20,000, so that the participant's remaining tax basis in the plan is zero.

Thereafter, the amount of the outstanding loan is not treated as part of the account balance for purposes of section 72. The participant attains age 59½ in the year 2003 and receives a distribution of the full account balance under the plan consisting of $60,000 in cash and the loan receivable. At that time, the plan's records reflect an offset of the loan amount against the loan receivable in the participant's account and a distribution of $60,000 in cash.

(ii) For the year 2003, the plan must report a gross distribution of $60,000 in Box 1 of Form 1099–R and a taxable amount of $60,000 in Box 2 of Form 1099–R.

Example 2. (i) The facts are the same as in *Example 1,* except that in 1999, immediately prior to the deemed distribution, the participant's account balance under the plan totals $50,000 and the participant's tax basis is $10,000. For 1999, the plan reports, in Box 1 of Form 1099–R, a gross distribution of $20,000 (which is the initial default amount in accordance with paragraph (c)(2)(ii) of this Q&A–22) and reports, in Box 2 of Form 1099–R, a taxable amount of $16,000 (the $20,000 deemed distribution minus $4,000 of tax basis ($10,000 times ($20,000/$50,000)) allocated to the deemed distribution). The plan then records an increase in tax basis equal to the $20,000 deemed distribution, so that the participant's remaining tax basis as of December 31, 1999, totals $26,000 ($10,000 minus $4,000 plus $20,000). Thereafter, the plan disregards, for purposes of section 72, the interest that accrues on the loan after the 1999 deemed distribution. Thus, as of December 31, 2001, the total taxable amount reported by the plan as a result of the deemed distribution is $16,000 and the plan's records show that the participant's tax basis is $26,000. As of January 1, 2002, the plan decides to apply Q&A–19 of this section to the loan. Accordingly, it reduces the participant's tax basis by the initial default amount of $20,000, so that the participant's remaining tax basis in the plan is $6,000. Thereafter, the amount of the outstanding loan is not treated as part of the account balance for purposes of section 72. The participant attains age 59½ in the year 2003 and receives a distribution of the full account balance under the plan consisting of $60,000 in cash and the loan receivable. At that time, the plan's records reflect an offset of the loan amount against the loan receivable in the participant's account and a distribution of $60,000 in cash.

(ii) For the year 2003, the plan must report a gross distribution of $60,000 in Box 1 of Form 1099–R and a taxable amount of $54,000 in Box 2 of Form 1099–R.

Example 3. (i) In 1993, when a participant's account balance in a plan is $100,000, the participant receives a loan of $50,000 from the plan. The participant makes the required loan repayments until 1995 when there is a deemed distribution of $28,919 as a result of a failure to repay the loan. For 1995, as a result of the deemed distribution, the plan reports, in Box 1 of Form 1099–R, a gross distribution of $28,919 (which is the initial default amount in accordance with paragraph (c)(2)(ii) of this Q&A–22) and, in Box 2 of Form 1099–R, a taxable amount of $28,919. For 1995, the plan also records an increase in the participant's tax basis for the same amount ($28,919). Each year thereafter through 2001, the plan reports a gross distribution equal to the interest accruing that year on the loan balance, reports a taxable amount equal to the interest accruing that year on the loan balance reduced by the participant's tax basis allocated to the gross distribution, and records a net increase in the participant's tax basis equal to that taxable amount. As of December 31, 2001, the taxable amount reported by the plan as a result of the loan totals $44,329 and the plan's records for purposes of section 72 show that the participant's tax basis totals the same amount ($44,329). As of January 1, 2002, the plan decides to apply Q&A–19 of this section. Accordingly, it reduces the participant's tax basis by the initial default amount of $28,919, so that the participant's remaining tax basis in the plan is $15,410 ($44,329 minus $28,919). Thereafter, the amount of the outstanding loan is not treated as part of the account balance for purposes of section 72. The participant attains age 59½ in the year 2003 and receives a distribution of the full account balance under the plan consisting of $180,000 in cash and the loan receivable equal to the $28,919 outstanding loan amount in 1995 plus interest accrued thereafter to the payment date in 2003. At that time, the plan's records reflect an offset of the loan amount against the loan receivable in the participant's account and a distribution of $180,000 in cash.

(ii) For the year 2003, the plan must report a gross distribution of $180,000 in Box 1 of Form 1099–R and a taxable amount of $164,590 in Box 2 of Form 1099–R ($180,000 minus the remaining tax basis of $15,410).

Example 4. (i) The facts are the same as in Example 1, except that in 2000, after the deemed distribution, the participant receives a $10,000 hardship distribution. At the time of the hardship distribution, the participant's account balance under the plan totals $50,000. For 2000, the plan reports, in Box 1 of Form 1099–R, a gross distribution of $10,000 and, in Box 2 of Form 1099–R, a taxable amount of $6,000 (the $10,000 actual distribution minus $4,000 of tax basis ($10,000 times ($20,000/$50,000)) allocated to this actual distribution). The plan then records a decrease in tax basis equal to $4,000, so that the participant's remaining tax basis as of December 31, 2000, totals $16,000 ($20,000 minus $4,000). After 1999, the plan disregards, for purposes of section 72, the interest that accrues on the loan after the 1999 deemed distribution. Thus, as of December 31, 2001, the total taxable amount reported by the plan as a result of the deemed distribution plus the 2000 actual distribution is $26,000 and the plan's records show that the participant's tax basis is $16,000. As of January 1, 2002, the plan decides to apply Q&A–19 of this section to the loan. Accordingly, it reduces the participant's tax basis by the initial default amount of $20,000, so that the participant's remaining tax basis in the plan is reduced from $16,000 to zero. However, because the $20,000 initial default amount exceeds $16,000, the plan records a loan transition amount of $4,000 ($20,000 minus $16,000). Thereafter, the amount of the outstanding loan, other than the $4,000 loan transition amount, is not treated as part of the account balance for purposes of section 72. The participant attains age 59½ in the year 2003 and receives a distribution of the full account balance under the plan consisting of $60,000 in cash and the loan receivable. At that time, the plan's records reflect an offset of the loan amount against the loan receivable in the participant's account and a distribution of $60,000 in cash.

(ii) In accordance with paragraph (c)(2)(iv) of this Q&A–22, the plan must report in Box 1 of Form 1099–R a gross distribution of $64,000 and in Box 2 of Form 1099–R a taxable amount for the participant for the year 2003 equal to $64,000 (the sum of the $60,000 paid in the year 2003 plus $4,000 as the loan transition amount).

(d) *Effective date for Q&A–19(b)(2) and Q&A–20.* Q&A–19(b)(2) and Q&A–20 of this section apply to assignments, pledges, and loans made on or after January 1, 2004.

[T.D. 8894, 65 FR 46591, July 31, 2000, as amended by T.D. 9021, 67 FR 71824, Dec. 3, 2002; 68 FR 9532, 9535, Feb. 28, 2003; T.D. 9169, 69 FR 78153, Dec. 29, 2004; T.D. 9294, 71 FR 61883, Oct. 20, 2006]

§ 1.73–1 Services of child.

(a) Compensation for personal services of a child shall, regardless of the provisions of State law relating to who is entitled to the earnings of the child, and regardless of whether the income is in fact received by the child, be deemed to be the gross income of the child and not the gross income of the parent of the child. Such compensation, therefore, shall be included in the gross income of the child and shall be reflected in the return rendered by or for such child. The income of a minor child is not required to be included in the gross income of the parent for income tax purposes. For requirements for making the return by such child, or for such child by his guardian, or other person charged with the care of his person or property, see section 6012.

(b) In the determination of taxable income or adjusted gross income, as the case may be, all expenditures made by the parent or the child attributable to amounts which are includible in the gross income of the child and not of the parent solely by reason of section 73 are deemed to have been paid or incurred by the child. In such determination, the child is entitled to take deductions not only for expenditures made on his behalf by his parent which would be commonly considered as business expenses, but also for other expenditures such as charitable contributions made by the parent in the name of the child and out of the child's earnings.

(c) For purposes of section 73, the term ''parent'' includes any individual who is entitled to the services of the child by reason of having parental rights and duties in respect of the child. See section 6201(c) and the regulations in Part 301 of this chapter (Procedure and Administration) for assessment of tax against the parent in certain cases.

§ 1.74–1 Prizes and awards.

(a) *Inclusion in gross income.* (1) Section 74(a) requires the inclusion in gross income of all amounts received as prizes and awards, unless such prizes or awards qualify as an exclusion from gross income under subsection (b), or unless such prize or award is a scholarship or fellowship grant excluded from gross income by section 117. Prizes and awards which are includible in gross income include (but are not limited to) amounts received from radio and television giveaway shows, door prizes, and awards in contests of all types, as well as any prizes and awards from an employer to an employee in recognition of some achievement in connection with his employment.

(2) If the prize or award is not made in money but is made in goods or services, the fair market value of the goods or services is the amount to be included in income.

(b) *Exclusion from gross income.* Section 74(b) provides an exclusion from gross income of any amount received as a prize or award, if (1) such prize or award was made primarily in recognition of past achievements of the recipient in religious, charitable, scientific, educational, artistic, literary, or civic fields; (2) the recipient was selected without any action on his part to enter the contest or proceedings; and (3) the recipient is not required to render substantial future services as a condition to receiving the prize or award. Thus, such awards as the Nobel prize and the Pulitzer prize would qualify for the exclusion. Section 74(b) does not exclude prizes or awards from an employer to an employee in recognition of some achievement in connection with his employment.

(c) *Scholarships and fellowship grants.* See section 117 and the regulations thereunder for provisions relating to scholarships and fellowship grants.

§ 1.75–1 Treatment of bond premiums in case of dealers in tax-exempt securities.

(a) *In general.* (1) Section 75 requires certain adjustments to be made by dealers in securities with respect to premiums paid on municipal bonds which are held for sale to customers in the ordinary course of the trade or business. The adjustments depend upon the method of accounting used by the taxpayer in computing the gross income from the trade or business. See paragraphs (b) and (c) of this section.

(2) The term ''municipal bond'' under section 75 means any obligation issued by a government or political subdivision thereof if the interest on the obligation is excludable from gross income under section 103. However, such term does not include an obligation—

(i) If the earliest maturity or call date of the obligation is more than 5 years from the date of acquisition by the taxpayer or the obligation is sold or otherwise disposed of by the taxpayer within 30 days after the date of acquisition by him, and

(ii) If, in case of an obligation acquired after December 31, 1957, the amount realized upon its sale (or, in the case of any other disposition, its fair market value at the time of disposition) is higher than its adjusted basis.

For purposes of this subparagraph, the amount realized on the sale of the obligation, or the fair market value of the obligation, shall not include any amount attributable to interest, and the adjusted basis shall be computed without regard to any adjustment for amortization of bond premium required under section 75 and section 1016(a)(6). For purposes of determining whether the obligation is sold or otherwise disposed of by the taxpayer within 30 days after the date of its acquisition by him, it is immaterial whether or not such 30-day period is entirely within one taxable year.

(3) The term ''cost of securities sold'' means the amount ascertained by subtracting the inventory value of the closing inventory of a taxable year from the sum of the inventory value of the opening inventory for such year and the cost of securities and other property purchased during such year which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year.

(b) *Inventories not valued at cost.* (1) In the case of a dealer in securities who computes gross income from his trade or business by the use of inventories and values such inventories on any basis other than cost, the adjustment required by section 75 is, except as provided in subparagraph (2) of this paragraph, the reduction of ''cost of securities sold'' by the amount equal to the amortizable bond premium which would be disallowed as a deduction under section 171(a)(2) with respect to the municipal bond if the dealer were an ordinary investor holding such bond. Such amortizable bond premium is computed under section 171(b) by reference to the cost or other original basis of the bond on the date of acquisition (determined without regard to section 1013, relating to inventory value on a subsequent date).

(2) With respect to an obligation acquired after December 31, 1957, which has as its earliest maturity or call date a date more than five years from the date on which it was acquired by the taxpayer, the following rules shall apply:

(i) If the taxpayer holds the obligation at the end of the taxable year, he is not required by section 75 to reduce the ‘‘cost of securities sold’’ for such year with respect to the obligation.

(ii) If the taxpayer sells or otherwise disposes of the obligation during the taxable year, he shall reduce the ‘‘cost of securities sold’’ for the taxable year of the sale or disposition unless he sold the obligation for more than its adjusted basis or otherwise disposed of it when its fair market value was more than its adjusted basis. For purposes of determining whether or not the taxpayer sold the obligation for more than its adjusted basis, or otherwise disposed of it when its fair market value was more than its adjusted basis, the amount realized on the sale of the obligation, or the fair market value of the obligation, shall not include any amount attributable to interest, and the adjusted basis shall be computed without regard to any adjustment for amortization of bond premium required under sections 75 and 1016(a)(6). The amount of the reduction referred to in the first sentence of this subdivision is the total amount by which the adjusted basis of the obligation would be required to be reduced under section 1016(a)(5) were the obligation subject to the amortizable bond premium provisions of section 171; that is, the amount of the amortizable bond premium attributable to the period during which the obligation was held which would be disallowed as a deduction under section 171(a)(2) if the taxpayer were an ordinary investor.

(3) This paragraph may be illustrated by the following examples:

Example 1. X, a dealer in securities who values his inventories on a basis other than cost, makes his income tax returns on the calendar year basis. On July 1, 1954, he bought, for $1,060 each, three municipal bonds (A, B, an C) having a face obligation of $1,000, and maturing on July 1, 1959. Bond A is sold on December 31, 1954, bond B is sold on December 31, 1955, and bond C is sold on June 30, 1956. For each bond the amortizable bond premium to maturity is $60, the period from date of acquisition to maturity is 60 months, and the amortizable bond premium per month is $1. The adjustment for each of the years 1954, 1955, and 1956 is as follows:

Bond	Date acquired	Date sold	Adjustment to “cost of securities sold” for—		
			1954	1955	1956
A	July 1, 1954	Dec. 31, 1954	$6		
B	July 1, 1954	Dec. 31, 1955	6	$12	
C	July 1, 1954	Jun. 30, 1956	6	12	$6
Total			18	24	6

Example 2. Y is a dealer in securities who values his inventories on a basis other than cost. He makes his income tax returns on the calendar year basis. On January 1, 1958, Y bought five bonds (D, E, F, G, and H) issued by various municipalities. Each bond has a face obligation of $1,000 and was purchased for $1,060. The interest on each is excludable from gross income under section 103. Bonds D, E, and F mature on December 31, 1962, and bonds G and H mature on December 31, 1967. The amortizable bond premium per month is $1 with respect to bonds D, E, and F, and is $.50 with respect to bonds G and H. The following table indicates the reduction in ‘‘cost of securities sold’’ which Y should make for the years shown, assuming that he sells the bonds on the dates and for the prices set forth:

Bond	Date sold	Sale price	Adjustment to “cost of securities sold” for—		
			1958	1959	1960
D	Feb. 1, 1959	$1,090	$12	$1	
E	Jan. 30, 1958	1,100	None		
F	Jan. 30, 1958	1,000	1		
G	Dec. 31, 1960	1,065	None	None	None
H	Dec. 31, 1960	1,050	None	None	$18
Total		....	13	1	18

An adjustment to ''cost of securities sold'' must be made with respect to bond D (even though it was ultimately sold at a gain) because the bond neither had an earliest maturity or call date of more than 5 years from the date on which Y acquired it, nor was it disposed of within 30 days after such date. An adjustment must be made for the years 1958 and 1959 since section 75(a)(1) requires that an adjustment be made with respect to such a bond at the close of each taxable year in which it is held. On the other hand, since bonds E, F, G, and H either were disposed of within 30 days after the date of such acquisition or had an earliest maturity or call date more than 5 years from the date of acquisition, and were acquired after December 31, 1957, it is necessary to determine whether Y disposed of them at a loss so as to require an adjustment under section 75. No adjustment is necessary with respect to bonds E and G because they were sold at a gain. An adjustment to ''cost of securities sold'' is required with respect to bonds F and H because they were sold at a loss. As in the case of bond D, an adjustment with respect to bond F is made in 1958 in accordance with section 75(a)(1); however, the adjustment with respect to bond H is made entirely in 1960, the taxable year in which Y sold that bond, in accordance with the last sentence of section 75(a). If Y had acquired bonds before January 1, 1958, it would be unnecessary to determine whether they were disposed of at a loss since that factor is significant only with respect to bonds acquired on or after that date.

(c) *Inventories not used or inventories valued at cost.* (1) In the case of a dealer in securities who computes gross income from his trade or business without the use of inventories or by use of inventories valued at cost, the adjustment required by section 75 is a reduction of the adjusted basis of each municipal bond sold or otherwise disposed of during the taxable year. The amount of such reduction is the total amount by which the adjusted basis of the bond would be required to be reduced under section 1016(a)(5) were the bond subject to the amortizable bond premium provisions of section 171; that is, the amount of the amortizable bond premium attributable to the period during which the bond was held which would be disallowed as a deduction under section 171(a)(2) if the taxpayer were an ordinary investor.

(2) Subparagraph (1) of this paragraph may be illustrated by the following example:

Example. Z, a dealer in securities who values his inventories on the basis of cost, makes his income tax returns on the calendar year basis. On January 1, 1954, he buys, for $1,060 each, three municipal bonds (I, J, and K) having a face obligation of $1,000, and maturing on January 1, 1959. Bond I is sold on December 31, 1954, bond J is sold on June 30, 1955, and bond K is sold on December 31, 1956. For each bond, the amortizable bond premium to maturity is $60, the period from the date of acquisition to maturity is 60 months, and the amortizable bond premium per month is $1.

Bond	Date acquired	Date sold	Adjustment for—		
			1954	1955	1956
I	Jan. 1, 1954	Dec. 31, 1954	$12		
J	Jan. 1, 1954	June 30, 1955	None	$18	
K	Jan. 1, 1954	Dec. 31, 1956	None	None	$36

(d) *Bonds acquired before July 1, 1950.* Under section 203(c) of the Revenue Act of 1950, adjustment is required for a municipal bond acquired before July 1, 1950, only with respect to taxable years beginning on or after that date. Accordingly, if the municipal bond was acquired before July 1, 1950, then for purposes of section 75 the amortizable bond premium under section 171 must be computed after adjusting the bond premium to the extent proper to reflect unamortized bond premium for so much of the holding period (as determined under section 1223) as precedes the taxable year of the dealer beginning on or after July 1, 1950. Thus, in example (1) of paragraph (b) and in the example in paragraph (c) of this section, the first taxable year beginning on or after July 1, 1950, is, for each dealer, the taxable year beginning January 1, 1951. If each dealer had purchased for $1,060 on April 1, 1950, a municipal bond having a face obligation of $1,000 and maturing April 1, 1955, and had sold such bond on February 28, 1955, the adjustment under section 75 would be computed as follows:

	Dealer *X*	Dealer *Z*
Bond premium	$60	$60
Adjustment for holding period prior to Jan. 1, 1951	9	9
Amortizable bond premium to maturity, as adjusted	51	51
Amortizable bond premium per month	1	1
Total adjustments under sec. (o), 1939 Code, for years 1951–53	36	None
Adjustment under sec. 75 for 1954	12	None
Adjustment under sec. 75 for 1955	2	50

[T.D. 6647, 28 FR 3519, Apr. 11, 1963]

§ 1.77–1 Election to consider Commodity Credit Corporation loans as income.

A taxpayer who receives a loan from the Commodity Credit Corporation may, at his election, include the amount of such loan in his gross income for the taxable year in which the loan is received. If a taxpayer makes such an election (or has made such an election under section 123 of the Internal Revenue Code of 1939 or under section 223(d) of the Revenue Act of 1939 (53 Stat. 897)), then for subsequent taxable years he shall include in his gross income all amounts received during those years as loans from the Commodity Credit Corporation, unless he secures the permission of the Commissioner to change to a different method of accounting. Application for permission to change such method of accounting and the basis upon which the return is made shall be filed with the Commission of Internal Revenue, Washington, D.C. 20224, within 90 days after the beginning of the taxable year to be covered by the return.

§ 1.77–2 Effect of election to consider commodity credit loans as income.

(a) If a taxpayer elects or has elected under section 77, section 123 of the Internal Revenue Code of 1939, or section 223(d) of the Revenue Act of 1939 (53 Stat. 897), as amended, to include in his gross income the amount of a loan from the Commodity Credit Corporation for the taxable year in which it is received, then—

(1) No part of the amount realized by the Commodity Credit Corporation upon the sale or other disposition of the commodity pledged for such loan shall be recognized as income to the taxpayer, unless the taxpayer receives an amount in addition to that advanced to him as the loan, in which event such additional amount shall be included in the gross income of the taxpayer for the taxable year in which it is received, and

(2) No deductible loss to the taxpayer shall be recognized on account of any deficiency realized by the Commodity Credit Corporation on such loan if the taxpayer was relieved from liability for such deficiency.

(b) The application of paragraph (a) of this section may be illustrated by the following example:

Example. A, a taxpayer who elected for his taxable year 1952 to include in gross income amounts received as loans from the Commodity Credit Corporation, received as loans $500 in 1952, $700 in 1953, and $900 in 1954. In 1956 all the pledged commodity was sold by the Commodity Credit Corporation for an amount $100 and $200 less than the loans with respect to the commodity pledged in 1952 and 1953, respectively, and for an amount $150 greater than the loan with respect to the commodity pledged in 1954. A, in making his return for 1956, shall include in gross income the sum of $150 if it is received during that year, but will not be allowed a deduction for the deficiencies of $100 and $200 unless he is required to satisfy such deficiencies and does satisfy them during that year.

§ 1.78–1 Dividends received from certain foreign corporations by certain domestic corporations choosing the foreign tax credit.

(a) *Taxes deemed paid by certain domestic corporations treated as a section 78 dividend.* Any reduction under section 907(a) of the foreign income taxes deemed to be paid with respect to foreign oil and gas extraction income does not affect the amount treated as a section 78 dividend. If a domestic corporation chooses to have the benefits of the foreign tax credit under section 901 for any taxable year, an amount which is equal to the foreign income taxes deemed to be paid by such corporation for such year under section 902(a) in accordance with §§ 1.902–1 and 1.902–2 and § 1.902(b)(2), or under section 960(a)(1) in accordance with § 1.960–7, shall, to the extent provided by this section, be treated as a dividend (hereinafter referred to as a section 78 dividend) received by such domestic corporation from the foreign corporation described in section 902(a) in accordance with

§§ 1.902–1 and 1.902–2 or section 960(c)(1) in accordance with § 1.960–7, as the case may be. A section 78 dividend shall be treated as a dividend for all purposes of the Code, except that it shall not be treated as a dividend under section 245, relating to dividends received from certain foreign corporations, or increase the earnings and profits of the domestic corporation. For purposes of determining the source of a section 78 dividend in computing the limitation on the foreign tax credit under section 904, see § 1.902(h)(1) and the regulations under section 960. For special rules relating to the determination of the foreign tax credit under section 902 with respect to certain minimum distributions received from controlled foreign corporations and the effect of such rules upon the gross-up under section 78, see paragraph (c) of § 1.963–4. For rules respecting the reduction of foreign income taxes under section 6038(b) in applying section 902(a) in accordance with §§ 1.902–1 and 1.902–2 or section 960(c)(1) in accordance with § 1.960–7, where there has been a failure to furnish certain information and for an illustration of the effect of such reduction upon the amount of a section 78 dividend, see paragraph (l) of § 1.6038–2.

(b) *Certain taxes not treated as a section 78 dividend.* Foreign income taxes deemed paid by a domestic corporation under section 902(a) in accordance with §§ 1.902–1 and 1.902–2 or section 960(c)(1) in accordance with § 1.960–7, shall not, to the extent provided by paragraph (b) of § 1.960–3, be treated as a section 78 dividend where such taxes are imposed on certain distributions from the earnings and profits of a controlled foreign corporation attributable to an amount which is, or has been, included in gross income of the domestic corporation under section 951.

(c) *United Kingdom income tax included in gross income under treaty.* Any amount of United Kingdom income tax appropriate to a dividend paid by a corporation which is a resident of the United Kingdom shall not be treated as a section 78 dividend by a domestic corporation to the extent that such tax is included in the gross income of such domestic corporation in accordance with Article XIII (1) of the income tax convention between the United States and the United Kingdom, as amended by Article II of the supplementary protocol between such Governments signed on August 19, 1957 (9 UST 1331). See § 507.117 of this chapter, relating to credit against United States tax liability for income tax paid or deemed to have been paid to the United Kingdom.

(d) *Taxable year in which section 78 dividend is received.* A section 78 dividend shall be considered received in the taxable year of a domestic corporation in which—

(1) The corporation receives the dividend by reason of which there are deemed paid under section 902(a) in accordance with §§ 1.902–1 and 1.902–2 the foreign income taxes which give rise to such section 78 dividend, or

(2) The corporation includes in gross income under section 951(a) the amounts by reason of which there are deemed paid under section 960(a)(1) in accordance with § 1.960–7 the foreign income taxes which give rise to such section 78 dividend, notwithstanding that such foreign income taxes may be carried back or carried over to another taxable year under section 904(d) and are deemed to be paid or accrued in such other taxable year.

(e) *Effective dates for the application of section 78*—(1) *In general.* This section shall apply to amounts of foreign income taxes deemed paid under section 902(a) in accordance with §§ 1.902–1 and 1.902–2, or under section 960(a)(1) in accordance with § 1.960–7, by reason of a distribution received by a domestic corporation—

(i) After December 31, 1964, or

(ii) Before January 1, 1965, in a taxable year of such domestic corporation beginning after December 31, 1962, but only to the extent that such distribution is made out of the accumulated profits of a foreign corporation for a taxable year of such foreign corporation beginning after December 31, 1962.

For special rules relating to determination of accumulated profits for such purposes, see the regulation under section 902.

(2) *Amounts under section 951 treated as distributions.* For purposes of this paragraph, any amount attributable to the earnings and profits for the taxable year of a first-tier corporation (as defined in paragraph (b)(1) of § 1.960–1)

which is included in the gross income of a domestic corporation under section 951(a) shall be treated as a distribution received by such domestic corporation on the last day in such taxable year on which such first-tier corporation is a controlled foreign corporation.

(f) *Illustrations.* The application of this section may be illustrated by the examples provided in § 1.902–1, § 1.904–5, § 1.960–3, § 1.960–4, and § 1.963–4.

[T.D. 6805, 30 FR 3208, Mar. 9, 1965, as amended by T.D. 7120, 36 FR 10859, June 4, 1971; 36 FR 11924, June 23, 1971; T.D. 7481, 42 FR 20130, Apr. 18, 1977; T.D. 7490; 42 FR 30497, June 15, 1977; 42 FR 32536, June 27, 1977; T.D. 7649, 44 FR 60086, Oct. 18, 1979; T.D. 7961, 49 FR 26225, June 27, 1984]

§ 1.79–0 Group-term life insurance—definitions of certain terms.

The following definitions apply for purposes of section 79, this section, and §§ 1.79–1, 1.79–2, and 1.79–3.

Carried directly or indirectly. A policy of life insurance is ''carried directly or indirectly'' by an employer if—

(a) The employer pays any part of the cost of the life insurance directly or through another person; or

(b) The employer or two or more employers arrange for payment of the cost of the life insurance by their employees and charge at least one employee less than the cost of his or her insurance, as determined under Table I of § 1.79–3(d)(2), and at least one other employee more than the cost of his or her insurance, determined in the same way.

Employee. An ''employee'' is—

(a) A person who performs services if his or her relationship to the person for whom services are performed is the legal relationship of employer and employee described in § 31.3401(c)–1; or

(b) A full-time life insurance salesperson described in section 7701(a)(20); or

(c) A person who formerly performed services as an employee.

A person who formerly performed services as an employee and currently performs services for the same employer as an independent contractor is considered an employee only with respect to insurance provided because of the person's former services as an employee.

Group of employees. A ''group of employees'' is all employees of an employer, or less than all employees if membership in the group is determined solely on the basis of age, marital status, or factors related to employment. Examples of factors related to employment are membership in a union some or all of whose members are employed by the employer, duties performed, compensation received, and length of service. Ordinarily the purchase of something other than group-term life insurance is not a factor related to employment. For example, if an employer provides credit life insurance to all employees who purchase automobiles, these employees are not a ''group of employees'' because membership is not determined solely on the basis of age, marital status, or factors related to employment. On the other hand, participation in an employer's pension, profit-sharing or accident and health plan is considered a factor related to employment even if employees are required to contribute to the cost of the plan. Ownership of stock in the employer corporation is not a factor related to employment. However, participation in an employer's stock bonus plan may be a factor related to employment and a ''group of employees'' may include employees who own stock in the employer corporation.

Permanent benefit. A ''permanent benefit'' is an economic value extending beyond one policy year (for example, a paid-up or cash surrender value) that is provided under a life insurance policy. However, the following features are not permanent benefits:

(a) A right to convert (or continue) life insurance after group life insurance coverage terminates;

(b) Any other feature that provides no economic benefit (other than current insurance protection) to the employee; or

(c) A feature under which term life insurance is provided at a level premium for a period of five years or less.

Policy. The term ''policy'' includes two or more obligations of an insurer (or its affiliates) that are sold in conjunction. Obligations that are offered or available to members of a group of employees are sold in conjunction if they are offered or available because of the employment relationship. The actuarial sufficiency of the premium charged for each obligation is not taken into account in determining whether the obligations are sold in conjunction. In addition, obligations may be sold in conjunction even if the obligations are contained in separate documents, each document is filed with and approved by the applicable state insurance commission, or each obligation is independent of any other obligation. Thus, a group of individual contracts under which life insurance is provided to a group of employees may be a policy. Similarly, two benefits provided to a group of employees, one term life insurance and the other a permanent benefit, may be a policy, even if one of the benefits is provided only to employees who decline the other benefit. However, an employer may elect to treat two or more obligations each of which provides no permanent benefits as separate policies if the premiums are properly allocated among such policies. An employer also may elect to treat an obligation which provides permanent benefits as a separate policy if—

(a) The insurer sells the obligation directly to the employee who pays the full cost thereof;

(b) The participation of the employer with respect to sales of the obligation to employees is limited to selection of the insurer and the type of coverage and to sales assistance activities such as providing employee lists to the insurer, permitting the insurer to use the employer's premises for solicitation, and collecting premiums through payroll deduction;

(c) The insurer sells the obligation on the same terms and in substantial amounts to individuals who do not purchase (and whose employers do not purchase) any other obligation from the insurer; and

(d) No employer-provided benefit is conditioned on purchase of the obligation.

[T.D. 7623, 44 FR 28797, May 17, 1979, as amended by T.D. 7917, 48 FR 45762, Oct. 7, 1983]

§ 1.79–1 Group-term life insurance—general rules.

(a) *What is group-term life insurance?* Life insurance is not group-term life insurance for purposes of section 79 unless it meets the following conditions:

(1) It provides a general death benefit that is excludable from gross income under section 101(a).

(2) It is provided to a group of employees.

(3) It is provided under a policy carried directly or indirectly by the employer.

(4) The amount of insurance provided to each employee is computed under a formula that precludes individual selection. This formula must be based on factors such as age, years of service, compensation, or position. This condition may be satisfied even if the amount of insurance provided is determined under a limited number of alternative schedules that are based on the amount each employee elects to contribute. However, the amount of insurance provided under each schedule must be computed under a formula that precludes individual selection.

(b) *May group-term life insurance be combined with other benefits?* No part of the life insurance provided under a policy that provides a permanent benefit is group-term life insurance unless—

(1) The policy or the employer designates in writing the part of the death benefit provided to each employee that is group-term life insurance; and

(2) The part of the death benefit that is provided to an employee and designated as the group-term life insurance benefit for any policy year is not less than the difference between the total death benefit provided under the policy and the employee's deemed death benefit (DDB) at the end of the policy year determined under paragraph (d)(3) of this section.

(c) *May a group include fewer than 10 employees?* (1) As a general rule, life insurance provided to a group of employees cannot qualify as group-term life insurance for purposes of section 79 unless, at some time during the calendar year, it is provided to at least 10 full-time employees who are members of the group of employees. For purposes of this rule, all life insurance provided under policies carried directly or indirectly by the employer is taken into account in determining the number of employees to whom life insurance is provided.

(2) The general rule of paragraph (c)(1) of this section does not apply if the following conditions are met:

(i) The insurance is provided to all full-time employees of the employer or, if evidence of insurability affects eligibility, to all full-time employees who provide evidence of insurability satisfactory to the insurer.

(ii) The amount of insurance provided is computed either as a uniform percentage of compensation or on the basis of coverage brackets established by the insurer. However, the amount computed under either method may be reduced in the case of employees who do not provide evidence of insurability satisfactory to the insurer. In general, no bracket may exceed 2½ times the next lower bracket and the lowest bracket must be at least 10 percent of the highest bracket. However, the insurer may establish a separate schedule of coverage brackets for employees who are over age 65, but no bracket in the over-65 schedule may exceed 2½ times the next lower bracket and the lowest bracket in the over-65 schedule must be at least 10 percent of the highest bracket in the basic schedule.

(iii) Evidence of insurability affecting employee's eligibility for insurance or the amount of insurance provided to that employee is limited to a medical questionnaire completed by the employee that does not require a physical examination.

(3) The general rule of paragraph (c)(1) of this section does not apply if the following conditions are met:

(i) The insurance is provided under a common plan to the employees of two or more unrelated employers.

(ii) The insurance is restricted to, but mandatory for, all employees of the employer who belong to or are represented by an organization (such as a union) that carries on substantial activities in addition to obtaining insurance.

(iii) Evidence of insurability does not affect an employee's eligibility for insurance or the amount of insurance provided to that employee.

(4) For purposes of paragraph (c) (2) and (3) of this section, employees are not taken into account if they are denied insurance for the following reasons:

(i) They are not eligible for insurance under the terms of the policy because they have not been employed for a waiting period, specified in the policy, which does not exceed six months.

(ii) They are part-time employees. Employees whose customary employment is for not more than 20 hours in any week, or 5 months in any calendar year, are presumed to be part-time employees.

(iii) They have reached the age of 65.

(5) For purposes of paragraph (c) (1) and (2) of this section, insurance is considered to be provided to an employee who elects not to receive insurance unless, in order to receive the insurance, the employee is required to contribute to the cost of benefits other than term life insurance. Thus, if an employee could receive term life insurance by contributing to its cost, the employee is taken into account in determining whether the insurance is provided to 10 or more employees even if such employee elects not to receive the insurance. However, an employee who must contribute to the cost of permanent benefits to obtain term life insurance is not taken into account in determining whether the term life insurance is provided to 10 or more employees unless the term life insurance is actually provided to such employee.

(d) *How much must an employee receiving permanent benefits include in income?*—(1) *In general.* If an insurance policy that meets the requirements of this section provides permanent benefits to an employee, the cost of the permanent benefits reduced by the amount paid for permanent benefits by the employee is included in the employee's income. The cost of the permanent benefits is determined under the formula in paragraph (d)(2) of this section.

(2) *Formula for determining cost of the permanent benefits.* In each policy year the cost of the permanent benefits for any particular employee must be no less than:

$X(\mathrm{DDB}_2 - \mathrm{DDB}_1)$

where

DDB_2 is the employee's deemed death benefit at the end of the policy year:

DDB_1 is the employee's deemed death benefit at the end of the preceding policy year; and

X is the net single premium for insurance (the premium for one dollar of paid-up whole-life insurance) at the employee's attained age at the beginning of the policy year.

(3) *Formula for determining deemed death benefit.* The deemed death benefit (DDB) at the end of any policy year for any particular employee is equal to—

$$R/Y$$

Where—

R is the net level premium reserve at the end of that policy year for all benefits provided to the employee by the policy or, if greater, the fair market value of the policy at the end of that policy year; and

Y is the net single premium for insurance (the premium for one dollar of paid-up, whole life insurance) at the employee's age at the end of that policy year.

(4) *Mortality tables and interest rates used.* For purposes of paragraph (d) (2) and (3) of this section, the net level premium reserve (*R*) and the net single premium (*X* or *Y*) shall be based on the 1958 CSO Mortality Table and 4 percent interest.

(5) *Dividends.* If an insurance policy that meets the requirements of this section provides permanent benefits, part or all of the dividends under the policy may be includible in the employee's income. If the employee pays nothing for the permanent benefits, all dividends under the policy that are actually or constructively received by the employee are includible in the employee's income. In all other cases, the amount of dividends included in the employee's income is equal to:

$$(D+C)-(PI+DI+AP)$$

where

D is the total amount of dividends actually or constructively received under the policy by the employee in the current and all preceding taxable years of the employee;

C is the total cost of the permanent benefits for the current and all preceding taxable years of the employee determined under the formulas in paragraph (d) (2) and (6) of this section:

PI is the total amount of premium included in the employee's income under paragraph (d)(1) of this section for the current and all preceding taxable years of the employee;

DI is the total amount of dividends included in the employee's income under this paragraph (d)(5) in all preceding taxable years of the employee; and

AP is the total amount paid for permanent benefits by the employee in the current and all preceding taxable years of the employee.

(6) *Different policy and taxable years.* (i) If a policy year begins in one employee taxable year and ends in another employee taxable year, the cost of the permanent benefits, determined under the formula in paragraph (d)(2) of this section, is allocated between the employee taxable years.

(ii) The cost of permanent benefits for a policy year is allocated first to the employee taxable year in which the policy year begins. The cost of permanent benefits allocated to that policy year is equal to:

$$F \times C$$

where

F is the fraction of the premium for that policy year that is paid on or before the last day of the employee taxable year; and

C is the cost of permanent benefits for the policy year determined under the formula in paragraph (d)(2) of this section.

(iii) Any part of the cost of permanent benefits that is not allocated to the employee taxable year in which the policy year begins is allocated to the subsequent employee taxable year.

(iv) The cost of permanent benefits for an employee taxable year is the sum of the costs of permanent benefits allocated to that year under paragraph (d)(6) (ii) and (iii) of this section.

(7) *Example.* The provisions of this paragraph may be illustrated by the following example:

Example. An employer provides insurance to employee A under a policy that meets the requirements of this section. Under the policy, A, who is 47 years old, received $70,000 of group-term life insurance and elects to receive a permanent benefit under the policy. A pays $2 for each $1,000 of group-term life insurance through payroll deductions and the employer pays the remainder of the premium for the group-term life insurance. The employer also pays one half of the premium specified in the policy for the permanent benefit. A pays the other half of the premium for the permanent benefit through payroll deductions. The policy specifies that the annual premium paid for the permanent benefit is $300. However, the amount of premium allocated to the permanent benefit by the formula in paragraph (d)(2) of this section is $350. A is a calendar year taxpayer; the policy year begins January 1. In year 2000, $200 is includible in A's income because of insurance provided by the employer. This amount is computed as follows:

(1) Cost of permanent benefits	$350
(2) Amounts considered paid by A for permanent benefits (½ × $300)	150
(3) Line (1) minus line (2)	200
(4) Cost of $70,000 of group-term life insurance under Table I of § 1.79–3	126
(5) Cost of $50,000 of group-term life insurance under Table I of § 1.79–3	90
(6) Cost of group-term insurance in excess of $50,000 (line (4) minus line(5))	36
(7) Amount considered paid by A for group-term life insurance (70 × $2)	140
(8) Line (6) minus line (7) (but not less than 0)	0
(9) Amount includible in income (line (3) plus line (8))	200

(e) *What is the effect of State law limits?* Section 79 does not apply to life insurance in excess of the limits under applicable state law on the amount of life insurance that can be provided to an employee under a single contract of group-term life insurance.

(f) *Cross references.* (1) See section 79(b) and § 1.79–2 for rules relating to group-term life insurance provided to certain retired individuals.

(2) See section 61(a) and the regulations thereunder for rules relating to life insurance not meeting the requirements of section 79, this section, or § 1.79–2, such as insurance provided on the life of a non-employee (for example, an employee's spouse), insurance not provided as compensation for personal services performed as an employee, insurance not provided under a policy carried directly or indirectly by the employer, or permanent benefits.

(3) See sections 106 and § 1.106–1 for rules relating to certain insurance that does not provide general death benefits, such as travel insurance or accident and health insurance (including amounts payable under a double indemnity clause or rider).

(g) [Reserved]

(h) *Effective date.* Section 1.79–0 applies to insurance provided in employee taxable years beginning on or after January 1, 1977 (except as provided in 26 CFR 1.79–1(g) (revised as of April 1, 1983) with respect to insurance provided in employee taxable years beginning in 1977). Sections 1.79–1 through 1.79–3 apply to insurance provided in employee taxable years beginning after December 31, 1982. See 26 CFR 1.79–1 through 1.79–3 (revised as of April 1, 1983) for rules applicable to insurance provided in employee taxable years beginning before January 1, 1983.

(Secs. 79(c) and 7805 of the Internal Revenue Code of 1954 (78 Stat. 36, 26 U.S.C. 79(c); 68A Stat. 917, 26 U.S.C. 7805))

[T.D. 7623, 44 FR 28797, May 17, 1979, as amended by T.D. 7917, 48 FR 45762, Oct. 7, 1983; T.D. 7924, 48 FR 54595, Dec. 6, 1983; T.D. 8821, 64 FR 29790, June 3, 1999; T.D. 9223, 70 FR 50971, Aug. 29, 2005]

§ 1.79–2 Exceptions to the rule of inclusion.

(a) *In general.* (1) Section 79(b) provides exceptions for the cost of group-term life insurance provided under certain policies otherwise described in section 79(a). The policy or policies of group-term life insurance which are described in section 79(a) but which qualify for one of the exceptions set forth in section 79(b) are described in paragraphs (b) through (d) of this section. Paragraph (b) of this section discusses the exception provided in section 79(b) (1); paragraph (c) of this section discusses the exception provided in section 79(b)(2); and paragraph (d) of this section discusses the exception provided in section 79(b)(3).

(2)(i) If a policy of group-term life insurance qualifies for an exception provided by section 79(b), then the amount equal to the cost of such insurance is excluded from the application of the provisions of section 79(a).

(ii) If a policy, or portion of a policy of group-term life insurance qualifies for an exception provided by section 79(b), the amount (if any) paid by the employee toward the purchase of such insurance is not to be taken into account as an amount referred to in section 79 (a)(2). In the case of a policy or policies of group-term life insurance which qualify for an exception provided by section 79(b) (1) or (3), the amount paid by the employee which is not to be taken into account as an amount referred to in section 79(a) (2) is the amount paid by the employee for the particular policy or policies of group-term life insurance which qualify for an exception provided under such section. If the exception provided in section 79(b)(2) is applicable only to a portion of the group-term life insurance on the employee's life, the amount considered to be paid by the employee toward the purchase of such portion is the amount equal to the excess of the cost of such portion of the insurance over the amount otherwise includible in the employee's gross income with respect to the group-term life insurance on his life carried directly or indirectly by such employer.

(iii) The rules of this subparagraph may be illustrated by the following example:

Example. A is an employee of X Corporation and is also an employee of Y Corporation, a subsidiary of X Corporation. A is provided, under a separate plan arranged by each of his employers, group-term life insurance on his life. During his taxable year, under the group-term life insurance plan of X Corporation, A is provided $60,000 of group-term life insurance on his life, and A pays $360.00 toward the purchase of such insurance. Under the group-term life insurance plan of Y Corporation, A is provided $65,000 of group-term life insurance on his life, but does not pay any part of the cost of such insurance. At the beginning of his taxable year, A terminates his employment with the X Corporation after he has reached the retirement age with respect to such employer, and the policy carried by the X Corporation qualifies for the exception provided by section 79(b)(1). For that taxable year, the cost of the group-term life insurance on A's life which is provided under the plan of X Corporation is not taken into account in determining the amount includible in A's gross income under section 79(a), and A may not take into account as an amount described in section 79(a)(2) the $360.00 he pays toward the purchase of such insurance.

(b) *Retired and disabled employees*—(1) *In general.* Section 79(b)(1) provides an exception for the cost of group-term life insurance on the life of an individual which is provided under a policy or policies otherwise described in section 79(a) if the individual has terminated his employment (as defined in subparagraph (2) of this paragraph) with such employer and either has reached the retirement age with respect to such employer (as defined in subparagraph (3) of this paragraph), or has become disabled (as defined in subparagraph (4)(i) of this paragraph). If an individual who has terminated his employment attains retirement age or has become disabled during his taxable year, or if an employee who has attained retirement age or has become disabled terminates his employment during the taxable year, the exception provided by section 79(b)(1) applies only to the portion of the cost of group-term life insurance which is provided subsequent to the happening of the last event which qualifies the policy of insurance on the employee's life for the exception provided in such section.

(2) *Termination of employment.* For purposes of section 79(b)(1), an individual has terminated his employment with an employer providing such individual group-term life insurance when such individual no longer renders services to that employer as an employee of such employer.

(3) *Retirement age.* For purposes of section 79(b)(1) and this section, the meaning of the term ''retirement age'' is determined in accordance with the following rules—

(i)(*a*) If the employee is covered under a written pension or annuity plan of the employer providing such individual group-term life insurance on his life (whether or not such plan is qualified under section 401(a) or 403(a)), then his retirement age shall be considered to be the earlier of—

(*1*) The earliest age indicated by such plan at which an active employee has the right (or an inactive individual would have the right had he continued in employment) to retire without disability and without the consent of his employer and receive immediate retirement benefits computed at either the full rate or a rate proportionate to completed service as set forth in the normal retirement formula of the plan, *i.e.*, without actuarial or similar reduction because of retirement before some later specified age, or

(*2*) The age at which it has been the practice of the employer to terminate, due to age, the services of the class of employees to which he last belonged.

(*b*) For purposes of (*a*) of this subdivision, if an employee is covered under more than one pension or annuity plan of the employer, his retirement age shall be determined with regard to that plan which covers that class of employees of the employer to which the employee last belonged. If the class of employees to which the employee last belonged is covered under more than one pension or annuity plan, then the employee's retirement age shall be determined with regard to that plan which covers the greatest number of the employer's employees.

(ii) In the absence of a written employee's pension or annuity plan described in subdivision (i) of this subparagraph, retirement age is the age, if any, at which it has been the practice of the employer to terminate, due to age, the services of the class of employees to which the particular employee last belonged, provided such age is reasonable in view of all the pertinent facts and circumstances.

(iii) If neither subdivision (i) or (ii) of this subparagraph applies, the retirement age is considered to be age 65.

(4) *Disabled.* (i) For taxable years beginning after December 31, 1966, an individual is considered disabled for purposes of section 79(b)(1) and subparagraph (1) of this paragraph if he is disabled within the meaning of section 72(m)(7) and paragraph (f) of §1.72–17. For taxable years beginning before January 1, 1967, an individual is considered disabled for purposes of section 79(b)(1) and subparagraph (1) of this paragraph if he is disabled within the meaning of section 213(g)(3), relating to the meaning of disabled, but the determination of the individual's status shall be made without regard to the provisions of section 213(g)(4), relating to the determination of status.

(ii)(*a*) In any taxable year in which an individual seeks to apply the exception set forth in section 79(b)(1) by reason of his being disabled within the meaning of subdivision (i) of this subparagraph, and in which the aggregate amount of insurance on the individual's life subject to the rule of inclusion set forth in section 79(a), but determined without regard to the amount of any insurance subject to any exception set forth in section 79(b), is greater than $50,000 of such insurance, the substantiation required by (*b*) or (*c*) of this subdivision must be submitted with the individual's tax return.

(*b*) For the first taxable year for which the individual seeks to apply the exception set forth in section 79(b)(1) by reason of his being disabled within the meaning of subdivision (i) of this subparagraph, there must be submitted with his income tax return a doctor's statement as to his impairment. There must also be submitted with the return a statement by the individual with respect to the effect of the impairment upon his substantial gainful activity, and the date such impairment occurred. For subsequent taxable years, the taxpayer may, in lieu of such statements, submit a statement declaring the continued existence (without substantial diminution) of the impairment and its continued effect upon his substantial gainful activity.

(*c*) In lieu of the substantiation required to be submitted by (*b*) of this subdivision for the taxable year, the individual may submit a signed statement issued to him by the insurer to the effect that the individual is disabled within the meaning of subdivision (i) of this paragraph. Such statement must set forth the basis for the insurer's determination that the individual was so disabled, and, for the first taxable year in which the individual is so disabled, the date such disability occurred.

(c) *Employer or charity a beneficiary*—(1) *General rule.* Section 79(b)(2) provides an exception with respect to the amounts referred to in section 79 (a) for the cost of any portion of the group-term life insurance on the life of an employee provided during part or all of the taxable year of the employee under which the employer is directly or indirectly the beneficiary, or under which a person described in section 170(c) (relating to definition of charitable contributions) is the sole beneficiary, for the entire period during such taxable year for which the employee receives such insurance.

(2) *Employer is a beneficiary.* For purposes of section 79(b)(2) and subparagraph (1) of this paragraph, the determination of whether the employer is directly or indirectly the beneficiary under a policy or policies of group-term life insurance depends upon the facts and circumstances of the particular case. Such determination is not

made solely with regard to whether the employer possesses all the incidents of ownership in the policy. Thus, for example, if the employer is the nominal beneficiary under a policy of group-term life insurance on the life of his employee but there is an arrangement whereby the employer is required to pay over all (or a portion) of the proceeds of such policy to the employee's estate or his beneficiary, the employer is not considered a beneficiary under such policy (or such portion of the policy).

(3) *Charity a beneficiary.* (i) For purposes of section 79(b)(2) and subparagraph (1) of this paragraph, a person described in section 170(c) is a beneficiary under a policy providing group-term life insurance if such person is designated the beneficiary under the policy by any assignment or designation of beneficiary under the policy which, under the law of the jurisdiction which is applicable to the policy, has the effect of making such person the beneficiary under such policy (whether or not such designation is revocable during the taxable year). Such a designation may be made by the employee with respect to any portion of the group-term life insurance on his life. However, no deduction is allowed under section 170, relating to charitable, etc., contributions and gifts, with respect to any such assignment or designation.

(ii) A person described in section 170(c) must be designated the sole beneficiary under the policy or portion of the policy. Such requirement is satisfied if the person described in section 170(c) is the beneficiary under such policy or portion of the policy, and there is no contingent or similar beneficiary under such policy or such portion other than a person described in section 170(c). A general ''preference beneficiary clause'' in a policy governing payment where there is no designated beneficiary in existence at the death of the employee will not of itself be considered to create a contingent or similar beneficiary. A person described in section 170(c) may be designated the beneficiary under a portion of the policy if such person is designated the sole beneficiary under a beneficiary designation which is expressed, for example, as a fraction of the amount of insurance on the insured's life.

(iii) If a person described in section 170(c) is designated, before May 1, 1964, the beneficiary under the policy (or portion thereof) and such person remains the beneficiary for the period beginning May 1, 1964, and ending with the close of the first taxable year of the employee ending after April 30, 1964, such person shall be treated as the beneficiary under the policy (or the portion thereof) for the period beginning January 1, 1964, and ending April 30, 1964.

(d) *Insurance contracts purchased under qualified employee plans.* (1) Section 79(b)(3) provides an exception with respect to the cost of any group-term life insurance which is provided under a life insurance contract purchased as a part of a plan described in section 403(a), or purchased by a trust described in section 401(a) which is exempt from tax under section 501(a) if the proceeds of such contract are payable directly or indirectly to a participant in such trust or to a beneficiary of such participant. The provisions of section 72(m)(3) and §1.72–16 apply to the cost of such group-term life insurance, and, therefore, no part of such cost is excluded from the gross income of the employee by reason of the provisions of section 79.

(2) Whether the life insurance protection on an employee's life is provided under a qualified employee plan referred to in subparagraph (1) of this paragraph depends upon the provisions of such plan. In determining whether a pension, profit-sharing, stock bonus, or annuity plan satisfies the requirements for qualification set forth in sections 401(a) or 403(a), only group-term life insurance which is provided under such plan is taken into account.

[T.D. 6888, 31 FR 9201, July 6, 1966, as amended by T.D. 6919, 32 FR 7390, May 18, 1967; T.D. 6985, 33 FR 19812, Dec. 27, 1968; T.D. 7623, 44 FR 28800, May 17, 1979]

§ 1.79–3 Determination of amount equal to cost of group-term life insurance.

(a) *In general.* This section prescribes the rules for determining the amount equal to the cost of group-term life insurance on an employee's life which is to be included in his gross income pursuant to the rule of inclusion set forth in section 79(a). Such amount is determined by—

(1) Computing the cost of the portion of the group-term life insurance on the employee's life to be taken into account (determined in accordance with the rules set forth in paragraph (b) of this section) for each "period of coverage" (as defined in paragraph (c) of this section) and aggregating the costs so determined, then

(2) Reducing the amount determined under subparagraph (1) of this paragraph by the amount determined in accordance with the rules set forth in paragraph (e) of this section, relating to the amount paid by the employee toward the purchase of group-term life insurance.

(b) *Determination of the portion of the group-term life insurance on the employee's life to be taken into account.* (1) For each "period of coverage" (as defined in paragraph (c) of this section), the portion of the group-term life insurance to be taken into account in computing the amount includible in an employee's gross income for purposes of paragraph (a)(1) of this section is the sum of the proceeds payable upon the death of the employee under each policy, or portion of a policy, of group-term life insurance on such employee's life to which the rule of inclusion set forth in section 79(a) applies, less $50,000 of such insurance. Thus, the amount of any proceeds payable under a policy, or portion of a policy, which qualifies for one of the exceptions to the rule of inclusion provided by section 79(b) is not taken into account. For the regulations relating to such exceptions to the rule of inclusion, see §1.79–2.

(2) For purposes of making the computation required by subparagraph (1) of this paragraph in any case in which the amount payable under the policy, or portion thereof, varies during the period of coverage, the amount payable under such policy during such period is considered to be the average of the amount payable under such policy at the beginning and the end of such period.

(3)(i) For purposes of making the computation required by subparagraph (1) of this paragraph in any case in which the amount payable under the policy is not payable as a specific amount upon the death of the employee in full discharge of the liability of the insurer, and such form of payment is not one of alternative methods of payment, the amount payable under such policy is the present value of the agreement by the insurer under the policy to make the payments to the beneficiary or beneficiaries entitled to such amounts upon the employee's death. For each period of coverage, such present value is to be determined as if the first and last day of such period is the date of death of the employee.

(ii) The present value of the agreement by the insurer under the policy to make payments shall be determined by the use of the mortality tables and interest rate employed by the insurer with respect to such a policy in calculating the amount held by the insurer (as defined in section 101(d)(2)), unless the Commissioner otherwise determines that a particular mortality table and interest rate, representative of the mortality table and interest rate used by commercial insurance companies with respect to such policies, shall be used to determine the present value of the policy for purposes of this subdivision.

(iii) For purposes of making the computation required by subdivision (i) of this subparagraph in any case in which it is necessary to determine the age of an employee's beneficiary and such beneficiary remains the same (under the policy, or the portion of the policy, with respect to which the determination of the present value of the agreement of the insurer to pay benefits is being made) for the entire period during the employee's taxable year for which such policy is in effect, the age of such beneficiary is such beneficiary's age at his nearest birthday on June 30th of the calendar year.

(iv) If the policy of group-term life insurance on the employee's life is such that the present value of the agreement by the insurer under the policy to pay benefits cannot be determined by the rules prescribed in this subparagraph, the taxpayer may submit with his return a computation of such present value, consistent with the actuarial and other assumptions set forth in this subparagraph, showing the appropriate factors applied in his case. Such computation shall be subject to the approval of the Commissioner upon examination of such return.

(c) *Period of coverage.* For purposes of this section, the phrase ''period of coverage'' means any one calendar month period, or part thereof, during the employee's taxable year during which the employee is provided group-term life insurance on his life to which the rule of inclusion set forth in section 79(a) applies. The phrase ''part thereof'' as used in the preceding sentence means any continuous period which is less than the one calendar month period referred to in the preceding sentence for which premiums are charged by the insurer.

(d) *The cost of the portion of the group-term life insurance on an employee's life.* (1) This paragraph sets forth the rules for determining the cost, for each period of coverage, of the portion of the group-term life insurance on the employee's life to be taken into account in computing the amount includible in the employee's gross income for purposes of paragraph (a)(1) of this section. The portion of the group-term life insurance on the employee's life to be taken into account is determined in accordance with the provisions of paragraph (b) of this section. Table I, which is set forth in subparagraph (2) of this paragraph, determines the cost for each $1,000 of such portion of the group-term life insurance on the employee's life for each one-month period. The cost of the portion of the group-term life insurance on the employee's life for each period of coverage of one month is obtained by multiplying the number of thousand dollars of such insurance computed to the nearest tenth which is provided during such period by the appropriate amount set forth in Table I. In any case in which group-term life insurance is provided for a period of coverage of less than one month, the amount set forth in Table I is prorated over such period of coverage.

(2) For the cost of group-term life insurance provided after June 30, 1999, the following table sets forth the cost of $1,000 of group-term life insurance provided for one month, computed on the basis of 5-year age brackets. See 26 CFR 1.79–3(d)(2) in effect prior to July 1, 1999, and contained in the 26 CFR part 1 edition revised as of April 1, 1999, for a table setting forth the cost of group-term life insurance provided before July 1, 1999. For purposes of Table I, the age of the employee is the employee's attained age on the last day of the employee's taxable year.

TABLE I—UNIFORM PREMIUMS FOR $1,000 OF GROUP-TERM LIFE INSURANCE PROTECTION

5-year age bracket	Cost per $1,000 of protection for one month
Under 25	$0.05
25 to 29	.06
30 to 34	.08
35 to 39	.09
40 to 44	.10
45 to 49	.15
50 to 54	.23
55 to 59	.43
60 to 64	.66
65 to 69	1.27
70 and above	2.06

(3) The net premium cost of group-term life insurance as provided in Table I of subparagraph (2) of this paragraph applies only to the cost of group-term life insurance subject to the rule of inclusion set forth in section 79(a). Therefore, such net premium cost is not applicable to the determination of the cost of group-term life insurance provided under a policy which is not subject to such rule of inclusion.

(e) *Effective date*—(1) *General effective date for table.* Except as provided in paragraph (e)(2) of this section, the table in paragraph (d)(2) of this section is applicable July 1, 1999. Until January 1, 2000, an employer may calculate imputed income for all its employees under age 30 using the 5-year age bracket for ages 25 to 29.

(2) *Effective date for table for purposes of §1.79–0.* For a policy of life insurance issued under a plan in existence on June 30, 1999, which would not be treated as carried directly or indirectly by an employer under §1.79–0 (taking into account the Table I in effect on that date), until January 1, 2003, an employer may use either the table in paragraph (d)(2) of this section or the table in effect prior to July 1, 1999 (as

described in paragraph (d)(2) of this section) for determining if the policy is carried directly or indirectly by the employer.

(f) *Amount paid by the employee toward the purchase of group-term life insurance.* (1) Except as otherwise provided in subparagraph (2) of this paragraph, if an employee pays any amount toward the purchase of group-term life insurance provided for a taxable year which is subject to the rule of inclusion set forth in paragraph (a)(2) of §1.79–1, the sum of all such amounts is the amount referred to in section 79(a)(2) and paragraph (a)(2) of this section. The rule of the preceding sentence applies even though the payments made by the employee are made with respect to a period of coverage during which no portion of the group-term life insurance on his life is taken into account under paragraph (b)(1) of this section.

(2) In determining the amount paid by the employee for purposes of section 79(a)(2) and paragraph (a)(2) of this section, there is not taken into account any amounts paid by the employee for group-term life insurance provided (or to be provided) for a different taxable year (other than amounts applicable to regular pay periods extending into the next taxable year). Thus, for example, if part of an employee's payment during a taxable year represents a prepayment for insurance to be provided after his retirement, such part does not reduce the amount includible in his gross income for the current taxable year. Furthermore, in determining such amount, there is not taken into account any amount paid by an employee toward the purchase of group-term life insurance which qualifies for one of the exceptions described in section 79(b). The amount paid by an employee toward the purchase of group-term life insurance which qualifies for one of the exceptions described in section 79(b) is determined under the rules of paragraph (a)(2) of §1.79–2.

(3) If payments are made by the employer and his employees to provide group-term life insurance which is subject to the rule of inclusion set forth in section 79(a) as well as to provide other benefits for the employees, and if the amount paid by the employee toward the purchase of such insurance cannot be determined by the provisions of the policy or plan under which such benefits are provided, then the determination of the portion of the cost of group-term life insurance (computed in accordance with the provisions of this section) which is attributable to the contributions of the employee shall be made in accordance with the provisions of this subparagraph. The amount paid by the employee toward the purchase of all the group-term life insurance on his life for his taxable year (or for the portion of his taxable year if such portion is the basis of the computation) under such group policy shall be an amount determined first by ascertaining the total amount paid by all employees who are covered for multiple benefits which is allocable toward the purchase of group-term life insurance on their lives for the year, and then by ascertaining the pro rata portion of such total amount attributable to the individual employee. The total amount paid by all employees who are covered for multiple benefits which is allocable toward the purchase of group-term life insurance on their lives with respect to such year shall be an amount which bears the same ratio to the total amount paid by all employees for multiple benefits with respect to such year as the aggregate premiums paid to the insurer for group-term life insurance on such employees' lives with respect to such year bears to the aggregate premiums paid to the insurer for such multiple benefits with respect to such year. The pro rata portion of such total amount attributable to the individual employee for the cost of group-term life insurance on his life shall be an amount which bears the same ratio to the total amount paid by all employees which is allocable toward the purchase of group-term insurance on their lives with respect to such year as the amount of group-term life insurance on the life of the employee at a specified time during the year, as determined by the employer, bears to the total amount of group-term life insurance on the lives of all employees insured for such multiple benefits at such time.

(g) *Effect of provision of other benefits*—(1) *In general.* This paragraph discusses the effect of the provision of certain benefits other than group-term life insurance on the life of the employee if the provision of such benefits is contingent upon the underwriting of group-term life insurance on the employee's life to which the rule of inclusion set forth in section 79(a) applies.

(2) *Dependent coverage.* An amount equal to the cost of group-term life insurance on the life of the spouse or other family member of the employee which is provided under a policy of group-term life insurance carried directly or indirectly by his employer is not subject to the provisions of section 79 since it is not on the life of the employee. See paragraph (d)(2)(ii)(*b*) of §1.61–2 for rules regarding the tax treatment of such insurance.

(3) *Disability provisions.* Payments made for disability benefits provided under a group-term life insurance contract are considered to constitute payments made for accident and health insurance. Thus, employer contributions to provide such benefits are excluded from gross income by reason of the provisions of section 106.

(4) *Cost of other benefits.* If a benefit described in this paragraph is provided under a policy under which both the employer and his employees contribute, then, except as otherwise provided in this subparagraph, the employer and the employees will be treated as contributing toward the payment of such benefit at the same rate as they contribute toward the cost of group-term life insurance on the employees' lives. A separate allocation of employer and employee contributions for such benefits is permissible only if—

(i) Such separate allocation is set forth in the group policy and is applicable to all the employees covered under such policy;

(ii) Such separate allocation is followed in transactions between the insurer and the group-policyholder; and

(iii) The allocation set forth in the policy satisfies the requirements of the law of the jurisdiction which is applicable to the contract regarding any minimum or maximum contribution rate by the employer or the employees.

(Secs. 79(c) and 7805 of the Internal Revenue Code of 1954 (78 Stat. 36, 26 U.S.C. 79(c); 68A Stat. 917, 28 U.S.C. 7805))

[T.D. 6888, 31 FR 9203, July 6, 1966, as amended by T.D. 7623, 44 FR 28800, May 17, 1979; T.D. 7924, 48 FR 54595, Dec. 6, 1983; T.D. 8273, 54 FR 47979, Nov. 20, 1989; T.D. 8424, 57 FR 33635, July 30, 1992; T.D. 8821, 64 FR 29790, June 3, 1999]

§ 1.79–4T Questions and answers relating to the nondiscrimination requirements for group-term life insurance (temporary).

Q–1: When does section 79, as amended by the Tax Reform Act of 1984, become effective?

A–1: (a) Generally, section 79, as amended, applies to taxable years (of the employee receiving insurance coverage) beginning after December 31, 1983. There are, however, several exceptions to this effective date where there is coverage under a group-term life insurance plan of the employer that was in existence on January 1, 1984, or a comparable successor to such a plan maintained by the employer or a successor employer.

(b) First, the new rules of section 79 (b) and (e), that require the inclusion in income of a retired employee of amounts attributable to the cost of group-term life insurance in excess of $50,000 and that include former employees within the definition of the term ''employee,'' will not apply to any employee who retired from employment on or before January 1, 1984.

(c) Second, in the case of an individual who retires after January 1, 1984, and before January 1, 1987, the new rules of section 79 (b) and (e) do not apply if (1) the individual attained age 55 on or before January 1, 1984, and (2) the plan was maintained by the same employer who employed the individual during 1983, or by a successor employer.

(d) Third, in the case of an individual who retires after December 31, 1986, the new rules of section 79 (b) and (e) do not apply if (1) the individual attained age 55 on or before January 1, 1984, (2) the plan was maintained by the same employer who employed the individual during 1983, or by a successor employer, and (3) the plan is not, after December 31, 1986, a discriminatory group-term life insurance plan (not taking into account any group-term life insurance coverage provided to employees who retired before January 1, 1987).

(e) For purposes of determining whether a plan is, after December 31, 1986, a discriminatory group-term life insurance plan, there shall be ignored any insurance coverage provided pursuant to a state law requirement that an insurer continue to provide insurance coverage for a period of time not in excess of two months following the termination of a policy.

Q–2: What is meant by a ''group-term life insurance plan of the employer that was in existence on January 1, 1984''?

A–2: A group-term life insurance plan of the employer was in existence on January 1, 1984, only if the group policy or policies providing group-term life insurance benefits under the plan were executed on or before January 1, 1984, and were not terminated prior to such date. The applicability of section 79, as amended, to an employee will not be affected by the transfer of the employee between employers treated as a single employer under section 79(d)(7) if the employee continues, after the transfer, to be provided with group-term life insurance benefits under a plan that is comparable (determined under the principles set forth in Q&A 3) to the plan provided by the former employer.

Q–3: When is a plan of group-term life insurance a ''comparable successor'' to another such plan?

A–3: A plan of group-term life insurance will be a comparable successor to another plan of group-term life insurance (the first plan) only if the plan does not differ from the first plan in any significant aspect with respect to individuals who are potentially eligible for benefits provided under the grandfather provisions in Q&A 1. These individuals consist of those persons who are covered under a plan of group-term life insurance of the employer that was in existence on January 1, 1984, or a comparable successor to such a plan maintained by the employer or a successor employer, and who either retired on or before January 1, 1984, or who both attained age 55 on or before January 1, 1984, and were employed by the employer maintaining the plan (or a predecessor of that employer) during the year 1983. Accordingly, if significant additional or reduced benefits are provided only to individuals who are not described in the preceding sentence, the plan will be considered a comparable successor plan. A plan will not fail to be a comparable successor plan merely because the employer purchases a policy or policies identical to the employer's first plan from a different insurance company. If the new plan provides significant additional or reduced benefits (either as to the type or amount available) to employees, or provides benefits to a category of employees that was formerly excluded from participating in the plan, the plan is generally not a comparable successor to the first plan. However, a plan will not be considered as providing significant additional or reduced benefits merely because a participant's coverage is based on a percentage of compensation and the participant's compensation for the taxable year has been increased or decreased. Furthermore, a plan will not be considered a non-comparable successor plan merely because it is amended, either to decrease benefits provided to key employees or to increase benefits provided to non-key employees, solely in order to comply with the nondiscrimination requirements of section 79(d). Finally, a plan will not be considered a non-comparable successor plan merely because a policy that is part of a discriminatory plan is terminated in order to end discriminatory coverage.

Q–4: For purposes of determining the effective date of section 79, as amended by the Tax Reform Act of 1984, what is a ''successor employer''?

A–4: A successor employer is an employer who employs a group of individuals formerly employed by another employer as a result of a business merger, acquisition or division.

Q–5: Under what circumstances will separate policies of group-term life insurance of an employer be considered to be a single plan in determining whether the employer's plan of group-term life insurance is discriminatory?

A–5: All policies providing group-term life insurance to a common key employee or key employees (as defined in this Q&A) carried directly or indirectly by an employer (or by a group of employers described in section 79(d)(7)) will be considered as a single plan for purposes of determining whether an employer's group-term life insurance plan is discriminatory. For example, if a key employee receives $50,000 of group-term life insurance coverage under one policy and the same key employee receives an additional $250,000 of coverage under a separate group-term life insurance policy, the two policies will be treated as a single plan in determining whether the group-term life insurance provided by the employer is discriminatory. If it is discriminatory, the key employees covered by either policy will not receive the benefit of section 79(a)(1) or section 79(c) for either policy. The result is the same even if each policy, considered alone, would be nondiscriminatory. A policy that provides group-term life insurance to a key employee and a policy under which the same key employee is eligible to receive group-term life insurance upon separation from service will be considered to provide group-term life insurance to a common key employee. In addition, an employer may treat two or more policies that do not provide group-term life insurance to a common key employee as constituting a single plan for purposes of satisfying the nondiscrimination provisions of section 79(d). For example, if the employer provides group-term life insurance coverage for non-key employees under one policy and provides group-term life insurance coverage for key employees under a second policy, the two policies may be considered together in determining whether the requirements of section 79(d) are satisfied with regard to the second policy. For purposes of this section, the term ''key employee'' has the meaning given to such term by paragraph (1) of section 416(i), except that subparagraph (A)(iv) of such paragraph shall be applied by not taking into account employees described in section 79(d)(3)(B) who are not participants in the plan. For purposes of this section, all references to ''plan year'' or ''plan years'' in section 416(g)(4)(C) and section 416(i) shall be deleted and replaced with ''taxable year of the employer'' or ''taxable years of the employer,'' respectively.

Q–6: In the case of a discriminatory group-term life insurance plan, what amounts should be included in the gross income of a key employee?

A–6: (a) In the case of a discriminatory group-term life insurance plan, each key employee must include in gross income for the taxable year the cost of his or her insurance benefit for that year provided by the employer under the plan.

(b) The cost of group-term life insurance coverage provided by an employer for a key employee during the employee's taxable year is determined by apportioning the net premium (group premium less policy dividends, premium refunds or experience rating credits) allocable to the group-term life insurance coverage during the key employee's taxable year, less the actual cost allocated to other key employees pursuant to the method described in the subparagraph (d) of this answer, if applicable, among the covered employees. In the event that the employer has other forms and types of coverage with the same insurer, the employer must make a reasonable allocation of the total premiums paid to the insurer. For example, where an employer has both health insurance coverage and a plan of group-term life insurance with the same insurer, and there is no volume discount, the net premium for the plan of group-term life insurance must include the excess, if any, of the payments the employer makes for the health insurance coverage over the payments the employer would make for such coverage if the plan of group-term life insurance for which this calculation is being made did not exist.

(c) In general, the portion of the net premium for group-term life insurance that should be apportioned to a key employee, other than a key employee to whom the method in subparagraph (d) of this answer is applicable, is determined by: (1) Calculating a ''tabular'' premium for the entire group (with the exception of all key employees to whom the method in subparagraph (d) of this answer is applicable), in the manner described below, (2) determining the ratio of the total actual net premium (less the actual cost allocated to key employees pursuant to the method in the subparagraph (d) of this answer) to the total tabular premium and (3) multiplying the tabular premium for the key employee at his or her attained age by such ratio. Thus, if the total actual net premium is 125 percent of the total tabular premium for all covered employees and the tabular premium at the key employee's attained age is $2.00 per thousand per month, the cost for such employee would be $2.50 per thousand per month ($2.00 times 125 percent). For these purposes the table used to calculate tabular premiums will be determined as follows:

(i) If the group policy contains a reasonable table (based on recognized mortality assumptions) of premium rates on an attained age basis (which table may use age brackets not exceeding five years) with reference to which the group premium is determined, such table will be used;

(ii) If such table is not available, the 1960 Basic Group Table published by the Society of Actuaries will be used.

(d) In cases where the mortality charge for group-term life insurance coverage provided to a key employee is calculated separately by the insurer (for example, where the charge for the coverage provided to a key employee is based on a medical examination) and the amount of such mortality charge plus a proportionate share of the loading charge for the coverage provided to the group is higher than the amount that would be allocable to such employee under the allocation method in subparagraph (c) the cost of group-term life insurance coverage for that employee shall be that higher amount.

Q–7: Must all active and former employees be considered in applying the coverage tests in section 79(d)(3) to determine whether or not a plan of group-term life insurance is discriminatory with respect to coverage?

A–7: No. Generally, a plan of group-term life insurance which covers both active and former employees will not satisfy the nondiscrimination requirements of section 79(d) unless the coverage tests in section 79(d)(3) are satisfied with respect to both the active and the former employees of the employer, except to the extent they are excluded from tests for discrimination by application of the grandfather provisions set forth in Q&A 1. However, for purposes of determining whether a plan is discriminatory with respect to coverage, the coverage tests must be applied separately to active and former employees. In addition, if the plan limits participation by former employees to employees who retired from employment with the employer, then only retired employees must be considered in applying the coverage tests to former employees. Also, in applying the coverage tests in section 79(d)(3), the employer may make reasonable mortality assumptions regarding former employees who are not covered under the plan but must be considered in applying the coverage tests. Furthermore, only those former employees who terminated employment on or after the earliest date of termination from employment for any former employee covered by the plan must be considered. Finally, for purposes of determining whether a plan of group-term life insurance of the employer (or a successor employer) that was in existence on January 1, 1984 (or a comparable successor to such a plan) is discriminatory, after December 31, 1986, with respect to group-term life insurance coverage for former employees, coverage provided to employees who retired on or before December 31, 1986, shall not be taken into account.

Q–8: Will a group-term life insurance plan be considered discriminatory if active employees receive greater benefits as a percentage of compensation than former employees, or vice versa?

A–8: No. For purposes of determining whether a plan is discriminatory with respect to the type and amount of benefits available, insurance coverage for former employees must be tested separately from insurance coverage for active employees. For example, a group-term life insurance plan that provides group-term life insurance benefits equal to 200 percent of compensation for all active employees and 100 percent of final compensation (based on the average annual compensation for the final five years) for all former employees would satisfy the nondiscrimination requirements of section 79(d). However, a group-term life insurance plan that provides group-term life insurance benefits equal to 200 percent of compensation for all active employees and 100 percent of final compensation (based on the average annual compensation for the final five years) only for key employees who are no longer employed by the employer (or a successor employer) would not satisfy the nondiscrimination requirement of section 79(d)(2)(A).

Q–9: Under what circumstances will the amount of benefits available under a plan of group-term life insurance be considered not to discriminate in favor of participants who are key employees?

A–9: A plan of group-term life insurance will be considered not to discriminate in favor of participants who are key employees, as to the amount of benefits available, if the plan provides a fixed amount of insurance which is the same for all covered employees. In other circumstances, the determination of whether a plan is nondiscriminatory will be based on all of the facts and circumstances. Such plans will be considered not to discriminate in favor of participants who are key employees, as to the amount of benefits available, if the plan contains no group of employees described in the following sentence that, if tested separately, would fail to satisfy the requirements of section 79(d)(2)(A). The group subject to separate testing under the preceding sentence consists of a key employee and all other participants (including other key employees) who receive, under the plan, an amount of insurance (as a multiple of compensation (either total compensation or the basic or regular rate of compensation)) that is equal to or greater than the amount of insurance received by such key employee. As described in Q&As 7&8, active and former employees are tested separately under section 79(d)(2)(A).

Example: Assume that a plan of group-term life insurance has 500 participants, 10 of whom are key employees. Under the plan, 400 of the non-key employees receive an amount of insurance equal to 100 percent of compensation, while all of the key employees and 90 of the non-key employees receive an amount of insurance equal to 200 percent of compensation. The plan will be considered not to discriminate in favor of the participants who are key employees because, tested separately, the group of participants receiving an amount of insurance equal to or greater than 200 percent of compensation would satisfy the requirements of section 79(d)(2)(A) (by reason of section 79(d)(3)(A)(ii)). If one of the key employees received an amount of insurance equal to 300 percent of compensation, the plan would be considered to discriminate in favor of participants who are key employees, because, tested separately, the group consisting of the single key employee receiving an amount of insurance equal to or greater than 300 percent of compensation would fail to satisfy the requirements of section 79(d)(2)(A).

In determining the groups of employees that are tested separately for this purpose, allowance shall be made for reasonable differences in amount of insurance (as a multiple of compensation) due to rounding, the use of compensation brackets or other similar factors. Thus, if a plan bases group-term life insurance coverage on ''compensation brackets,'' it is not intended that any participants will be treated as receiving an amount of insurance (as a multiple of compensation) that is greater (or less) than that of any other participant merely because the first participant's compensation is at the lower (or higher) end of a compensation bracket while the second participant's compensation is at the higher (or lower) end of a compensation bracket. However, any compensation brackets utilized by a plan will be examined to determine if the brackets, or compensation groupings, result in discrimination in favor of key employees. In addition, a plan does not meet the requirements for nondiscrimination as to the type and amount of benefits available under the plan unless all types of benefits (including permanent benefits) and all terms and conditions with respect to such benefits which are available to any participant who is a key employee are also available on a nondiscriminatory basis to non-key employee participants.

Q–10: How is additional coverage purchased by employees under a plan of group-term life insurance treated for purposes of determining whether a plan of group-term life insurance is discriminatory?

A–10: (a) The extent to which employees purchase additional coverage under a plan of group-term life insurance is not taken into account for purposes of determining whether a plan of group-term life insurance is discriminatory. For example, a plan providing insurance to all employees of 1 times annual compensation, which gives all employees the option to purchase additional insurance of 1 times annual compensation at their own expense, would not be considered discriminatory as to the type and amount of benefits available, even if the group (or groups) of participants who purchase additional insurance, if tested separately, would not satisfy the requirements of section 79(d)(2)(A). Solely for this purpose, the choice of an amount of group-term life insurance as a benefit under a cafeteria plan will be treated as the purchase of group-term life insurance by an employee. If additional insurance coverage is available to any key employee that is not available, on a nondiscriminatory basis, to non-key employees, the plan will be considered discriminatory, even if the full cost of such additional insurance coverage is paid by the employee(s) electing such benefits.

(b) If the employer bears a part of the expense of any additional coverage that is purchased by an employee under a plan of group-term life insurance, the additional insurance shall be treated, in part, as an amount of insurance provided by the employer under the plan and, in part, as an amount of insurance purchased by the employee. Except to the extent provided in subparagraph (a) above, the portion of insurance treated as an amount of insurance purchased by the employee is not taken into account for purposes of determining whether the plan is discriminatory. Whether such insurance (together with any other insurance provided by the employer under the plan) will cause the plan to be considered to discriminate in favor of participants who are key employees is determined under the rules of Q&A 9.

Q–11: What effect do the provisions of section 79(d)(1) have if a plan of group-term life insurance is discriminatory for only part of a year?

A–11: If a plan of group-term life insurance is discriminatory at any time during the key employee's taxable year, then it is a discriminatory group-term life insurance plan for that taxable year and the provisions of section 79(d)(1) will be applicable with respect to all group-term life insurance costs allocable to that employee for that year.

Q–12: Are the section 79(d) provisions independent from the requirements contained in Treas. Reg. § 1.79–1?

A–12: Yes. Treasury regulation § 1.79–1(c)(1) provides that life insurance provided to a group of employees cannot qualify as group-term life insurance if it is provided to less than ten full-time employees unless certain requirements are satisfied. The satisfaction of these requirements does not guarantee that the plan will be nondiscriminatory, and vice versa. Treasury regulation § 1.79–1(a)(4) provides that life insurance is not group-term life insurance unless the amount of insurance provided to each employee is computed under a formula that precludes individual selection. The mere fact that a life insurance policy is nondiscriminatory is not determinative as to whether the policy precludes individual selection, and vice versa.

[T.D. 8073, 51 FR 4315, Feb. 4, 1986; 51 FR 7262, Mar. 3, 1986]

§ 1.82–1 Payments for or reimbursements of expenses of moving from one residence to another residence attributable to employment or self-employment.

(a) *Reimbursements in gross income*—(1) *In general.* Any amount received or accrued, directly or indirectly, by an individual as a payment for or reimbursement of expenses of moving from one residence to another residence attributable to employment or self-employment is includible in gross income under section 82 as compensation for services in the taxable year received or accrued. For rules relating to the year a deduction may be allowed for expenses of moving from one residence to another residence, see section 217 and the regulations thereunder.

(2) *Amounts received or accrued as reimbursement or payment.* For purposes of this section, amounts are considered as

being received or accrued by an individual as reimbursement or payment whether received in the form of money, property, or services. A cash basis taxpayer will include amounts in gross income under section 82 when they are received or treated as received by him. Thus, for example, if an employer moves an employee's household goods and personal effects from the employee's old resident to his new residence using the employer's facilities, the employee is considered as having received a payment in the amount of the fair market value of the services furnished at the time the services are furnished by the employer. If the employer pays a mover for moving the employee's household goods and personal effects, the employee is considered as having received the payment at the time the employer pays the mover, rather than at the time the mover moves the employee's household goods and personal effects. Where an employee receives a loan or advance from an employer to enable him to pay his moving expenses, the employee will not be deemed to have received a reimbursement of moving expenses until such time as he accounts to his employer if he is not required to repay such loan or advance and if he makes such accounting within a reasonable time. Such loan or advance will be deemed to be a reimbursement of moving expenses at the time of such accounting to the extent used by the employee for such moving expenses.

(3) *Direct or indirect payments or reimbursements*. For purposes of this section amounts are considered as being received or accrued whether received directly (paid or provided to an individual by an employer, a client, a customer, or similar person) or indirectly (paid to a third party on behalf of an individual by an employer, a client, a customer, or similar person). Thus, if an employer pays a mover for the expenses of moving an employee's household goods and personal effects from one residence to another residence, the employee has indirectly received a payment which is includible in his gross income under section 82.

(4) *Expenses of moving from one residence to another residence*. An expense of moving from one residence to another residence is any expenditure, cost, loss, or similar item paid or incurred in connection with a move from one residence to another residence. Moving expenses include (but are not limited to) any expenditure, cost, loss, or similar item directly or indirectly resulting from the acquisition, sale, or exchange of property, the transportation of goods or property, or travel (by the taxpayer or any other person) in connection with a change in residence. Such expenses include items described in section 217(b) (relating to the definition of moving expenses), irrespective of the dollar limitations contained in section 217(b)(3) and the conditions contained in section 217(c), as well as items not described in section 217 (b), such as a loss sustained on the sale or exchange of personal property, storage charges, taxes, or expenses of refitting rugs or draperies.

(5) *Attributable to employment or self-employment*. Any amount received or accrued from an employer, a client, a customer, or similar person in connection with the performance of services for such employer, client, customer, or similar person, is attributable to employment or self-employment. Thus, for example, if an employer reimburses an employee for a loss incurred on the sale of the employee's house, reimbursement is attributable to the performance of services if made because of the employer-employee relationship. Similarly, if an employer in order to prevent an employee's sustaining a loss on a sale of a house acquires the property from the employee at a price in excess of fair market value, the employee is considered to have received a payment attributable to employment to the extent that such payment exceeds the fair market value of the property.

(b) *Effective date*—(1) *In general*. Except as provided in subparagraph (2) of this paragraph, paragraph (a) of this section is applicable only to amounts received or accrued in taxable years beginning after December 31, 1969.

(2) *Election with respect to payments or reimbursements for expenses paid or incurred before January 1, 1971*. Paragraph (a) of this section does not apply with

respect to moving expenses paid or incurred before January 1, 1971, in connection with the commencement of work by an employee at a new principal place of work where such employee had been notified by his employer on or before December 19, 1969, of such move and the employee makes an election under paragraph (h) of §1.217–2.

[T.D. 7195, 37 FR 13533, July 11, 1972, as amended by T.D. 7578, 43 FR 59355, Dec. 20, 1978]

§1.83–1 Property transferred in connection with the performance of services.

(a) *Inclusion in gross income*—(1) *General rule.* Section 83 provides rules for the taxation of property transferred to an employee or independent contractor (or beneficiary thereof) in connection with the performance of services by such employee or independent contractor. In general, such property is not taxable under section 83(a) until it has been transferred (as defined in §1.83–3(a)) to such person and become substantially vested (as defined in §1.83–3(b)) in such person. In that case, the excess of—

(i) The fair market value of such property (determined without regard to any lapse restriction, as defined in §1.83–3(i)) at the time that the property becomes substantially vested, over

(ii) The amount (if any) paid for such property,

shall be included as compensation in the gross income of such employee or independent contractor for the taxable year in which the property becomes substantially vested. Until such property becomes substantially vested, the transferor shall be regarded as the owner of such property, and any income from such property received by the employee or independent contractor (or beneficiary thereof) or the right to the use of such property by the employee or independent contractor constitutes additional compensation and shall be included in the gross income of such employee or independent contractor for the taxable year in which such income is received or such use is made available. This paragraph applies to a transfer of property in connection with the performance of services even though the transferor is not the person for whom such services are performed.

(2) *Life insurance.* The cost of life insurance protection under a life insurance contract, retirement income contract, endowment contract, or other contract providing life insurance protection is taxable generally under section 61 and the regulations thereunder during the period such contract remains substantially nonvested (as defined in §1.83–3(b)). For the taxation of life insurance protection under a split-dollar life insurance arrangement (as defined in §1.61–22(b)(1) or (2)), see §1.61–22.

(3) *Cross references.* For rules concerning the treatment of employers and other transferors of property in connection with the performance of services, see section 83(h) and §1.83–6. For rules concerning the taxation of beneficiaries of an employees' trust that is not exempt under section 501(a), see section 402(b) and the regulations thereunder.

(b) *Subsequent sale, forfeiture, or other disposition of nonvested property.* (1) If substantially nonvested property (that has been transferred in connection with the performance of services) is subsequently sold or otherwise disposed of to a third party in an arm's length transaction while still substantially nonvested, the person who performed such services shall realize compensation in an amount equal to the excess of—

(i) The amount realized on such sale or other disposition, over

(ii) The amount (if any) paid for such property.

Such amount of compensation is includible in his gross income in accordance with his method of accounting. Two preceding sentences also apply when the person disposing of the property has received it in a non-arm's length transaction described in paragraph (c) of this section. In addition, section 83(a) and paragraph (a) of this section shall thereafter cease to apply with respect to such property.

(2) If substantially nonvested property that has been transferred in connection with the performance of services to the person performing such

services is forfeited while still substantially nonvested and held by such person, the difference between the amount paid (if any) and the amount received upon forfeiture (if any) shall be treated as an ordinary gain or loss. This paragraph (b)(2) does not apply to property to which § 1.83–2(a) applies.

(3) This paragraph (b) shall not apply to, and no gain shall be recognized on, any sale, forfeiture, or other disposition described in this paragraph to the extent that any property received in exchange therefor is substantially nonvested. Instead, section 83 and this section shall apply with respect to such property received (as if it were substituted for the property disposed of).

(c) *Dispositions of nonvested property not at arm's length.* If substantially nonvested property (that has been transferred in connection with the performance of services) is disposed of in a transaction which is not at arm's length and the property remains substantially nonvested, the person who performed such services realizes compensation equal in amount to the sum of any money and the fair market value of any substantially vested property received in such disposition. Such amount of compensation is includible in his gross income in accordance with his method of accounting. However, such amount of compensation shall not exceed the fair market value of the property disposed of at the time of disposition (determined without regard to any lapse restriction), reduced by the amount paid for such property. In addition, section 83 and these regulations shall continue to apply with respect to such property, except that any amount previously includible in gross income under this paragraph (c) shall thereafter be treated as an amount paid for such property. For example, if in 1971 an employee pays $50 for a share of stock which has a fair market value of $100 and is substantially monvested at that time and later in 1971 (at a time when the property still has a fair market value of $100 and is still substantially nonvested) the employee disposes of, in a transaction not at arm's length, the share of stock to his wife for $10, the employee realizes compensation of $10 in 1971. If in 1972, when the share of stock has a fair market value of $120, it becomes substantially vested, the employee realizes additional compensation in 1972 in the amount of $60 (the $120 fair market value of the stock less both the $50 price paid for the stock and the $10 taxed as compensation in 1971). For purposes of this paragraph, if substantially nonvested property has been transferred to a person other than the person who performed the services, and the transferee dies holding the property while the property is still substantially nonvested and while the person who performed the services is alive, the transfer which results by reason of the death of such transferee is a transfer not at arm's length.

(d) *Certain transfers upon death.* If substantially nonvested property has been transferred in connection with the performance of services and the person who performed such services dies while the property is still substantially nonvested, any income realized on or after such death with respect to such property under this section is income in respect of a decedent to which the rules of section 691 apply. In such a case the income in respect of such property shall be taxable under section 691 (except to the extent not includible under section 101(b)) to the estate or beneficiary of the person who performed the services, in accordance with section 83 and the regulations thereunder. However, if an item of income is realized upon such death before July 21, 1978, because the property became substantially vested upon death, the person responsible for filing decedent's income tax return for decedent's last taxable year may elect to treat such item as includible in gross income for decedent's last taxable year by including such item in gross income on the return or amended return filed for decedent's last taxable year.

(e) *Forfeiture after substantial vesting.* If a person is taxable under section 83(a) when the property transferred becomes substantially vested and thereafter the person's beneficial interest in such property is nevertheless forfeited pursuant to a lapse restriction, any loss incurred by such person (but not by a beneficiary of such person) upon such forfeiture shall be an ordinary loss to the extent the basis in such property has been increased as a result of the recognition of income by such person under section 83(a) with respect to such property.

(f) *Examples.* The provisions of this section may be illustrated by the following examples:

Example 1. On November 1, 1978, X corporation sells to E, an employee, 100 shares of X corporation stock at $10 per share. At the time of such sale the fair market value of the X corporation stock is $100 per share. Under the terms of the sale each share of stock is subject to a substantial risk of forfeiture which will not lapse until November 1, 1988. Evidence of this restriction is stamped on the face of E's stock certificates, which are therefore nontransferable (within the meaning of §1.83–3(d)). Since in 1978 E's stock is substantially nonvested, E does not include any of such amount in his gross income as compensation in 1978. On November 1, 1988, the fair market value of the X corporation stock is $250 per share. Since the X corporation stock becomes substantially vested in 1988, E must include $24,000 (100 shares of X corporation stock × $250 fair market value per share less $10 price paid by E for each share) as compensation for 1988. Dividends paid by X to E on E's stock after it was transferred to E on November 1, 1973, are taxable to E as additional compensation during the period E's stock is substantially nonvested and are deductible as such by X.

Example 2. Assume the facts are the same as in example (1), except that on November 1, 1985, each share of stock of X corporation in E's hands could as a matter of law be transferred to a bona fide purchaser who would not be required to forfeit the stock if the risk of forfeiture materialized. In the event, however, that the risk materializes, E would be liable in damages to X. On November 1, 1985, the fair market value of the X corporation stock is $230 per share. Since E's stock is transferable within the meaning of §1.83–3(d) in 1985, the stock is substantially vested and E must include $22,000 (100 shares of X corporation stock × $230 fair market value per share less $10 price paid by E for each share) as compensation for 1985.

Example 3. Assume the facts are the same as in example (1) except that, in 1984 E sells his 100 shares of X corporation stock in an arm's length sale to I, an investment company, for $120 per share. At the time of this sale each share of X corporation's stock has a fair market value of $200. Under paragraph (b) of this section, E must include $11,000 (100 shares of X corporation stock × $120 amount realized per share less $10 price paid by E per share) as compensation for 1984 notwithstanding that the stock remains nontransferable and is still subject to a substantial risk of forfeiture at the time of such sale. Under §1.83–4(b)(2), I's basis in the X corporation stock is $120 per share.

[T.D. 7554, 43 FR 31913, July 24, 1978, as amended by T.D. 9092, 68 FR 54351, Sept. 17, 2003]

§ 1.83–2 Election to include in gross income in year of transfer.

(a) *In general.* If property is transferred (within the meaning of §1.83–3(a)) in connection with the performance of services, the person performing such services may elect to include in gross income under section 83(b) the excess (if any) of the fair market value of the property at the time of transfer (determined without regard to any lapse restriction, as defined in §1.83–3(i)) over the amount (if any) paid for such property, as compensation for services. The fact that the transferee has paid full value for the property transferred, realizing no bargain element in the transaction, does not preclude the use of the election as provided for in this section. If this election is made, the substantial vesting rules of section 83(a) and the regulations thereunder do not apply with respect to such property, and except as otherwise provided in section 83(d)(2) and the regulations thereunder (relating to the cancellation of a nonlapse restriction), any subsequent appreciation in the value of the property is not taxable as compensation to the person who performed the services. Thus, property with respect to which this election is made shall be includible in gross income as of the time of transfer, even though such property is substantially nonvested (as defined in §1.83–3(b)) at the time of transfer, and no compensation will be includible in gross income when such property becomes substantially vested (as defined in §1.83–3(b)). In computing the gain or loss from the subsequent sale or exchange of such property, its basis shall be the amount paid for the property increased by the amount included in gross income under section 83(b). If property for which a section 83(b) election is in effect is forfeited while substantially nonvested, such forfeiture shall be treated as a sale or exchange upon which there is realized a loss equal to the excess (if any) of—

(1) The amount paid (if any) for such property, over,

(2) The amount realized (if any) upon such forfeiture.

If such property is a capital asset in the hands of the taxpayer, such loss shall be a capital loss. A sale or other disposition of the property that is in substance a forfeiture, or is made in contemplation of a forfeiture, shall be treated as a forfeiture under the two immediately preceding sentences.

(b) *Time for making election.* Except as provided in the following sentence, the election referred to in paragraph (a) of this section shall be filed not later than 30 days after the date the property was transferred (or, if later, January 29, 1970) and may be filed prior to the date of transfer. Any statement filed before February 15, 1970, which was amended not later than February 16, 1970, in order to make it conform to the requirements of paragraph (e) of this section, shall be deemed a proper election under section 83(b).

(c) *Manner of making election.* The election referred to in paragraph (a) of this section is made by filing one copy of a written statement with the internal revenue office with whom the person who performed the services files his return. In addition, one copy of such statement shall be submitted with this income tax return for the taxable year in which such property was transferred.

(d) *Additional copies.* The person who performed the services shall also submit a copy of the statement referred to in paragraph (c) of this section to the person for whom the services are performed. In addition, if the person who performs the services and the transferee of such property are not the same person, the person who performs the services shall submit a copy of such statement to the transferee of the property.

(e) *Content of statement.* The statement shall be signed by the person making the election and shall indicate that it is being made under section 83(b) of the Code, and shall contain the following information:

(1) The name, address and taxpayer identification number of the taxpayer;

(2) A description of each property with respect to which the election is being made;

(3) The date or dates on which the property is tansferred and the taxable year (for example, ''calendar year 1970'' or ''fiscal year ending May 31, 1970'') for which such election was made;

(4) The nature of the restriction or restrictions to which the property is subject;

(5) The fair market value at the time of transfer (determined without regard to any lapse restriction, as defined in §1.83–3(i)) of each property with respect to which the election is being made;

(6) The amount (if any) paid for such property; and

(7) With respect to elections made after July 21, 1978, a statement to the effect that copies have been furnished to other persons as provided in paragraph (d) of this section.

(f) *Revocability of election.* An election under section 83(b) may not be revoked except with the consent of the Commissioner. Consent will be granted only in the case where the transferee is under a mistake of fact as to the underlying transaction and must be requested within 60 days of the date on which the mistake of fact first became known to the person who made the election. In any event, a mistake as to the value, or decline in the value, of the property with respect to which an election under section 83(b) has been made or a failure to perform an act contemplated at the time of transfer of such property does not constitute a mistake of fact.

[T.D. 7554, 43 FR 31915, July 24, 1978]

§ 1.83–3 Meaning and use of certain terms.

(a) *Transfer*—(1) *In general.* For purposes of section 83 and the regulations thereunder, a transfer of property occurs when a person acquires a beneficial ownership interest in such property (disregarding any lapse restriction, as defined in §1.83–3(i)). For special rules applying to the transfer of a life insurance contract (or an undivided interest therein) that is part of a split-dollar life insurance arrangement (as defined in §1.61–22(b)(1) or (2)), *see* §1.61–22(g).

(2) *Option.* The grant of an option to purchase certain property does not

constitute a transfer of such property. However, see §1.83–7 for the extent to which the grant of the option itself is subject to section 83. In addition, if the amount paid for the transfer of property is an indebtedness secured by the transferred property, on which there is no personal liability to pay all or a substantial part of such indebtedness, such transaction may be in substance the same as the grant of an option. The determination of the substance of the transaction shall be based upon all the facts and circumstances. The factors to be taken into account include the type of property involved, the extent to which the risk that the property will decline in value has been transferred, and the likelihood that the purchase price will, in fact, be paid. See also §1.83–4(c) for the treatment of forgiveness of indebtedness that has constituted an amount paid.

(3) *Requirement that property be returned.* Similarly, no transfer may have occurred where property is transferred under conditions that require its return upon the happening of an event that is certain to occur, such as the termination of employment. In such a case, whether there is, in fact, a transfer depends upon all the facts and circumstances. Factors which indicate that no transfer has occurred are described in paragraph (a) (4), (5), and (6) of this section.

(4) *Similarity to option.* An indication that no transfer has occurred is the extent to which the conditions relating to a transfer are similar to an option.

(5) *Relationship to fair market value.* An indication that no transfer has occurred is the extent to which the consideration to be paid the transferee upon surrendering the property does not approach the fair market value of the property at the time of surrender. For purposes of paragraph (a) (5) and (6) of this section, fair market value includes fair market value determined under the rules of §1.83–5(a)(1), relating to the valuation of property subject to nonlapse restrictions. Therefore, the existence of a nonlapse restriction referred to in §1.83–5(a)(1) is not a factor indicating no transfer has occurred.

(6) *Risk of loss.* An indication that no transfer has occurred is the extent to which the transferee does not incur the risk of a beneficial owner that the value of the property at the time of transfer will decline substantially. Therefore, for purposes of this (6), risk of decline in property value is not limited to the risk that any amount paid for the property may be lost.

(7) *Examples.* The provisions of this paragraph may be illustrated by the following examples:

Example 1. On January 3, 1971, X corporation sells for $500 to S, a salesman of X, 10 shares of stock in X corporation with a fair market value of $1,000. The stock is nontransferable and subject to return to the corporation (for $500) if S's sales do not reach a certain level by December 31, 1971. Disregarding the restriction concerning S's sales (since the restrictions is a lapse restriction), S's interest in the stock is that of a beneficial owner and therefore a transfer occurs on January 3, 1971.

Example 2. On November 17, 1972, W sells to E 100 shares of stock in W corporation with a fair market value of $10,000 in exchange for a $10,000 note without personal liability. The note requires E to make yearly payments of $2,000 commencing in 1973. E collects the dividends, votes the stock and pays the interest on the note. However, he makes no payments toward the face amount of the note. Because E has no personal liability on the note, and since E is making no payments towards the face amount of the note, the likelihood of E paying the full purchase price is in substantial doubt. As a result E has not incurred the risks of a beneficial owner that the value of the stock will decline. Therefore, no transfer of the stock has occurred on November 17, 1972, but an option to purchase the stock has been granted to E.

Example 3. On January 3, 1971, X corporation purports to transfer to E, an employee, 100 shares of stock in X corporation. The X stock is subject to the sole restriction that E must sell such stock to X on termination of employment for any reason for an amount which is equal to the excess (if any) of the book value of the X stock at termination of employment over book value on January 3, 1971. The stock is not transferable by E and the restrictions on transfer are stamped on the certificate. Under these facts and circumstances, there is no transfer of the X stock within the meeting of section 83.

Example 4. Assume the same facts as in example (3) except that E paid $3,000 for the stock and that the restriction required E upon termination of employment to sell the stock to M for the total amount of dividends that have been declared on the stock since September 2, 1971, or $3,000 whichever is higher. Again, under the facts and circumstances, no transfer of the X stock has occurred.

Example 5. On July 4, 1971, X corporation purports to transfer to G, an employee, 100 shares of X stock. The stock is subject to the sole restriction that upon termination of employment G must sell the stock to X for the greater of its fair market value at such time or $100, the amount G paid for the stock. On July 4, 1971 the X stock has a fair market value of $100. Therefore, G does not incur the risk of a beneficial owner that the value of the stock at the time of transfer ($100) will decline substantially. Under these facts and circumstances, no transfer has occurred.

(b) *Substantially vested and substantially nonvested property.* For purposes of section 83 and the regulations thereunder, property is substantially nonvested when it is subject to a substantial risk of forfeiture, within the meaning of paragraph (c) of this section, and is nontransferable, within the meaning of paragraph (d) of this section. Property is substantially vested for such purposes when it is either transferable or not subject to a substantial risk of forfeiture.

(c) *Substantial risk of forfeiture*—(1) *In general.* For purposes of section 83 and the regulations thereunder, whether a risk of forfeiture is substantial or not depends upon the facts and circumstances. A substantial risk of forfeiture exists where rights in property that are transferred are conditioned, directly or indirectly, upon the future performance (or refraining from performance) of substantial services by any person, or the occurrence of a condition related to a purpose of the transfer, and the possibility of forfeiture is substantial if such condition is not satisfied.

Property is not transferred subject to a substantial risk of forfeiture to the extent that the employer is required to pay the fair market value of a portion of such property to the employee upon the return of such property. The risk that the value of property will decline during a certain period of time does not constitute a substantial risk of forfeiture. A nonlapse restriction, standing by itself, will not result in a substantial risk of forfeiture.

(2) *Illustrations of substantial risks of forfeiture.* The regularity of the performance of services and the time spent in performing such services tend to indicate whether services required by a condition are substantial. The fact that the person performing services has the right to decline to perform such services without forfeiture may tend to establish that services are insubstantial. Where stock is transferred to an underwriter prior to a public offering and the full enjoyment of such stock is expressly or impliedly conditioned upon the successful completion of the underwriting, the stock is subject to a substantial risk of forfeiture. Where an employee receives property from an employer subject to a requirement that it be returned if the total earnings of the employer do not increase, such property is subject to a substantial risk of forfeiture. On the other hand, requirements that the property be returned to the employer if the employee is discharged for cause or for committing a crime will not be considered to result in a substantial risk of forfeiture. An enforceable requirement that the property be returned to the employer if the employee accepts a job with a competing firm will not ordinarily be considered to result in a substantial risk of forfeiture unless the particular facts and circumstances indicate to the contrary. Factors which may be taken into account in determining whether a convenant not to compete constitutes a substantial risk of forfeiture are the age of the employee, the availability of alternative employment opportunities, the likelihood of the employee's obtaining such other employment, the degree of skill possessed by the employee, the employee's health, and the practice (if any) of the employer to enforce such covenants. Similarly, rights in property transferred to a retiring employee subject to the sole requirement that it be returned unless he renders consulting services upon the request of his former employer will not be considered subject to a substantial risk of forfeiture unless he is in fact expected to perform substantial services.

(3) *Enforcement of forfeiture condition.* In determining whether the possibility of forfeiture is substantial in the case of rights in property transferred to an employee of a corporation who owns a significant amount of the total combined voting power or value of all classes of stock of the employer corporation or of its parent corporation,

there will be taken into account (i) the employee's relationship to other stockholders and the extent of their control, potential control and possible loss of control of the corporation, (ii) the position of the employee in the corporation and the extent to which he is subordinate to other employees, (iii) the employee's relationship to the officers and directors of the corporation, (iv) the person or persons who must approve the employee's discharge, and (v) past actions of the employer in enforcing the provisions of the restrictions. For example, if an employee would be considered as having received rights in property subject to a substantial risk of forfeiture, but for the fact that the employee owns 20 percent of the single class of stock in the transferor corporation, and if the remaining 80 percent of the class of stock is owned by an unrelated individual (or members of such an individual's family) so that the possibility of the corporation enforcing a restriction on such rights is substantial, then such rights are subject to a substantial risk of forfeiture. On the other hand, if 4 percent of the voting power of all the stock of a corporation is owned by the president of such corporation and the remaining stock is so diversely held by the public that the president, in effect, controls the corporation, then the possibility of the corporation enforcing a restriction on rights in property transferred to the president is not substantial, and such rights are not subject to a substantial risk of forfeiture.

(4) *Examples.* The rules contained in paragraph (c)(1) of this section may be illustrated by the following examples. In each example it is assumed that, if the conditions on transfer are not satisfied, the forfeiture provision will be enforced.

Example 1. On November 1, 1971, corporation X transfers in connection with the performance of services to E, an employee, 100 shares of corporation X stock for $90 per share. Under the terms of the transfer, E will be subject to a binding commitment to resell the stock to corporation X at $90 per share if he leaves the employment of corporation X for any reason prior to the expiration of a 2-year period from the date of such transfer. Since E must perform substantial services for corporation X and will not be paid more than $90 for the stock, regardless of its value, if he fails to perform such services during such 2-year period, E's rights in the stock are subject to a substantial risk of forfeiture during such period.

Example 2. On November 10, 1971, corporation X transfers in connection with the performance of services to a trust for the benefit of employees, $100*x*. Under the terms of the trust any child of an employee who is an enrolled full-time student at an accredited educational institution as a candidate for a degree will receive an annual grant of cash for each academic year the student completes as a student in good standing, up to a maximum of four years. E, an employee, has a child who is enrolled as a full-time student at an accredited college as a candidate for a degree. Therefore, E has a beneficial interest in the assets of the trust equalling the value of four cash grants. Since E's child must complete one year of college in order to receive a cash grant, E's interest in the trust assets are subject to a substantial risk of forfeiture to the extent E's child has not become entitled to any grants.

Example 3. On November 25, 1971, corporation X gives to E, an employee, in connection with his performance of services to corporation X, a bonus of 100 shares of corporation X stock. Under the terms of the bonus arrangement E is obligated to return the corporation X stock to corporation X if he terminates his employment for any reason. However, for each year occurring after November 25, 1971, during which E remains employed with corporation X, E ceases to be obligated to return 10 shares of the corporation X stock. Since in each year occurring after November 25, 1971, for which E remains employed he is not required to return 10 shares of corporation X's stock, E's rights in 10 shares each year for 10 years cease to be subject to a substantial risk of forfeiture for each year he remains so employed.

Example 4. (a) Assume the same facts as in example (3) except that for each year occurring after November 25, 1971, for which E remains employed with corporation X, X agrees to pay, in redemption of the bonus shares given to E if he terminates employment for any reason, 10 percent of the fair market value of each share of stock on the date of such termination of employment. Since corporation X will pay E 10 percent of the value of his bonus stock for each of the 10 years after November 25, 1971, in which he remains employed by X, and the risk of a decline in value is not a substantial risk of forfeiture, E's interest in 10 percent of such bonus stock becomes substantially vested in each of those years.

(b) The following chart illustrates the fair market value of the bonus stock and the fair market value of the portion of bonus stock that becomes substantially vested on November 25, for the following years:

Year	Fair market value of	
	All stock	Portion of stock that becomes vested
1972	$200	$20
1973	300	30
1974	150	15
1975	150	15
1976	100	10

If E terminates his employment on July 1, 1977, when the fair market value of the bonus stock is $100, E must return the bonus stock to X, and X must pay, in redemption of the bonus stock, $50 (50 percent of the value of the bonus stock on the date of termination of employment). E has recognized income under section 83(a) and §1.83–1(a) with respect to 50 percent of the bonus stock, and E's basis in that portion of the stock equals the amount of income recognized, $90. Under §1.83–1(e), the $40 loss E incurred upon forfeiture ($90 basis less $50 redemption payment) is an ordinary loss.

Example 5. On January 7, 1971, corporation X, a computer service company, transfers to E, 100 shares of corporation X stock for $50. E is a highly compensated salesman who sold X's products in a three-state area since 1960. At the time of transfer each share of X stock has a fair market value of $100. The stock is transferred to E in connection with his termination of employment with X. Each share of X stock is subject to the sole condition that E can keep such share only if he does not engage in competition with X for a 5-year period in the three-state area where E had previously sold X's products. E, who is 45 years old, has no intention of retiring from the work force. In order to earn a salary comparable to his current compensation, while preventing the risk of forfeiture from arising, E will have to expend a substantial amount of time and effort in another industry or market to establish the necessary business contacts. Thus, under these facts and circumstances E's rights in the stock are subject to a substantial risk of forfeiture.

(d) *Transferability of property.* For purposes of section 83 and the regulations thereunder, the rights of a person in property are transferable if such person can transfer any interest in the property to any person other than the transferor of the property, but only if the rights in such property of such transferee are not subject to a substantial risk of forfeiture. Accordingly, property is transferable if the person performing the services or receiving the property can sell, assign, or pledge (as collateral for a loan, or as security for the performance of an obligation, or for any other purpose) his interest in the property to any person other than the transferor of such property and if the transferee is not required to give up the property or its value in the event the substantial risk of forfeiture materializes. On the other hand, property is not considered to be transferable merely because the person performing the services or receiving the property may designate a beneficiary to receive the property in the event of his death.

(e) *Property.* For purposes of section 83 and the regulations thereunder, the term ''property'' includes real and personal property other than either money or an unfunded and unsecured promise to pay money or property in the future. The term also includes a beneficial interest in assets (including money) which are transferred or set aside from the claims of creditors of the transferor, for example, in a trust or escrow account. See, however, §1.83–8(a) with respect to employee trusts and annuity plans subject to section 402(b) and section 403(c). In the case of a transfer of a life insurance contract, retirement income contract, endowment contract, or other contract providing life insurance protection, or any undivided interest therein, the policy cash value and all other rights under such contract (including any supplemental agreements thereto and whether or not guaranteed), other than current life insurance protection, are treated as property for purposes of this section. However, in the case of the transfer of a life insurance contract, retirement income contract, endowment contract, or other contract providing life insurance protection, which was part of a split-dollar arrangement (as defined in §1.61–22(b)) entered into (as defined in §1.61–22(j)) on or before September 17, 2003, and which is not materially modified (as defined in §1.61–22(j)(2)) after September 17, 2003, only the cash surrender value of the contract is considered to be property. Where rights in a contract providing life insurance protection are substantially nonvested, see §1.83–1(a)(2) for rules relating to taxation of the cost of life insurance protection.

(f) *Property transferred in connection with the performance of services.* Property transferred to an employee or an independent contractor (or beneficiary thereof) in recognition of the performance of, or the refraining from performance of, services is considered transferred in connection with the performance of services within the meaning of section 83. The existence of other persons entitled to buy stock on the same terms and conditions as an employee, whether pursuant to a public or private offering may, however, indicate that in such circumstances a transfer to the employee is not in recognition of the performance of, or the refraining from performance of, services. The transfer of property is subject to section 83 whether such transfer is in respect of past, present, or future services.

(g) *Amount paid.* For purposes of section 83 and the regulations thereunder, the term ''amount paid'' refers to the value of any money or property paid for the transfer of property to which section 83 applies, and does not refer to any amount paid for the right to use such property or to receive the income therefrom. Such value does not include any stated or unstated interest payments. For rules regarding the calculation of the amount of unstated interest payments, see §1.483–1(c). When section 83 applies to the transfer of property pursuant to the exercise of an option, the term ''amount paid'' refers to any amount paid for the grant of the option plus any amount paid as the exercise price of the option. For rules regarding the forgiveness of indebtedness treated as an amount paid, see §1.83–4(c).

(h) *Nonlapse restriction.* For purposes of section 83 and the regulations thereunder, a restriction which by its terms will never lapse (also referred to as a ''nonlapse restriction'') is a permanent limitation on the transferability of property—

(1) Which will require the transferee of the property to sell, or offer to sell, such property at a price determined under a formula, and

(2) Which will continue to apply to and be enforced against the transferee or any subsequent holder (other than the transferor).

A limitation subjecting the property to a permanent right of first refusal in a particular person at a price determined under a formula is a permanent nonlapse restriction. Limitations imposed by registration requirements of State or Federal security laws or similar laws imposed with respect to sales or other dispositions of stock or securities are not nonlapse restrictions. An obligation to resell or to offer to sell property transferred in connection with the performance of services to a specific person or persons at its fair market value at the time of such sale is not a nonlapse restriction. See §1.83–5(c) for examples of nonlapse restrictions.

(i) *Lapse restriction.* For purposes of section 83 and the regulations thereunder, the term ''lapse restriction'' means a restriction other than a nonlapse restriction as defined in paragraph (h) of this section, and includes (but is not limited to) a restriction that carries a substantial risk of forfeiture.

(j) *Sales which may give rise to suit under section 16(b) of the Securities Exchange Act of 1934*—(1) *In general.* For purposes of section 83 and the regulations thereunder if the sale of property at a profit within six months after the purchase of the property could subject a person to suit under section 16(b) of the Securities Exchange Act of 1934, the person's rights in the property are treated as subject to a substantial risk of forfeiture and as not transferable until the earlier of (i) the expiration of such six-month period, or (ii) the first day on which the sale of such property at a profit will not subject the person to suit under section 16(b) of the Securities Exchange Act of 1934. However, whether an option is ''transferable by the optionee'' for purposes of §1.83–7(b)(2)(i) is determined without regard to section 83(c)(3) and this paragraph (j).

(2) *Examples.* The provisions of this paragraph may be illustrated by the following examples:

Example 1. On January 1, 1983, X corporation sells to P, a beneficial owner of 12% of X corporation stock, in connection with P's performance of services, 100 shares of X corporation stock at $10 per share. At the time of the sale the fair market value of the X corporation stock is $100 per share. P, as a beneficial owner of more 10% of X corporation stock, is liable to suit under section 16(b) of the Securities Exchange Act of 1934 for recovery of any profit from any sale and purchase or purchase and sale of X corporation stock within a six-month period, but no other restrictions apply to the stock. Because the section 16(b) restriction is applicable to P, P's rights in the 100 shares of stock purchased on January 1, 1983, are treated as subject to a substantial risk of forfeiture and as not transferable through June 29, 1983. P chooses not to make an election under section 83 (b) and therefore does not include any amount with respect to the stock purchase in gross income as compensation on the date of purchase. On June 30, 1983, the fair market value of X corporation stock is $250 per share. P must include $24,000 (100 shares of X corporation stock × $240 ($250 fair market value per share less $10 price paid by P for each share)) in gross income as compensation on June 30, 1983. If, in this example, restrictions other than section 16(b) applied to the stock, such other restrictions (but not section 16(b)) would be taken into account in determining whether the stock is subject to a substantial risk of foreiture and is nontransferable for periods after June 29, 1983.

Example 2. Assume the same facts as in example (1) except that P is not an insider on or after May 1, 1983, and the section 16(b) restriction does not apply beginning on that date. On May 1, 1983, P must include in gross income as compensation the difference between the fair market value of the stock on that date and the amount paid for the stock.

Example 3. Assume the same facts as in example (1) except that on June 1, 1983, X corporation sells to P an additional 100 shares of X corporation stock at $20 per share. At the time of the sale the fair market value of the X corporation stock is $150 per share. On June 30, 1983, P must include $24,000 in gross income as compensation with respect to the January 1, 1983 purchase. On November 30, 1983, the fair market value of X corporation stock is $200 per share. Accordingly, on that date P must include $18,000 (100 shares of X corporation stock × $180 ($200 fair market value per share less $20 price paid by P for each share)) in gross income as compensation with respect to the June 1, 1983 purchase.

(3) *Effective date.* This paragraph applies property transferred after December 31, 1981.

(k) *Special rule for certain accounting rules.* (1) For purposes of section 83 and the regulations thereunder, property is subject to substantial risk of forfeiture and is not transferable so long as the property is subject to a restriction on transfer to comply with the "Pooling-of-Interests Accounting" rules set forth in Accounting Series Release Numbered 130 ((10/5/72) 37 FR 20937; 17 CFR 211.130) and Accounting Series Release Numbered 135 ((1/18/73) 38 FR 1734; 17 CFR 211.135).

(2) *Effective date.* This paragraph applies to property transferred after December 31, 1981.

[T.D. 7554, 43 FR 31916, July 24, 1978, as amended by T.D. 8042, 50 FR 31713, Aug. 6, 1985; 50 FR 39664, Sept. 30, 1985; T.D. 9092, 68 FR 54351, Sept. 17, 2003; T.D. 9223, 70 FR 50971, Aug. 29, 2005]

§ 1.83–4 Special rules.

(a) *Holding period.* Under section 83(f), the holding period of transferred property to which section 83(a) applies shall begin just after such property is substantially vested. However, if the person who has performed the services in connection with which property is transferred has made an election under section 83(b), the holding period of such property shall begin just after the date such property is transferred. If property to which section 83 and the regulations thereunder apply is transferred at arm's length, the holding period of such property in the hands of the transferee shall be determined in accordance with the rules provided in section 1223.

(b) *Basis.* (1) Except as provided in paragraph (b)(2) of this section, if property to which section 83 and the regulations thereunder apply is acquired by any person (including a person who acquires such property in a subsequent transfer which is not at arm's length), while such property is still substantially nonvested, such person's basis for the property shall reflect any amount paid for such property and any amount includible in the gross income of the person who performed the services (including any amount so includible as a result of a disposition by the person who acquired such property.) Such basis shall also reflect any adjustments to basis provided under sections 1015 and 1016.

(2) If property to which § 1.83–1 applies is transferred at arm's length, the basis of the property in the hands of the transferee shall be determined under section 1012 and the regulations thereunder.

(c) *Forgiveness of indebtedness treated as an amount paid.* If an indebtedness that has been treated as an amount paid under §1.83–1(a)(1)(ii) is subsequently cancelled, forgiven or satisfied for an amount less than the amount of such indebtedness, the amount that is not, in fact, paid shall be includible in the gross income of the service provider in the taxable year in which such cancellation, forgiveness or satisfaction occurs.

[T.D. 7554, 43 FR 31918, July 24, 1978]

§ 1.83–5 Restrictions that will never lapse.

(a) *Valuation.* For purposes of section 83 and the regulations thereunder, in the case of property subject to a nonlapse restriction (as defined in §1.83–3(h)), the price determined under the formula price will be considered to be the fair market value of the property unless established to the contrary by the Commissioner, and the burden of proof shall be on the commissioner with respect to such value. If stock in a corporation is subject to a nonlapse restriction which requires the transferee to sell such stock only at a formula price based on book value, a reasonable multiple of earnings or a reasonable combination thereof, the price so determined will ordinarily be regarded as determinative of the fair market value of such property for purposes of section 83. However, in certain circumstances the formula price will not be considered to be the fair market value of property subject to such a formula price restriction, even though the formula price restriction is a substantial factor in determining such value. For example, where the formula price is the current book value of stock, the book value of the stock at some time in the future may be a more accurate measure of the value of the stock than the current book value of the stock for purposes of determining the fair market value of the stock at the time the stock becomes substantially vested.

(b) *Cancellation*—(1) *In general.* Under section 83(d)(2), if a nonlapse restriction imposed on property that is subject to section 83 is cancelled, then, unless the taxpayer establishes—

(i) That such cancellation was not compensatory, and

(ii) That the person who would be allowed a deduction, if any, if the cancellation were treated as compensatory, will treat the transaction as not compensatory, as provided in paragraph (c)(2) of this section, the excess of the fair market value of such property (computed without regard to such restriction) at the time of cancellation, over the sum of—

(iii) The fair market value of such property (computed by taking the restriction into account) immediately before the cancellation, and

(iv) The amount, if any, paid for the cancellation, shall be treated as compensation for the taxable year in which such cancellation occurs. Whether there has been a noncompensatory cancellation of a nonlapse restriction under section 83(d)(2) depends upon the particular facts and circumstances. Ordinarily the fact that the employee or independent contractor is required to perform additional services or that the salary or payment of such a person is adjusted to take the cancellation into account indicates that such cancellation has a compensatory purpose. On the other hand, the fact that the original purpose of a restriction no longer exists may indicate that the purpose of such cancellation is noncompensatory. Thus, for example, if a so-called ''buy-sell'' restriction was imposed on a corporation's stock to limit ownership of such stock and is being cancelled in connection with a public offering of the stock, such cancellation will generally be regarded as noncompensatory. However, the mere fact that the employer is willing to forego a deduction under section 83(h) is insufficient evidence to establish a noncompensatory cancellation of a nonlapse restriction. The refusal by a corporation or shareholder to repurchase stock of the corporation which is subject to a permanent right of first refusal will generally be treated as a cancellation of a nonlapse restriction. The preceding sentence shall not apply where there is no nonlapse restriction, for example, where the price to be paid for the stock subject to the right of first refusal is the fair market value of the stock. Section 83(d)(2) and this (1) do not apply where immediately after the cancellation of a nonlapse restriction the property is still substantially nonvested and no section 83(b) election has been made with respect to such property. In such a case the rules of section 83(a) and § 1.83–1 shall apply to such property.

(2) *Evidence of noncompensatory cancellation*. In addition to the information necessary to establish the factors described in paragraph (b)(1) of this section, the taxpayer shall request the employer to furnish the taxpayer with a written statement indicating that the employer will not treat the cancellation of the nonlapse restriction as a compensatory event, and that no deduction will be taken with respect to such cancellation. The taxpayer shall file such written statement with his income tax return for the taxable year in which or with which such cancellation occurs.

(c) *Examples*. The provisions of this section may be illustrated by the following examples:

Example 1. On November 1, 1971, X corporation whose shares are closely held and not regularly traded, transfers to E, an employee, 100 shares of X corporation stock subject to the condition that, if he desires to dispose of such stock during the period of his employment, he must resell the stock to his employer at its then existing book value. In addition, E or E's estate is obligated to offer to sell the stock at his retirement or death to his employer at its then existing book value. Under these facts and circumstances, the restriction to which the shares of X corporation stock are subject is a nonlapse restriction. Consequently, the fair market value of the X stock is includible in E's gross income as compensation for taxable year 1971. However, in determining the fair market value of the X stock, the book value formula price will ordinarily be regarded as being determinative of such value.

Example 2. Assume the facts are the same as in example (1), except that the X stock is subject to the condition that if E desires to dispose of the stock during the period of his employment he must resell the stock to his employer at a multiple of earnings per share that is in this case a reasonable approximation of value at the time of transfer to E. In addition, E or E's estate is obligated to offer to sell the stock at his retirement or death to his employer at the same multiple of earnings. Under these facts and circumstances, the restriction to which the X corporation stock is subject is a nonlapse restriction. Consequently, the fair market value of the X stock is includible in E's gross income for taxable year 1971. However, in determining the fair market value of the X stock, the multiple-of-earnings formula price will ordinarily be regarded as determinative of such value.

Example 3. On January 4, 1971, X corporation transfers to E, an employee, 100 shares of stock in X corporation. Each such share of stock is subject to an agreement between X and E whereby E agrees that such shares are to be held solely for investment purposes and not for resale (a so-called investment letter restriction). E's rights in such stock are substantially vested upon transfer, causing the fair market value of each share of X corporation stock to be includible in E's gross income as compensation for taxable year 1971. Since such an investment letter restriction does not constitute a nonlapse restriction, in determining the fair market value of each share, the investment letter restriction is disregarded.

Example 4. On September 1, 1971, X corporation transfers to B, an independent contractor, 500 shares of common stock in X corporation in exchange for B's agreement to provide services in the construction of an office building on property owned by X corporation. X corporation has 100 shares of preferred stock outstanding and an additional 500 shares of common stock outstanding. The preferred stock has a liquidation value of \$1,000*x*, which is equal to the value of all assets owned by X. Therefore, the book value of the common stock in X corporation is \$0. Under the terms of the transfer, if B wishes to dispose of the stock, B must offer to sell the stock to X for 150 percent of the then existing book value of B's common stock. The stock is also subject to a substantial risk of forfeiture until B performs the agreed-upon services. B makes a timely election under section 83(b) to include the value of the stock in gross income in 1971. Under these facts and circumstances, the restriction to which the shares of X corporation common stock are subject is a nonlapse restriction. In determining the fair market value of the X common stock at the time of transfer, the book value formula price would ordinarily be regarded as determinative of such value. However, the fair market value of X common stock at the time of transfer, subject to the book value restriction, is greater than \$0 since B was willing to agree to provide valuable personal services in exchange for the stock. In determining the fair market value of the stock, the expected book value after construction of the office building would be given great weight. The likelihood of completion of construction would be a factor in determining the expected book value after completion of construction.

[T.D. 7554, 43 FR 31918, July 24, 1978]

§ 1.83–6 Deduction by employer.

(a) *Allowance of deduction*—(1) *General rule.* In the case of a transfer of property in connection with the performance of services, or a compensatory cancellation of a nonlapse restriction described in section 83(d) and § 1.83–5, a deduction is allowable under section 162 or 212 to the person for whom the services were performed. The amount of the deduction is equal to the amount included as compensation in the gross income of the service provider under section 83 (a), (b), or (d)(2), but only to the extent the amount meets the requirements of section 162 or 212 and the regulations thereunder. The deduction is allowed only for the taxable year of that person in which or with which ends the taxable year of the service provider in which the amount is included as compensation. For purposes of this paragraph, any amount excluded from gross income under section 79 or section 101(b) or subchapter N is considered to have been included in gross income.

(2) *Special Rule.* For purposes of paragraph (a)(1) of this section, the service provider is deemed to have included the amount as compensation in gross income if the person for whom the services were performed satisfies in a timely manner all requirements of section 6041 or section 6041A, and the regulations thereunder, with respect to that amount of compensation. For purposes of the preceding sentence, whether a person for whom services were performed satisfies all requirements of section 6041 or section 6041A, and the regulations thereunder, is determined without regard to § 1.6041–3(c) (exception for payments to corporations). In the case of a disqualifying disposition of stock described in section 421(b), an employer that otherwise satisfies all requirements of section 6041 and the regulations thereunder will be considered to have done so timely for purposes of this paragraph (a)(2) if Form W-2 or Form W-2c, as appropriate, is furnished to the employee or former employee, and is filed with the federal government, on or before the date on which the employer files the tax return claiming the deduction relating to the disqualifying disposition.

(3) *Exceptions.* Where property is substantially vested upon transfer, the deduction shall be allowed to such person in accordance with his method of accounting (in conformity with sections 446 and 461). In the case of a transfer to an employee benefit plan described in § 1.162–10(a) or a transfer to an employees' trust or annuity plan described in section 404(a)(5) and the regulations thereunder, section 83(h) and this section do not apply.

(4) *Capital expenditure, etc.* No deduction is allowed under section 83(h) to the extent that the transfer of property constitutes a capital expenditure, an item of deferred expense, or an amount properly includible in the value of inventory items. In the case of a capital expenditure, for example, the basis of the property to which such capital expenditure relates shall be increased at the same time and to the same extent as any amount includible in the employee's gross income in respect of such transfer. Thus, for example, no deduction is allowed to a corporation in respect of a transfer of its stock to a promoter upon its organization, notwithstanding that such promoter must include the value of such stock in his gross income in accordance with the rules under section 83.

(5) *Transfer of life insurance contract (or an undivided interest therein)*—(i) *General rule.* In the case of a transfer of a life insurance contract (or an undivided interest therein) described in § 1.61–22(c)(3) in connection with the performance of services, a deduction is allowable under paragraph (a)(1) of this section to the person for whom the services were performed. The amount of the deduction, if allowable, is equal to the sum of the amount included as compensation in the gross income of the service provider under § 1.61–22(g)(1) and the amount determined under § 1.61–22(g)(1)(ii).

(ii) *Effective date*—(A) *General rule.* Paragraph (a)(5)(i) of this section applies to any split-dollar life insurance arrangement (as defined in § 1.61–22(b)(1) or (2)) entered into after September 17, 2003. For purposes of this paragraph (a)(5), an arrangement is entered into as determined under § 1.61–22(j)(1)(ii).

(B) *Modified arrangements treated as new arrangements.* If an arrangement entered into on or before September 17, 2003 is materially modified (within the meaning of §1.61–22(j)(2)) after September 17, 2003, the arrangement is treated as a new arrangement entered into on the date of the modification.

(6) *Effective date.* Paragraphs (a)(1) and (2) of this section apply to deductions for taxable years beginning on or after January 1, 1995. However, taxpayers may also apply paragraphs (a)(1) and (2) of this section when claiming deductions for taxable years beginning before that date if the claims are not barred by the statute of limitations. Paragraphs (a) (3) and (4) of this section are effective as set forth in §1.83–8(b).

(b) *Recognition of gain or loss.* Except as provided in section 1032, at the time of a transfer of property in connection with the performance of services the transferor recognizes gain to the extent that the transferor receives an amount that exceeds the transferor's basis in the property. In addition, at the time a deduction is allowed under section 83(h) and paragraph (a) of this section, gain or loss is recognized to the extent of the difference between (1) the sum of the amount paid plus the amount allowed as a deduction under section 83(h), and (2) the sum of the taxpayer's basis in the property plus any amount recognized pursuant to the previous sentence.

(c) *Forfeitures.* If, under section 83(h) and paragraph (a) of this section, a deduction, an increase in basis, or a reduction of gross income was allowable (disregarding the reasonableness of the amount of compensation) in respect of a transfer of property and such property is subsequently forfeited, the amount of such deduction, increase in basis or reduction of gross income shall be includible in the gross income of the person to whom it was allowable for the taxable year of forfeiture. The basis of such property in the hands of the person to whom it is forfeited shall include any such amount includible in the gross income of such person, as well as any amount such person pays upon forfeiture.

(d) *Special rules for transfers by shareholders*—(1) *Transfers.* If a shareholder of a corporation transfers property to an employee of such corporation or to an independent contractor (or to a beneficiary thereof), in consideration of services performed for the corporation, the transaction shall be considered to be a contribution of such property to the capital of such corporation by the shareholder, and immediately thereafter a transfer of such property by the corporation to the employee or independent contractor under paragraphs (a) and (b) of this section. For purposes of this (1), such a transfer will be considered to be in consideration for services performed for the corporation if either the property transferred is substantially nonvested at the time of transfer or an amount is includible in the gross income of the employee or independent contractor at the time of transfer under §1.83–1(a)(1) or §1.83–2(a). In the case of such a transfer, any money or other property paid to the shareholder for such stock shall be considered to be paid to the corporation and transferred immediately thereafter by the corporation to the shareholder as a distribution to which section 302 applies. For special rules that may applyto a corporation's transfer of its own stock to any person in consideration of services performed for another corporation or partnership, see §1.1032–3. The preceding sentence applies to transfers of stock and amounts paid for such stock occurring on or after May 16, 2000.

(2) *Forfeiture.* If, following a transaction described in paragraph (d)(1) of this section, the transferred property is forfeited to the shareholder, paragraph (c) of this section shall apply both with respect to the shareholder and with respect to the corporation. In addition, the corporation shall in the taxable year of forfeiture be allowed a loss (or realize a gain) to offset any gain (or loss) realized under paragraph (b) of this section. For example, if a shareholder transfers property to an employee of the corporation as compensation, and as a result the shareholder's basis of \$200x in such property is allocated to his stock in such corporation and such corporation recognizes a short-term capital gain of \$800x, and is allowed a deduction of \$1,000x on such transfer, upon a subsequent forfeiture

of the property to the shareholder, the shareholder shall take \$200*x* into gross income, and the corporation shall take \$1,000*x* into gross income and be allowed a short-term capital loss of \$800*x*.

(e) *Options*. [Reserved]

(f) *Reporting requirements*. [Reserved]

[T.D. 7554, 43 FR 31919, July 24, 1978, as amended by T.D. 8599, July 19, 1995; T.D. 8883, 65 FR 31076, May 16, 2000; T.D. 9092, 68 FR 54352, Sept. 17, 2003]

§ 1.83–7 Taxation of nonqualified stock options.

(a) *In general*. If there is granted to an employee or independent contractor (or beneficiary thereof) in connection with the performance of services, an option to which section 421 (relating generally to certain qualified and other options) does not apply, section 83(a) shall apply to such grant if the option has a readily ascertainable fair market value (determined in accordance with paragraph (b) of this section) at the time the option is granted. The person who performed such services realizes compensation upon such grant at the time and in the amount determined under section 83(a). If section 83(a) does not apply to the grant of such an option because the option does not have a readily ascertainable fair market value at the time of grant, sections 83(a) and 83(b) shall apply at the time the option is exercised or otherwise disposed of, even though the fair market value of such option may have become readily ascertainable before such time. If the option is exercised, sections 83(a) and 83(b) apply to the transfer of property pursuant to such exercise, and the employee or independent contractor realizes compensation upon such transfer at the time and in the amount determined under section 83(a) or 83(b). If the option is sold or otherwise disposed of in an arm's length transaction, sections 83(a) and 83(b) apply to the transfer of money or other property received in the same manner as sections 83(a) and 83(b) would have applied to the transfer of property pursuant to an exercise of the option. The preceding sentence does not apply to a sale or other disposition of the option to a person related to the service provider that occurs on or after July 2, 2003. For this purpose, a person is related to the service provider if—

(1) The person and the service provider bear a relationship to each other that is specified in section 267(b) or 707(b)(1), subject to the modifications that the language ''20 percent'' is used instead of ''50 percent'' each place it appears in sections 267(b) and 707(b)(1), and section 267(c)(4) is applied as if the family of an individual includes the spouse of any member of the family; or

(2) The person and the service provider are engaged in trades or businesses under common control (within the meaning of section 52(a) and (b)); provided that a person is not related to the service provider if the person is the service recipient with respect to the option or the grantor of the option.

(b) *Readily ascertainable defined*—(1) *Actively traded on an established market*. Options have a value at the time they are granted, but that value is ordinarily not readily ascertainable unless the option is actively traded on an established market. If an option is actively traded on an established market, the fair market value of such option is readily ascertainable for purposes of this section by applying the rules of valuation set forth in § 20.2031–2.

(2) *Not actively traded on an established market*. When an option is not actively traded on an established market, it does not have a readily ascertainable fair market value unless its fair market value can otherwise be measured with reasonable accuracy. For purposes of this section, if an option is not actively traded on an established market, the option does not have a readily ascertainable fair market value when granted unless the taxpayer can show that all of the following conditions exist:

(i) The option is transferable by the optionee;

(ii) The option is exerciseable immediately in full by the optionee;

(iii) The option or the property subject to the option is not subject to any restriction or condition (other than a lien or other condition to secure the payment of the purchase price) which has a significant effect upon the fair market value of the option; and

(iv) The fair market value of the option privilege is readily ascertainable in accordance with paragraph (b)(3) of this section.

(3) *Option privilege.* The option privilege in the case of an option to buy is the opportunity to benefit during the option's exercise period from any increase in the value of property subject to the option during such period, without risking any capital. Similarly, the option privilege in the case of an option to sell is the opportunity to benefit during the exercise period from a decrease in the value of property subject to the option. For example, if at some time during the exercise period of an option to buy, the fair market value of the property subject to the option is greater than the option's exercise price, a profit may be realized by exercising the option and immediately selling the property so acquired for its higher fair market value. Irrespective of whether any such gain may be realized immediately at the time an option is granted, the fair market value of an option to buy includes the value of the right to benefit from any future increase in the value of the property subject to the option (relative to the option exercise price), without risking any capital. Therefore, the fair market value of an option is not merely the difference that may exist at a particular time between the option's exercise price and the value of the property subject to the option, but also includes the value of the option privilege for the remainder of the exercise period. Accordingly, for purposes of this section, in determining whether the fair market value of an option is readily ascertainable, it is necessary to consider whether the value of the entire option privilege can be measured with reasonable accuracy. In determining whether the value of the option privilege is readily ascertainable, and in determining the amount of such value when such value is readily ascertainable, it is necessary to consider—

(i) Whether the value of the property subject to the option can be ascertained;

(ii) The probability of any ascertainable value of such property increasing or decreasing; and

(iii) The length of the period during which the option can be exercised.

(c) *Reporting requirements.* [Reserved]

(d) This section applies on and after July 2, 2003. For transactions prior to that date, see §1.83–7 as published in 26 CFR part 1 (revised as of April 1, 2003).

[T.D. 7554, 43 FR 31920, July 24, 1978, as amended by T.D. 9067, 68 FR 39454, July 2, 2003; T.D. 9148, 69 FR 48392, Aug. 10, 2004]

§ 1.83–8 Applicability of section and transitional rules.

(a) *Scope of section 83.* Section 83 is not applicable to—

(1) A transaction concerning an option to which section 421 applies;

(2) A transfer to or from a trust described in section 401(a) for the benefit of employees or their beneficiaries, or a transfer under an annuity plan that meets the requirements of section 404(a)(2) for the benefit of employees or their beneficiaries;

(3) The transfer of an option without a readily ascertainable fair market value (as defined in §1.83–7(b)(1)); or

(4) The transfer of property pursuant to the exercise of an option with a readily ascertainable fair market value at the date of grant. Section 83 applies to a transfer to or from a trust or under an annuity plan for the benefit of employees, independent contractors, or their beneficiaries (except as provided in paragraph (a)(2) of this section), but to the extent a transfer is subject to section 402(b) or 403(c), section 83 applies to such a transfer only as provided for in section 402(b) or 403(c).

(b) *Transitional rules*—(1) *In general.* Except as otherwise provided in this paragraph, section 83 and the regulations thereunder shall apply to property transferred after June 30, 1969.

(2) *Binding written contracts.* Section 83 and the regulations thereunder shall not apply to property transferred pursuant to a binding written contract entered into before April 22, 1969. For purposes of this paragraph, a binding written contract means only a written contract under which the employee or independent contractor has an enforceable right to compel the transfer of property or to obtain damages upon the breach of such contract. A contract which provides that a person's right to such property is contingent upon the happening of an event (including the

passage of time) may satisfy the requirements of this paragraph. However, if the event itself, or the determination of whether the event has occurred, rests with the board of directors or any other individual or group acting on behalf of the employer (other than an arbitrator), the contract will not be treated as giving the person an enforceable right for purposes of this paragraph.

The fact that the board of directors has the power (either expressly or impliedly) to terminate employment of an officer pursuant to a contract that contemplates the completion of services over a fixed or ascertainable period does not negate the existence of a binding written contract. Nor will the binding nature of the contract be negated by a provision in such contract which allows the employee or independent contractor to terminate the contract for any year and receive cash instead of property if such election would cause a substantial penalty, such as a forfeiture of part or all of the property received in connection with the performance of services in an earlier year.

(3) *Options granted before April 22, 1969.* Section 83 shall not apply to property received upon the exercise of an option granted before April 22, 1969.

(4) *Certain written plans.* Section 83 shall not apply to property transferred (whether or not by the exercise of an option) before May 1, 1970, pursuant to a written plan adopted and approved before July 1, 1969. A plan is to be considered as having been adopted and approved before July 1, 1969, only if prior to such date the transferor of the property undertook an ascertainable course of conduct which under applicable State law does not require further approval by the board of directors or the stockholders of any corporation. For example, if a corporation transfers property to an employee in connection with the performance of services pursuant to a plan adopted and approved before July 1, 1969, by the board of directors of such corporation, it is not necessary that the stockholders have adopted or approved such plan if State law does not require such approval. However, such approval is necessary if required by the articles of incorporation or the bylaws or if, by its terms, such plan will not become effective without such approval.

(5) *Certain options granted pursuant to a binding written contract.* Section 83 shall not apply to property transferred before January 1, 1973, upon the exercise of an option granted pursuant to a binding written contract (as defined in paragraph (b)(2) of this section) entered into before April 22, 1969, between a corporation and the transferor of such property requiring the transferor to grant options to employees of such corporation (or a subsidiary of such corporation) to purchase a determinable number of shares of stock of such corporation, but only if the transferee was an employee of such corporation (or a subsidiary of such corporation) on or before April 22, 1969.

(6) *Certain tax free exchanges.* Section 83 shall not apply to property transferred in exchange for (or pursuant to the exercise of a conversion privilege contained in) property transferred before July 1, 1969, or in exchange for property to which section 83 does not apply (by reason of paragraphs (1), (2), (3), or (4) of section 83(i)), if section 354, 355, 356, or 1036 (or so much of section 1031 as relates to section 1036) applies, or if gain or loss is not otherwise required to be recognized upon the exercise of such conversion privilege, and if the property received in such exchange is subject to restrictions and conditions substantially similar to those to which the property given in such exchange was subject.

[T.D. 7554, 43 FR 31921, July 24, 1978]

§ 1.84–1 Transfer of appreciated property to political organizations.

(a) *Transfer defined.* A transfer after May 7, 1974, of property to a political organization (as defined in section 527(e)(1), and including a newsletter fund to the extent provided under section 527(g)) is treated as a sale of the property to the political organization if the fair market value of the property exceeds its adjusted basis. The transferor is treated as having realized an amount equal to the fair market value of the property on the date of the transfer. For purposes of this section, a transfer is any assignment, conveyance, or delivery of property other than a bona fide sale for an adequate and full consideration in money or money's worth, whether the transfer is in trust or otherwise, whether the transfer is direct or indirect and whether the property is real or personal, tangible or intangible. Thus, for example, a sale at less than fair market value (other than an ordinary trade discount), or a receipt of property by a political organization under an agency agreement entitling the organization to sell the property and retain all or a portion of the proceeds of the sale, is a transfer within the meaning, of this section. The term ''transfer'' also includes an illegal contribution of property.

(b) *Amount realized.* A transferor to whom this section applies realizes an amount equal to the fair market value of the property on the date of the transfer. For purposes of this section, the definition of fair market value set forth in §1.170A–1(c) (2) and (3) is incorporated by reference.

(c) *Amount recognized.* A transferor to whom this section applies is treated as having sold the property to the political organization on the date of the transfer. Therefore, the rules of chapter 1 of subtitle A (relating to income tax) apply to the gain realized under this section as if this gain were an amount realized upon the sale of the property. These rules include those of section 55 and section 56 (relating to minimum tax for tax preference), section 306 (relating to disposition of certain stock), section 1201 (relating to the alternative tax on certain capital gains), section 1245 (relating to gain from dispositions of certain depreciable property), and section 1250 (relating to gain from dispositions of certain depreciable realty).

(d) *Holding period.* The holding period of property transferred to a political organization to which this section applies begins on the day after the date of acquisition of the property by the political organization.

[T.D. 7671, 45 FR 8003, Feb. 6, 1980]

§ 1.85–1 Unemployment compensation.

(a) *Introduction.* Section 85 prescribes rules relating to the inclusion in gross income of unemployment compensation (as defined in paragraph (b)(1) of this section) paid in taxable years beginning after December 31, 1978, pursuant to governmental programs. In general, these rules provide that unemployment compensation paid pursuant to governmental programs is includible in the gross income of a taxpayer if the taxpayer's modified adjusted gross income (as defined in paragraph (b)(2) of this section) exceeds a statutory base amount (as defined in paragraph (b)(3) of this section). If there is such an excess, however, the amount included in gross income is limited under paragraph (c)(1) of this section to the lesser of one-half of such excess or the amount of the unemployment compensation. If such taxpayer's modified adjusted gross income does not exceed the applicable statutory base amount, none of the unemployment compensation is included in the taxpayer's gross income.

(b) *Definitions*—(1) *Unemployment compensation*—(i) *General rule.* Except as provided in paragraph (b)(1)(iii) of this section, the term ''unemployment compensation'' means any amount received under a law of the United States, or of a State, which is in the nature of unemployment compensation. Thus, section 85 applies only to unemployment compensation paid pursuant to governmental programs and does not apply to amounts paid pursuant to private nongovernmental unemployment compensation plans (which are includible in income without regard to section 85). Generally, unemployment compensation programs are those designed to protect taxpayers against the loss of income caused by involuntary layoff. Ordinarily, unemployment compensation is paid in cash and on a periodic basis. The amount of the payments is usually computed in accordance with formula based on the taxpayer's length of prior employment and wages. Such payments, however, may be made in a lump sum or other than in cash or on some other basis.

(ii) *Disability and worker's compensation payments.* Amounts in the nature of unemployment compensation also include cash disability payments made pursuant to a governmental program as a substitute for case unemployment payments to an unemployed taxpayer who is ineligible for such payments solely because of the disability. Usually these disability payments are paid in the same weekly amount and for the same period as the unemployment compensation benefits to which the unemployed taxpayer otherwise would have been entitled. Amounts received under workmen's compensation acts as compensation for personal injuries or sickness are not amounts in the nature of unemployment compensation. See section 104(a)(1) relating to the exclusion from gross income of such amounts.

(iii) *Employee contributions to a governmental plan.* If a governmental unemployment compensation program is funded in part by an employee's contribution which is not deductible by the employee, an amount paid to such employee under the program is not to be considered unemployment compensation until an amount equal to the total nondeductible contributions paid by the employee to such program has been paid to such employee.

(iv) *Examples of governmental unemployment compensation programs.* Governmental unemployment compensation programs include (but are not limited to) programs established under:

(A) A State law approved by the Secretary of Labor pursuant to section 3304 of the Internal Revenue Code of 1954.

(B) Chapter 85 of title 5, United States Code, relating to unemployment compensation for Federal employees generally and for ex-servicemen.

(C) Trade Act of 1974, sections 231 and 232 (19 U.S.C. 2291 and 2292).

(D) Disaster Relief Act of 1974, section 407 (42 U.S.C. 5177).

(E) The Airline Deregulation Act of 1978 (49 U.S.C. 1552(b)).

(F) The Railroad Unemployment Insurance Act, section 2 (45 U.S.C. 352).

(2) *Modified adjusted gross income.* The term ''modified adjusted gross income'' means the sum of the following amounts:

(i) Adjusted gross income (as defined in section 62);

(ii) All disability payments of the type that are eligible for exclusion from gross income under section 105(d); and

(iii) All amounts of unemployment compensation (as defined in paragraph (b)(1) of this section).

(3) *Base amount.* The term ''base amount'' means—

(i) $25,000 in the case of a joint return under section 6013.

(ii) Zero in the case of a taxpayer who—

(A) Is married (within the meaning of section 143) at the close of the taxable year,

(B) Does not file a joint return for such taxable year, and

(C) Does not live apart (as defined in paragraph (b)(4) of this section) from his or her spouse at all times during the taxable year.

(iii) $20,000 in the case of all other taxpayers.

(4) *Living apart.* A taxpayer does not ''live apart'' from his or her spouse at all times during a taxable year if for any period during the taxable year the taxpayer is a member of the same household as such taxpayer's spouse. A taxpayer is a member of a household for any period, including temporary absences due to special circumstances, during which the household is the taxpayer's place of abode. A temporary absence due to special circumstances includes a nonpermanent absence caused by illness, education, business, vacation, or military service.

(c) *Limitations*—(1) *General rule.* If for a taxable year, a taxpayer's modified adjusted gross income does not exceed the applicable statutory base amount, no amount of unemployment compensation is included in gross income for the taxable year. If there is such an excess, the taxpayer includes in gross income for the taxable year the lesser of the following:

(i) One-half of the excess of the taxpayer's modified adjusted gross income over such taxpayer's base amount, or

(ii) The amount of unemployment compensation.

(2) *Exception for fraudulently received unemployment compensation.* If a taxpayer fraudulently receives unemployment compensation under any governmental unemployment compensation program, then the entire amount of such fraudulently received unemployment compensation must be included in the taxpayer's gross income for the

taxable year in which the benefits were received. Thus, the limitation in section 85 and in paragraph (c)(1) of this section, does not apply to such amounts.

(3) *Examples.* The application of this paragraph may be illustrated by the following examples:

Example 1. H and W are married taxpayers who for calendar year 1979 file a joint income tax return. During 1979 H receives $4,500 of disability income that is eligible for an exclusion under section 105(d). W works for part of 1979 and receives $20,000 as compensation and also receives $5,000 of unemployment compensation in 1979. Assume that H and W's adjusted gross income is $20,000. The modified adjusted gross income of H and W is $29,500 ($4,500 + $20,000 + $5,000). Since their modified adjusted gross income ($29,500) is greater than their base amount ($25,000), some of the unemployment compensation received by W must be included in their gross income on their 1979 joint income tax return. Under paragraph (c)(1) of this section, of the $5,000 which is unemployment compensation, the lesser of $2,250 (($29,500—$25,000)÷2) or $5,000 must be included in their gross income. Thus, $2,250 of the $5,000 received by W in 1979 is included in the gross income of H and W on their joint income tax return for 1979.

Example 2. Assume the same facts in example (1) except H received $5,000 of disability income that is eligible for an exclusion under section 105(d) and W receives $28,000 as compensation, and $4,000 which is unemployment compensation. Assume that H and W's adjusted gross income is $28,000. The modified adjusted gross income of H and W is $37,000 ($4,000 + $28,000 + $5,000). Since their modified adjusted gross income ($37,000) is greater than their base amount ($25,000), all of the unemployment compensation received by W must be included in their gross income on their 1979 joint income tax return. Under paragraph (c)(1) of this section, of the $4,000 which is unemployment compensation, the lesser of $6,000 (($37,000—$25,000)÷2) or $4,000 must be included in their gross income. Thus, all of the $4,000 unemployment compensation received by W is included in the gross income of H and W on their joint income tax return for 1979.

(d) *Cross reference.* See section 6050B, relating to the requirement that every person who makes payments of unemployment compensation aggregating $10 or more to any individual during any calendar year file an information return with the Internal Revenue Service.

[T.D. 7705, 45 FR 46069, July 9, 1980]

§ 1.88–1 Nuclear decommissioning costs.

(a) *In general.* Section 88 provides that the amount of nuclear decommissioning costs directly or indirectly charged to the customers of a taxpayer that is engaged in the furnishing or sale of electric energy generated by a nuclear power plant must be included in the gross income of such taxpayer in the same manner as amounts charged for electric energy. For this purpose, decommissioning costs directly or indirectly charged to the customers of a taxpayer include all decommissioning costs that consumers are liable to pay by reason of electric energy furnished by the taxpayer during the taxable year, whether payable to the taxpayer, a trust, State government, or other entity, and even though the taxpayer may not control the investment or current expenditure of the amount and the amount may not be paid to the taxpayer at the time decommissioning costs are incurred. However, decommissioning costs payable to a taxpayer holding a qualified leasehold interest (as described in paragraph (b)(2)(ii) of §1.468A–1) are included in the gross income of such taxpayer, and not in the gross income of the lessor.

(b) *Examples.* The following examples illustrate the application of the principles of paragraph (a) of this section:

Example 1. X corporation, an accrual method taxpayer engaged in the sale of electric energy generated by a nuclear power plant owned by X, is authorized by the public utility commission of State A to collect nuclear decommissioning costs from ratepayers residing in State A. With respect to the sale of electric energy, X includes in income amounts that have been billed to customers as well as estimated unbilled amounts that relate to energy provided by X after the previous billing but before the end of the taxable year (''accrued unbilled amounts''). The decommissioning costs are included in the monthly bills provided by X to its ratepayers and the entire amount billed is remitted directly to X. Under paragraph (a) of this section, the decommissioning costs must be included in the gross income of X in the same manner as amounts charged for electric energy (*i.e.,* by including in income decommissioning costs that relate to amounts billed as well as decommissioning costs that relate to accrued unbilled amounts). The same rule would apply if the decommissioning costs charged to ratepayers were separately billed and the amounts billed were remitted to State A to be held in trust for the purpose of decommissioning the nuclear power plant owned by X. In that case, X must include in gross income decommissioning costs that relate to amounts billed as well as decommissioning costs that relate to accrued unbilled amounts.

Example 2. Assume the same facts as in Example (1), except that X and M, a municipality located in State A, have entered into a life-of-unit contract pursuant to which (i) M is entitled to 20 percent of the electric energy generated by the nuclear power plant owned by X, and (ii) M is obligated to pay 20 percent of the plant operating costs, including decommissioning costs, incurred by X. Under paragraph (a) of this section, the decommissioning costs that relate to electric energy consumed or distributed by M during any taxable year must be included in the gross income of X for such taxable year. The result contained in this example would be the same if M was a State or an agency or instrumentality of a State or a political subdivision thereof.

(c) *Cross reference.* For special rules relating to the deduction for amounts paid to a nuclear decommissioning fund, see §1.468A–1 through §1.468A–5, 1.468A–7, 1.468A–8.

(d) *Effective date.* (1) Section 88 and this section apply to nuclear decommissioning costs directly or indirectly charged to the customers of a taxpayer on or after July 18, 1984, and with respect to taxable years ending on or after such date.

(2) If the amount of nuclear decommissioning costs directly or indirectly charged to the customers of a taxpayer before July 18, 1984, was includible in gross income in a different manner than amounts charged for electric energy, such amount must be included in gross income for the taxable year in which includible in gross income under the method of accounting of the taxpayer that was in effect when such amount was charged to customers.

[T.D. 8184, 53 FR 6804, Mar. 3, 1988]

ITEMS SPECIFICALLY EXCLUDED FROM GROSS INCOME

§ 1.101–1 Exclusion from gross income of proceeds of life insurance contracts payable by reason of death.

(a)(1) *In general.* Section 101(a)(1) states the general rule that the proceeds of life insurance policies, if paid by reason of the death of the insured, are excluded from the gross income of the recipient. Death benefit payments having the characteristics of life insurance proceeds payable by reason of death under contracts, such as workmen's compensation insurance contracts, endowment contracts, or accident and health insurance contracts, are covered by this provision. For provisions relating to death benefits paid by or on behalf of employers, see section 101(b) and §1.101–2. The exclusion from gross income allowed by section 101(a) applies whether payment is made to the estate of the insured or to any beneficiary (individual, corporation, or partnership) and whether it is made directly or in trust. The extent to which this exclusion applies in cases where life insurance policies have been transferred for a valuable consideration is stated in section 101(a)(2) and in paragraph (b) of this section. In cases where the proceeds of a life insurance policy, payable by reason of the death of the insured, are paid other than in a single sum at the time of such death, the amounts to be excluded from gross income may be affected by the provisions of section 101 (c) (relating to amounts held under agreements to pay interest) or section 101(d) (relating to amounts payable at a date later than death). See §§1.101–3 and 1.101–4. However, neither section 101(c) nor section 101(d) applies to a single sum payment which does not exceed the amount payable at the time of death even though such amount is actually paid at a date later than death.

(2) *Cross references.* For rules governing the taxability of insurance proceeds constituting benefits payable on the death of an employee—

(i) Under pension, profit-sharing, or stock bonus plans described in section 401(a) and exempt from tax under section 501(a), or under annuity plans described in section 403(a), see section 72 (m)(3) and paragraph (c) of §1.72–16;

(ii) Under annuity contracts to which §1.403(b)–3 applies, see §1.403(b)–7; or

(iii) Under eligible State deferred compensation plans described in section 457(b), see paragraph (c) of §1.457–1.

For the definition of a life insurance company, see section 801.

(b) *Transfers of life insurance policies.* (1) In the case of a transfer, by assignment or otherwise, of a life insurance policy or any interest therein for a valuable consideration, the amount of the proceeds attributable to such policy or interest which is excludable from the transferee's gross income is generally limited to the sum of (i) the actual value of the consideration for such transfer, and (ii) the premiums and other amounts subsequently paid by the transferee (see section 101(a)(2) and example (1) of subparagraph (5) of this paragraph). However, this limitation on the amount excludable from the transferee's gross income does not apply (except in certain special cases involving a series of transfers), where the basis of the policy or interest transferred, for the purpose of determining gain or loss with respect to the transferee, is determinable, in whole or in part, by reference to the basis of such policy or interest in the hands of the transferor (see section 101(a)(2)(A) and examples (2) and (4) of subparagraph (5) of this paragraph). Neither does the limitation apply where the policy or interest therein is transferred to the insured, to a partner of the insured, to a partnership in which the insured is a partner, or to a corporation in which the insured is a shareholder or officer (see section 101(a)(2)(B)). For rules relating to gratuitous transfers, see subparagraph (2) of this paragraph. For special rules with respect to certain cases where a series of transfers is involved, see subparagraph (3) of this paragraph.

(2) In the case of a gratuitous transfer, by assignment or otherwise, of a life insurance policy or any interest therein, as a general rule the amount of the proceeds attributable to such policy or interest which is excludable from the transferee's gross income under section 101(a) is limited to the sum of (i) the amount which would have been excludable by the transferor (in accordance with this section) if no such transfer had taken place, and (ii) any premiums and other amounts subsequently paid by the transferee. See example (6) of subparagraph (5) of this paragraph. However, where the gratuitous transfer in question is made by or to the insured, a partner of the insured, a partnership in which the insured is a partner, or a corporation in which the insured is a shareholder or officer, the entire amount of the proceeds attributable to the policy or interest transferred shall be excludable from the transferee's gross income (see section 101(a)(2)(B) and example (7) of subparagraph (5) of this paragraph).

(3) In the case of a series of transfers, if the last transfer of a life insurance policy or an interest therein is for a valuable consideration—

(i) The general rule is that the final transferee shall exclude from gross income, with respect to the proceeds of such policy or interest therein, only the sum of—

(*a*) The actual value of the consideration paid by him, and

(*b*) The premiums and other amounts subsequently paid by him;

(ii) If the final transfer is to the insured, to a partner of the insured, to a partnership in which the insured is a partner, or to a corporation in which the insured is a shareholder or officer, the final transferee shall exclude the entire amount of the proceeds from gross income;

(iii) Except where subdivision (ii) of this subparagraph applies, if the basis of the policy or interest transferred, for the purpose of determining gain or loss with respect to the final transferee, is determinable, in whole or in part, by reference to the basis of such policy or interest therein in the hands of the transferor, the amount of the proceeds which is excludable by the final transferee is limited to the sum of—

(*a*) The amount which would have been excludable by his transferor if no such transfer had taken place, and

(*b*) Any premiums and other amounts subsequently paid by the final transferee himself.

(4) For the purposes of section 101(a)(2) and subparagraphs (1) and (3) of this paragraph, a "transfer for a valuable consideration" is any absolute transfer for value of a right to receive all or a part of the proceeds of a life insurance policy. Thus, the creation, for value, of an enforceable contractual right to receive all or a part of the proceeds of a policy may constitute a transfer for a valuable consideration of

the policy or an interest therein. On the other hand, the pledging or assignment of a policy as collateral security is not a transfer for a valuable consideration of such policy or an interest therein, and section 101 is inapplicable to any amounts received by the pledgee or assignee.

(5) The application of this paragraph may be illustrated by the following examples:

Example 1. A pays premiums of $500 for an insurance policy in the face amount of $1,000 upon the life of B, and subsequently transfers the policy to C for $600. C receives the proceeds of $1,000 upon the death of B. The amount which C can exclude from his gross income is limited to $600 plus any premiums paid by C subsequent to the transfer.

Example 2. The X Corporation purchases for a single premium of $500 an insurance policy in the face amount of $1,000 upon the life of A, one of its employees, naming the X Corporation as beneficiary. The X Corporation transfers the policy to the Y Corporation in a tax-free reorganization (the policy having a basis for determining gain or loss in the hands of the Y Corporation determined by reference to its basis in the hands of the X Corporation). The Y Corporation receives the proceeds of $1,000 upon the death of A. The entire $1,000 is to be excluded from the gross income of the Y Corporation.

Example 3. The facts are the same as in example (2) except that, prior to the death of A, the Y Corporation transfers the policy to the Z Corporation for $600. The Z Corporation receives the proceeds of $1,000 upon the death of A. The amount which the Z Corporation can exclude from its gross income is limited to $600 plus any premiums paid by the Z Corporation subsequent to the transfer of the policy to it.

Example 4. The facts are the same as in example (3) except that, prior to the death of A, the Z Corporation transfers the policy to the M Corporation in a tax-free reorganization (the policy having a basis for determining gain or loss in the hands of the M Corporation determined by reference to its basis in the hands of the Z Corporation). The M Corporation receives the proceeds of $1,000 upon the death of A. The amount which the M Corporation can exclude from its gross income is limited to $600 plus any premiums paid by the Z Corporation and the M Corporation subsequent to the transfer of the policy to the Z Corporation.

Example 5. The facts are the same as in example (3) except that, prior to the death of A, the Z Corporation transfers the policy to the N Corporation, in which A is a shareholder. The N Corporation receives the proceeds of $1,000 upon the death of A. The entire $1,000 is to be excluded from the gross income of the N Corporation.

Example 6. A pays premiums of $500 for an insurance policy in the face amount of $1,000 upon his own life, and subsequently transfers the policy to his wife B for $600. B later transfers the policy without consideration to C, who is the son of A and B. C receives the proceeds of $1,000 upon the death of A. The amount which C can exclude from his gross income is limited to $600 plus any premiums paid by B and C subsequent to the transfer of the policy to B.

Example 7. The facts are the same as in example (6) except that, prior to the death of A, C transfers the policy without consideration to A, the insured. A's estate receives the proceeds of $1,000 upon the death of A. The entire $1,000 is to be excluded from the gross income of A's estate.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6783, 29 FR 18356, Dec. 24, 1964; T.D. 7836, 47 FR 42337, Sept. 27, 1982; T.D. 9340, 72 FR 41159, July 26, 2007]

§ 1.101–2 Employees' death benefits.

(a) *In general.* (1) Section 101(b) states the general rule that amounts up to $5,000 which are paid to the beneficiaries or the estate of an employee, or former employee, by or on behalf of an employer and by reason of the death of the employee shall be excluded from the gross income of the recipient. This exclusion from gross income applies whether payment is made to the estate of the employee or to any beneficiary (individual, corporation, or partnership), whether it is made directly or in trust, and whether or not it is made pursuant to a contractual obligation of the employer. The exclusion applies whether payment is made in a single sum or otherwise, subject to the provisions of section 101 (c), relating to amounts held under an agreement to pay interest thereon (see § 1.101–3). The exclusion from gross income also applies to any amount not actually paid which is otherwise taxable to a beneficiary of an employee because it was made available as a distribution from an employee's trust.

(2) The exclusion does not apply to amounts constituting income payable to the employee during his life as compensation for his services, such as bonuses or payments for unused leave or uncollected salary, nor to certain other

amounts with respect to which the deceased employee possessed, immediately before his death, a nonforfeitable right to receive the amounts while living (see section 101(b)(2)(B) and paragraph (d) of this section). Further, the exclusion does not apply to amounts received as an annuity under a joint and survivor annuity obligation where the employee was the primary annuitant and the annuity starting date occurred before the death of the employee (see section 101 (b)(2)(C) and paragraph (e)(1)(ii) of this section). In the case of amounts received by a beneficiary as an annuity (but not as a survivor under a joint and survivor annuity with respect to which the employee was the primary annuitant), the exclusion is applied indirectly by means of the provisions of section 72 and the regulations thereunder (see section 101(b)(2)(D) and paragraph (e)(1) (iii) and (iv) of this section). Thus, for example, the exclusion applies to amounts which are received by a survivor of an employee retired on disability under the provisions of the Civil Service retirement law (5 U.S.C. 8301 or any former corresponding provisions of law) or the Retired Serviceman's Family Protection Plan or Survivor Benefit Plan (10 U.S.C. 1431 *et seq.*), provided such employee dies before attaining mandatory retirement age (as defined in §1.105–4 (a)(3)(i)(B)).

(3) The total amount excludable with respect to any employee may not exceed $5,000, regardless of the number of employers or the number of beneficiaries. For allocation of the exclusion among beneficiaries, see paragraph (c) of this section. For rules governing the taxability of benefits payable on the death of an employee under pension, profitsharing, or stock bonus plans described in section 401(a) and exempt under section 501(a), under annuity plans described in section 403(a), or under annuity contracts to which paragraph (a) or (b) of §1.403(b)–1 applies, see sections 72(m)(3), 402(a), and 403 and the regulations thereunder.

(b) *Payments under certain employee benefit plans*—(1) *In general.* Where a payment is made by reason of the death of an employee by an employer-provided welfare fund or a trust, including a stock bonus, pension, or profitsharing trust described in section 401 (a), or by an insurance company (if such payment does not constitute ''life insurance'' within the purview of section 101(a), the payment shall be considered to have been made by or on behalf of the employer to the extent that it exceeds amounts contributed by, or deemed contributed by, the deceased employee.

(2) *Cross references.* For provisions governing the taxability of distributions payable on the death of an employee participant—

(i) Under a trust described in section 401(a) and exempt from tax under section 501(a), see paragraph (c) of §1.72–16 and paragraph (a)(5) of §1.402 (a)–1;

(ii) Under an annuity plan described in section 403(a), see paragraph (c) of §1.72–16 and paragraph (c) of §1.403 (a)–1;

(iii) Under annuity contracts to which paragraph (a) or (b) of §1.403 (b)–1 applies, see paragraph (c) (2) and (3) of §1.403(b)–1;

(iv) Under eligible State deferred compensation plans described in section 457 (b), see paragraph (c) of §1.457–1.

(c) *Allocation of the exclusion.* (1) Where the aggregate payments by or on behalf of an employer or employers as death benefits to the beneficiaries or the estate of a deceased employee exceed $5,000, the $5,000 exclusion shall be apportioned among them in the same proportion as the amount received by or the present value of the amount payable to each bears to the total death benefits paid or payable by or on behalf of the employer or employers.

(2) The application of the rule in subparagraph (1) of this paragraph may be illustrated by the following example:

Example. The M Corporation, the employer of A, a deceased employee who died November 30, 1954, makes payments in 1955 to the beneficiaries of A as follows: $5,000 to W, A's widow, $2,000 to B, the son of A, and $3,000 to C, the daughter of A. No other amounts are paid by any other employer of A to his estate or beneficiaries. By application of the apportionment rule stated above, W, the widow, will exclude $2,500 ($5,000/$10,000, or one-half, of $5,000); B, the son, will exclude $1,000 ($2,000/$10,000, or one-fifth, of $5,000); and C, the daughter, will exclude $1,500 ($3,000/$10,000, or three-tenths, of $5,000).

(d) *Nonforfeitable rights.* (1) Except as provided in subparagraphs (3) and (4) of this paragraph, the exclusion provided by section 101(b) does not apply to amounts with respect to which the deceased employee possessed, immediately before his death, a nonforfeitable right to receive the amounts while living. Section 101(b)(2)(B). For the purpose of section 101(b) and this paragraph, an employee shall be considered to have had a nonforfeitable right with respect to—

(i) Any amount to which he would have been entitled—

(*a*) If he had made an appropriate election or demand, or

(*b*) Upon termination of his employment (see examples (5) and (6) of subparagraph (2) of this paragraph); or

(ii) The present value (immediately before his death) of—

(*a*) Amounts payable as an annuity (as defined in paragraph (b) of §1.72–2, whether immediate or deferred) by or on behalf of the employer (see example (1) of subparagraph (2) of this paragraph), or

(*b*) Amounts which would have been so payable if the employee had terminated his employment and continued to live;

or

(iii) Any amount to the extent it is paid in lieu of amounts described in either subdivision (i) or (ii) of this subparagraph. See examples (2), (3), and (4) of subparagraph (2) of this paragraph.

For purposes of subdivision (iii) of this subparagraph, any amount paid in discharge of an obligation which arose solely because of the existence of a particular fact or circumstance subsequent to the employee's death shall not be considered an amount paid in lieu of amounts described in subdivision (i) or (ii) of this subparagraph. Subdivision (iii) of this subparagraph shall apply, however, to the extent indicated therein, to amounts payable without regard to any such contingency (to the extent that such amounts are equal to or less than those described in subdivision (i) and (ii) of this subparagraph which are not paid). See paragraph (e)(1)(iii)(*b*) of this section for rules with respect to finding the present value of an annuity immediately before the employee's death.

(2) The application of paragraph (d)(1) of this section may be illustrated by the following examples, in which it is assumed that the plans are not ''qualified plans'' and that no employer is an organization referred to in section 170(b)(1)(A) (ii) or (vi) or a religious organization (other than a trust) which is exempt from tax under section 501(a):

Example 1. A, who was a participant under the X Company pension plan, retired on December 31, 1953. He had made no contributions to the plan. Upon his retirement, he became entitled to monthly payments of $100 payable for life, or 120 months certain. A died on October 31, 1954, having received 10 monthly payments of $100 each. After his death, the monthly payments became payable to his estate for the remaining 110 months certain. No exclusion from gross income is allowed to A's estate (or any beneficiary who receives the right to such payments from the estate), since the employee's right to the monthly payments was nonforfeitable at the date of his death. It will be noted that in this example it is unnecessary to consider the present value of the annuity to A just before his death since the payments to be made include only those certain to be made in any event under the plan whether or not A continued to live.

Example 2. C, a participant under the Y Company pension plan, died on December 15, 1954, while actively in the employment of the company, survived by a widow and minor children. Because of his years of service, he would have been entitled to an annuity for life, his own contributions to the plan and interest thereon being guaranteed, if he had retired or terminated his employment at a time immediately before his death. The plan further provides that—(a) if, but only if, an employee is survived by a widow and minor children, his widow is to receive an annuity for her life without regard to whether or not the employee had begun his annuity; (b) any payments made with respect to his widow's annuity are to reduce the guaranteed amount to an equal extent; and (c) if the employee is not so survived, the guaranteed amount is payable to his beneficiary or estate, but no amount is payable to anyone with respect to what would have been the widow's annuity. In view of these provisions, that portion of the present value of the annuity payable to C's widow which exceeds the guaranteed amount shall be considered paid neither as an amount, nor in lieu of an amount, which C had a nonforfeitable right to receive while living. The reason for this result is that the payment of such excess is contingent upon C's being survived by a widow and minor children, a circumstance existing subsequent to his death. Conversely, to the extent that the present value of the annuity payable to C's widow does not exceed the guaranteed amount, annuity payments attributable to such present value shall be considered paid in lieu of an amount which C had a nonforfeitable right to receive while living.

Example 3. D, a participant under the Y Company pension plan, died on January 1, 1955, while actively in the employment of the company. The Y Company plan provides that where an employee dies in service, the present value of the accumulated credits which he could have obtained at that time if he had instead separated from the service shall be paid in a single sum to his surviving spouse or to his estate if no widow survives him. The present value of D's accumulated credits, at the time of his death, was $10,000. However, the plan also provides that a surviving spouse may elect to take, in lieu of a single sum, an annuity the present value of which exceeds such sum by $2,500. D's widow elects to receive an annuity (the present value of which is $12,500). Therefore, $2,500 is an amount to which the exclusion of section 101(b) and this section shall apply.

Example 4. A, an employee of the X Company, continues to work after reaching the normal retirement age of 60 years, although he could have retired at that age and obtained an annuity of $3,000 per year for his life. A is not entitled to any part of the annuity while he is employed and receiving compensation. A dies at the age of 67 while still in active employment. Since he had passed normal retirement age, his additional years of service did not entitle him to a larger annuity at age 67 than that which he could have obtained at age 60. However, the plan of the X Company provides that in the event of an employee's death prior to separation from the service, his widow is to be paid an annuity for her life in the same amount per year as that which the employee could have obtained if he had instead retired; but if no widow survives him, the present value of the annuity which the employee could have obtained at a time just before his death is to be paid to a named beneficiary or the estate of the employee. Assuming that the present value of the annuity to A's widow, whose age is 61, is $36,000 and the present value of the annuity which would have been payable to A at age 67 if he had then retired is $23,500, the present value of the widow's annuity, to the extent of $23,500, is an amount which is payable in lieu of amounts which the employee had a nonforfeitable right to receive while living because it does not exceed the value of his nonforfeitable rights and is not otherwise paid. On the other hand, the $12,500 excess of the value of the widow's annuity ($36,000) over the value of the employee's annuity ($23,500) is an amount to which section 101(b) applies since the employee had no right to any part of it. If no other death benefits are payable, a $5,000 exclusion is available (see section 101(b)(2)(D) and paragraph (e) of this section).

Example 5. The trustee of the X Corporation noncontributory profit-sharing plan is required under the provisions of the plan to pay to the beneficiary of B, an employee of the X Corporation who died on July 1, 1955, the benefit due on account of the death of B. The provisions of the profit-sharing plan give each participating employee in case of termination of employment a 10-percent vested interest in the amount accumulated in his account for each year of participation in the plan. In case of death, the entire credit in the participant's account is to be paid to his beneficiary. At the time of B's death, he had been a participant for three years and the accumulation in his account was $8,000. After his death this amount is paid to his beneficiary. At the time of B's death, the amount distributable to him on account of termination of employment would have been $2,400 (30 percent of $8,000). The difference of $5,600 ($8,000 minus $2,400), payable to the beneficiary of B, is an amount payable solely by reason of B's death. Accordingly, $5,000 of the $5,600 may be excluded from the gross income of the beneficiary receiving such payment (assuming no other death benefits are involved). However, if it is assumed that the facts are the same as above, except that at the time of his death B has been a participant for 6 years, the amount distributable to him on account of termination of employment would have been $4,800 (60 percent of $8,000). The difference of $3,200 ($8,000 minus $4,800), payable to B's beneficiary, is an amount payable solely by reason of B's death. Accordingly, only $3,200 may be excluded from the gross income of the beneficiary receiving such payment (assuming no other death benefits are involved).

Example 6. The X Corporation instituted a trust, forming part of a pension plan, for its employees, the cost thereof being borne entirely by the corporation. The plan provides, in part, that after 10 or more years of service and attaining the age of 55, an employee can elect to retire and receive benefits before the normal retirement date contingent upon the employer's approval. If he retires without the employer's consent, or voluntarily leaves the company, no benefits are or will be payable. The plan further provides that if the employee is involuntarily separated or dies before retirement, he or his beneficiary, respectively, will receive a percentage of the reserve provided for the employee in the trust fund on the following basis: 10 to 15 years of service, 25 percent; 15 to 20 years of service, 50 percent; 20 to 25 years of service, 75 percent; 25 or more years of service, 100 percent. A, an employee of the X Corporation for 17 years, died at the age of 56 while in the employ of the corporation. At the time of his death, $15,000 was the reserve provided for him in the trust. His beneficiary receives $7,500, an amount equal to 50 percent of the reserve provided for A's retirement; accordingly, $5,000 of the $7,500 may be excluded from the gross income of the beneficiary receiving such payment (assuming no other death benefits are involved) since A, prior to his death, had only a forfeitable right to receive $7,500.

(3)(i) Notwithstanding the rule stated in subparagraph (1) of this paragraph and illustrated in subparagraph (2) of this paragraph, the exclusion from gross income provided by section 101(b) applies to the receipt of certain amounts, paid under ''qualified'' plans, with respect to which the deceased employee possessed, immediately before his death, a nonforfeitable right to receive the amounts while living (see section 101(b)(2)(B) (i) and (ii)). The payments to which this exclusion applies are—

(*a*) ''Total distributions payable'' by a stock bonus, pension, or profit-sharing trust described in section 401(a) which is exempt from tax under section 501(a), and

(*b*) ''Total amounts'' paid under an annuity contract under a plan described in section 403(a), provided such distributions or amounts are paid in full within one taxable year of the distributee (see example (3) of subdivision (ii) of this subparagraph). For the purposes of applying section 101(b), ''Total distributions payable'' means the balance to the credit of an employee which becomes payable to a distributee on account of the employee's death, either before or after separation from the service (see section 402(a)(3)(C), the regulations thereunder, and examples (2) and (4) of subdivision (ii) of this subparagraph); and ''total amounts'' means the balance to the credit of an employee which becomes payable to the payee by reason of the employee's death, either before or after separation from the service (see section 403(a)(2)(B), the regulations thereunder, and example (1) of subdivision (ii) of this subparagraph). See subparagraph (4) of this paragraph relating to the exclusion of amounts which are received under annuity contracts purchased by certain exempt organizations and with respect to which the deceased employee possessed, immediately before his death, a nonforfeitable right to receive the amounts while living.

(ii) The application of the provisions of subdivision (i) of this subparagraph may be illustrated by the following examples:

Example 1. The widow of an employee elects, under a noncontributory ''qualified'' plan, to receive in a lump sum the present value of the annuity which C, the deceased employee, could have obtained at a time just before his death if he had retired at that time. Such present value is $6,000. Of this amount, $5,000 is excludable from the widow's gross income despite the fact that C had a nonforfeitable right to the amount in lieu of which the payment is made, since such payment is an amount to which subdivision (i) of this subparagraph applies (assuming no other death benefits are involved).

Example 2. The trustee of the X Corporation noncontributory, ''qualified'', profit-sharing plan is required under the provisions of the plan to pay to the beneficiary of B, an employee of the X Corporation who died on July 1, 1955, the benefit due on account of the death of B. The provisions of the profit-sharing plan give each participating employee, in case of termination of employment, a 10 percent vested interest in the amount accumulated in his account for each year of participation in the plan, but, in case of death, the entire credit to the participant's account is to be paid to his beneficiary. At the time of B's death, he had been a participant for five years. The accumulation in his account was $8,000, and the amount which would have been distributable to him in the event of termination of employment was $4,000 (50 percent of $8,000). After his death, $8,000 is paid to his beneficiary in a lump sum. (It may be noted that these are the same facts as in example (5) of subparagraph (2) of this paragraph except that the employee has been a participant for five years instead of three and the plan is a ''qualified'' plan.) It is immaterial that the employee had a nonforfeitable right to $4,000, because the payment of the $8,000 to the beneficiary is the payment of the ''total distributions payable'' within one taxable year of the distributee to which subdivision (i) of this subparagraph applies. Assuming no other death benefits are involved, the beneficiary may exclude $5,000 of the $8,000 payment from gross income.

Example 3. The facts are the same as in example (2) except that the beneficiary is entitled to receive only the $4,000 to which the employee had a nonforfeitable right and elects, 30 days after B's death, to receive it over a period of ten years. Since the ''total distributions payable'' are not paid within one taxable year of the distributee, no exclusion from gross income is allowable with respect to the $4,000.

Example 4. The X Corporation instituted a trust, forming part of a ''qualified'' profit-sharing plan for its employees, the cost thereof being borne entirely by the corporation. The plan provides, in part, that if, after 10 or more years of service, an employee leaves the employ of the corporation, either voluntarily or involuntarily, before retirement, a percentage of the reserve provided for the employee in the trust fund will be paid to the employee as follows: 10 to 15 years of service, 25 percent; 15 to 20 years of service, 50 percent; 20 to 25 years of service, 75 percent; 25 or more years of service, 100 percent. The plan further provides that if an employee dies before reaching retirement age, his beneficiary will receive a percentage of the reserve provided for the employee in the trust fund, on the same basis as shown in the preceding sentence. A, an employee of the X Corporation for 17 years, died before attaining retirement age while in the employ of the corporation. At the time of his death, $15,000 was the reserve provided for him in the trust fund. His beneficiary receives $7,500 in a lump sum, an amount equal to 50 percent of the reserve provided for A's retirement. The beneficiary may exclude from gross income (assuming no other death benefits are involved) $5,000 of the $7,500, since the latter amount constitutes ''total distributions payable'' paid within one taxable year of the distributee, to which subdivision (i) of this subparagraph applies.

(4)(i) Notwithstanding the rule stated in subparagraph (1) of this paragraph and illustrated in subparagraph (2) of this paragraph, the exclusion from gross income under section 101(b) also applies (but only to the extent provided in the next sentence) to amounts with respect to which the deceased employee possessed, immediately before his death, a nonforfeitable right to receive the amounts while living—

(*a*) If such amounts are paid under an annuity contract purchased by an employer which is an organization referred to in section 170(b)(1)(A) (ii) or (vi) or which is a religious organization (other than a trust) and which is exempt from tax under section 501(a).

(*b*) If such amounts are paid as part of a ''total payment'' with respect to the deceased employee; and

(*c*) If such ''total payment'' is paid in full within one taxable year of the payee beginning after December 31, 1957.

However, the amount that is excludable under section 101(b) by reason of this subparagraph shall not exceed an amount which bears the same ratio to the amount which would be includible in the payee's gross income if it were not for the second sentence of section 101(b)(2)(B) and this subparagraph, as the amount contributed by the employer for the annuity contract that was excludable from the deceased employee's gross income under paragraph (b) of § 1.403(b)–1 bears to the total amount contributed by the employer for the annuity contract. See section 101(b)(2)(B)(iii). For purposes of this subparagraph, a ''total payment'' means a payment of the balance to the credit of an employee with respect to all ''section 403(b) annuities'' purchased by the employer which becomes payable to the payee by reason of the employee's death, either before or after separation from the service. An annuity contract will be regarded as a ''section 403(b) annuity'' if any amount contributed (or considered as contributed under paragraph (b)(2) of § 1.403(b)–1) by the employer for such contract was excludable from the employee's gross income under paragraph (b) of § 1.403(b)–1. Under this definition, therefore, an annuity contract may be regarded as a ''section 403(b) annuity'' even though some of the employer's contributions for the contract were not excludable from the employee's gross income under paragraph (b) of § 1.403(b)–1 because, for example, the employer was not an exempt organization when such contributions were paid. For purposes of computing the ratio described in this subdivision in such a case, the total amount contributed by the employer for the contract includes the amounts contributed by the employer when it was not an exempt organization.

(ii) This subparagraph does not relate to any amounts with respect to which the deceased employee did not possess, immediately before his death, a nonforfeitable right to receive the amounts while living. Such amounts are excludable under the provisions of section 101(b) without regard to section 101(b)(2)(B) and this subparagraph. Thus, if a ''total payment'' received by a beneficiary of a deceased employee under an annuity contract purchased by an organization described in subdivision (i)(*a*) of this subparagraph consists both of amounts with respect to which the deceased employee possessed, immediately before his death, a nonforfeitable right to receive the amounts while living and of amounts with respect to which the deceased employee did not possess such a nonforfeitable right, only those amounts with respect to which the deceased employee possessed such a nonforfeitable right are amounts to which this subparagraph applies. Therefore, for purposes of computing the ratio described in subdivision (i) of this subparagraph in such a case, there shall be taken into account only the employer contributions attributable to those amounts with respect to which the deceased employee possessed, immediately before his death, a nonforfeitable right to receive the amounts while living. See example (3) of subdivision (v) of this subparagraph. In no event, however, may the total amount excludable under section 101(b) with respect to any employee exceed $5,000 (See paragraph (a)(3) of this section).

(iii)(*a*) In any case when the deceased employee's interest in the employer's contributions for an annuity contract was forfeitable at the time the contributions were made but, at a subsequent date prior to his death, such interest changed to a nonforfeitable interest, then, for purposes of computing the ratio described in subdivision (i) of this subparagraph, the cash surrender value of the contract on the date of the change (except to the extent attributable to employee contributions) shall be considered as the amount contributed by the employer for the contract. In such a case, if only part of the deceased employee's interest in the annuity changed from a forfeitable to a nonforfeitable interest, then only the corresponding part of the cash surrender value of the contract on the date of the change shall be considered as the amount contributed by the employer for the contract. Similarly, if part of the deceased employee's interest in the annuity contract changed from a forfeitable to a nonforfeitable interest on a particular date and another part of his interest so changed on a subsequent date, it is necessary, in order to compute the amount contributed by the employer for the contract, to first determine (under the rules in the preceding sentence) the amount that is considered as the amount contributed by the employer with respect to each change, and then to add these amounts together. For purposes of computing the ratio described in subdivision (i) of this subparagraph in all of the above cases, the amount contributed by the employer that was excludable from the employee's gross income under paragraph (b) of §1.403(b)–1 is that amount which, under paragraph (b)(2) of such section, was considered as employer contributions and which, under such paragraph (b) of §1.403(b)–1, was excludable from the deceased employee's gross income for the taxable year in which the change occurred.

(*b*) This subdivision (iii) may be illustrated by the following examples:

Example 1. X Organization contributed $4,000 toward the purchase of an annuity contract for A, an employee who died in 1970. At the time they were made, A's interest in such contributions was forfeitable. A made no contributions toward the purchase of the annuity contract. On January 1, 1960, A's entire interest in the annuity contract changed to a nonforfeitable interest. At the time of such change, the cash surrender value of the contract was $5,000. For purposes of the ratio described in subdivision (i) of this subparagraph, the total amount contributed by X Organization for the annuity contract is $5,000. If any part of such $5,000 was excludable under paragraph (b) of §1.403(b)–1 from A's gross income for his taxable year in which the change occurred, the amount so excludable shall be considered as the amount contributed for the contract by the employer that was excludable from the employee's gross income under paragraph (b) of §1.403(b)–1.

Example 2. Assume the same facts as in example (1) except that only one-half of A's interest in the annuity contract changed to a nonforfeitable interest on January 1, 1960, and that no other part of his interest so changed during his lifetime. For purposes of the ratio described in subdivision (i) of this subparagraph, the total amount contributed by X Organization for the annuity contract is $2,500 (½ of the cash surrender value of the annuity contract on the date of the change). To the extent such $2,500 was, under paragraph (b) of §1.403(b)–1, excludable from A's gross income for the taxable year of the change, it is considered as the amount contributed by the employer that was excludable under paragraph (b) of §1.403(b)–1.

Example 3. Assume the same facts as in example (1) except that one-half of A's interest in the annuity contract changed to a nonforfeitable interest on January 1, 1960, and the other half of his interest changed to a nonforfeitable interest on January 1, 1965. On January 1, 1965, the cash surrender value of the annuity contract was $6,000. For purposes of the ratio described in subdivision (i) of this subparagraph, the total amount contributed by X organization for the annuity contract is $5,500 (*i.e.*, ½×$5,000 plus ½×$6,000). The amount contributed by the employer that was excludable from A's gross income under paragraph (b) of §1.403(b)–1 is an amount equal to the sum of the amount that was, under such paragraph, excludable from A's gross income for the taxable year during which the first change occurred and the amount that was, under such paragraph, excludable from A's gross income for the taxable year in which the second change occurred.

(iv) For purposes of this subparagraph, an annuity contract will be considered to have been purchased by an employer which is an organization referred to in section 170(b)(1)(A) (ii) or (vi) or which is a religious organization (other than a trust) and which is exempt from tax under section 501(a), if any of the contributions paid toward the purchase price of such contract by the employer were paid at a time when the employer was such an organization. Thus an annuity contract may be regarded as purchased by such an organization even though part of the organization's contributions for such annuity contract were paid at a time when the organization was not such an exempt organization.

(v) The application of this subparagraph may be illustrated by the following examples:

Example 1. The widow of A, a deceased employee, elects, under an annuity contract purchased for A by X Organization, to receive in a lump sum the present value of such annuity contract as of the date of A's death. Such present value is $6,000 and is received by the widow in a taxable year beginning after December 31, 1957. X Organization contributed $3,000 toward the purchase of the annuity contract and A contributed $2,000 toward such purchase. A's interest in X Organization's contributions was nonforfeitable at the time such contributions were made. Thus, just before his death, A's entire interest in the annuity contract was a nonforfeitable interest and, if he had retired at that time, he could have received the present value of $6,000. The whole amount of the $3,000 contributed by X Organization for the annuity contract was excludable from A's gross income under paragraph (b) of §1.403(b)–1. This annuity contract was the only annuity contract purchased by X Organization for A and was not purchased as part of a qualified plan. However, all the contributions paid by X Organization were paid at a time when X Organization was an organization referred to in section 170(b)(1)(A)(ii) and exempt from tax under section 501(a). The amount that A's widow may exclude from gross income (assuming no other death benefits) is computed in the following manner:

(*a*) Amount includible in gross income without regard to second sentence of section 101(b)(2)(B) ($6,000 minus $2,000 contributed for contract by A)	$4,000
(*b*) Total employer contributions for the contract	$3,000
(*c*) Amount of employer contributions for the contract that was excludable under paragraph (b) of § 1.403(b)–1	$3,000
(*d*) Percent of total employer contributions for the contract that were excludable under paragraph (b) of § 1.403(b)–1 ((*c*) ÷ (*b*))	100%
(*e*) Amount to which section 101(b) exclusion applies ((*d*) × (*a*))	$4,000

Example 2. The facts are the same as in example (1) except that only $2,000 of X Organization's contributions for the annuity contract was excludable from A's gross income under paragraph (b) of §1.403(b)–1 and that the remaining $1,000 was includible in A's gross income for the taxable years during which such amounts were contributed by X Organization. The amount that A's widow may exclude from gross income (assuming no other death benefits) is computed in the following manner:

(*a*) Amount includible in gross income without regard to second sentence of section 101(b)(2)(B) ($6,000 minus $2,000 contributed for contract by A and $1,000 of X Organization's contributions includible in A's gross income)	$3,000
(*b*) Total employer contributions for the contract	$3,000
(*c*) Amount of employer contributions for the contract that was excludable under paragraph (b) of § 1.403(b)–1	$2,000
(*d*) Percent of total employer contributions for the contract that were excludable under paragraph (b) of § 1.403(b)–1 ((*c*) ÷ (*b*))	67%
(*e*) Amount to which section 101(b) exclusion applies ((*d*) × (*a*))	$2,000

Example 3. The widow of B, a deceased employee, elects, under an annuity contract purchased for B by Y Organization, to receive in a lump sum the present value of such annuity contract as of the date of B's death. Such present value is $6,000 and is received by the widow in a taxable year beginning after December 31, 1957. Y Organization contributed $4,000 toward the purchase of the contract; whereas B made no contributions toward the purchase of the contract. This annuity contract was the only annuity contract purchased by Y Organization for B and was not purchased as part of a ''qualified'' plan. However, all the contributions paid by

Y Organization were paid at a time when it was an organization referred to in section 170(b)(1)(A)(ii) and exempt from tax under section 501(a). B's interest in Y Organization's contributions was, at the time they were paid, forfeitable. However, prior to his death, one-half of B's interest in the annuity contract changed from a forfeitable to a nonforfeitable interest. Therefore, just before his death, B could have obtained $3,000 under the annuity contract if he had retired at that time. On the date of the change, the cash surrender value of the annuity contract was $5,000. As a result of the change, $1,500 was, under paragraph (b) of §1.403(b)–1, excludable from B's gross income, and $600 was includible in his gross income for the taxable year in which the change occurred. Part of the value of the annuity contract on the date of the change was attributable to contributions made by Y Organization prior to January 1, 1958, and, consequently, was neither excludable from B's gross income under paragraph (b) of §1.403(b)–1 nor includible in B's gross income (see paragraph (b) of §1.403(d)–1). The amount that B's widow may exclude from gross income (assuming no other death benefits) is computed in the following manner:

(*a*) Amount of "total payment" with respect to which A had a forfeitable right at time of death. (½×$6,000)	$3,000
(*b*) Amount includible in gross income without regard to second sentence of section 101(b)(2)(B) (½×$6,000 less $600 includible in B's gross income for year when his rights changed to nonforfeitable rights)	$2,400
(*c*) Total employer contributions for the contract (½ of cash surrender value of contract on date B's rights changed to nonforfeitable rights)	$2,500
(*d*) Amount of employer contributions for the contract that was excludable under paragraph (b) of § 1.403(b)–1	$1,500
(*e*) Percent of total employer contributions for the contract that were excludable under paragraph (b) of § 1.403(b)–1 ((*d*) ÷ (*c*))	60%
(*f*) Amount to which section 101(b) exclusion applies by reason of the second sentence of section 101(b)(2)(B) ((*e*)×(*b*))	$1,440
(*g*) Total amount to which section 101(b) exclusion applies ((*a*)+(*f*))	$4,440

(e) *Annuity payments.* (1) Where death benefits are paid in the form of annuity payments, the following rules shall govern for purposes of the exclusion provided in section 101(b):

(i) The exclusion from gross income provided by section 101(b) does not apply to amounts, paid as an annuity, with respect to which the employee possessed, immediately before his death, a nonforfeitable right to receive the amounts while living, or to amounts paid as an annuity in lieu thereof. See paragraph (d) of this section.

(ii) Under section 101(b)(2)(C), no exclusion is allowable for amounts received by a surviving annuitant under a joint and survivor's annuity contract if the annuity starting date (as defined in section 72(c)(4) and paragraph (b) of §1.72–4) occurs before the death of the employee. If the annuity starting date occurs after the death of the employee, the joint and survivor's annuity contract shall be treated as an annuity to which section 101(b)(2)(D) applies. See subdivision (iii) of this subparagraph.

(iii)(*a*) Subject to the other limitations stated in section 101(b) and in this section (see section 101(b)(2)(D)), the amount to which the exclusion of section 101(b) shall apply, with respect to ''amounts received as an annuity'' (as defined in paragraph (b) of §1.72–2) shall be the amount by which the present value of the annuity to be paid to the beneficiary, computed as of the date of the employee's death, exceeds the value (if any) of whichever of the following is the larger:

(*1*) Amounts contributed by the employee (determined in accordance with the provisions of section 72 and the regulations thereunder), or

(*2*) Amounts with respect to which the employee possessed, immediately before his death, a nonforfeitable right to receive the amounts while living, or amounts paid in lieu thereof (see paragraph (d) of this section).

(*b*) The present value of an annuity (immediately before the death of the employee), to the employee, or (immediately after the death of the employee), to his estate or beneficiary, shall be determined as follows:

(*1*) In the case of an annuity paid by an insurance company or by an organization (other than an insurance company) regularly engaged in issuing annuity contracts with an insurance company as the coinsurer or reinsurer of the obligations under the contract, by use of the discount interest rates and mortality tables used by the insurance company involved to determine the installment benefits; and

(*2*) In the case of an annuity issued after November 23, 1984, to which paragraph (e)(1)(iii)(*b*)(*1*) of this section is not applicable, by use of the appropriate tables in §20.2031–7 of this chapter (Estate Tax Regulations).

(iv) Any amount subject to section 101(b)(2)(D) which is excludable under section 101(b) (see subdivision (iii) of this subparagraph) shall, for purposes of section 72, be treated as additional consideration paid by the employee. See paragraph (b) of § 1.72–8.

(v) Where more than one beneficiary, or more than one death benefit, is involved, the exclusion provided by section 101(b) shall be apportioned to the various beneficiaries and benefits in accordance with the proportion that the present value of each benefit bears to the total present value of all the benefits.

(2) The application of the principles of this paragraph may be illustrated by the following examples:

Example 1. (i) A died on January 1, 1969. Under the plan of the X Corporation, W, who is the widow of employee A, and who is 55 years old at the time of A's death, is entitled to an immediate annuity of $2,000 per year during her life and C, the minor child of A, is entitled to receive $1,000 per year for 15 years. A made no contributions under the plan and died while still employed by the X Corporation. At the time of A's death, the amount in his account is $18,000. Under the terms of the plan, this amount would have been distributable to him on account of voluntary termination of employment, but would not have been payable after his death except in the form of the annuities just described. This amount, accordingly, constitutes a nonforfeitable interest in lieu of which the annuities are paid. The exclusion does not apply, except to the extent that the present value of the annuities exceeds $18,000, whether or not the plan is ''qualified'', since the total of the amount in A's account will not be paid within one taxable year of the distributees. See subparagraph (1)(i) of this paragraph.

(ii) The computation of the exclusion applicable to the interests of W and C (assuming that the payments will not be made by an insurance company or some other organization regularly engaged in issuing annuity contracts) is, by application of the tables in § 20.2031–7 of this chapter (Estate Tax Regulations), as follows: The present value of W's interest is $26,243.60, determined by multiplying the annual payment of $2,000 by 13.1218 (the factor in Table I for a person aged 55); the present value of C's interest is $11,517.40, determined by multiplying the yearly payment of $1,000 by 11.5174 (the factor in Table II for payments for a term certain of 15 years). The present value of both annuities is $37,761 and (assuming no other death benefits are involved), the total amount excludable is $5,000, because the total present value of the annuities exceeds the employee's nonforfeitable interest by more than $5,000 ($37,761 minus $18,000 equal $19,761). The exclusion allocable to W's interest is $26,243.60/$37,761 times $5,000, or $3,474.96; the exclusion allocable to C's interest is $11,517.40/$37,761 times $5,000, or $1,525.04. That portion of the death benefit exclusion as so determined for each beneficiary is to be treated as consideration paid by the employee for purposes of section 72.

Example 2. The facts are the same as in example (1), except that the nonforfeitable interest of A, at the time of his death, amounted to $33,761. Since the present value of both annuities ($37,761) exceeds the value of such nonforfeitable interest by only $4,000, the latter amount is the total amount excludable from the gross income of the beneficiaries. This $4,000 exclusion is to be divided in the same proportions as those indicated in example (1). Thus, the exclusion allocable to W's interest is $26,243.60/$37,761 times $4,000, or $2,779.97; and the exclusion allocable to the interest of C is $11,517.40/$37,761 times $4,000, or $1,220.03. That portion of the death benefit exclusion as so determined for each beneficiary is to be treated as consideration paid by the employee for purposes of section 72.

(f) *Distributions on behalf of a self- employed individual.* (1) Under sections 401(c)(1) and 403(a)(3), certain self-employed individuals may be covered by a pension or profit-sharing plan described in section 401(a) and exempt under section 501(a) or under an annuity plan described in section 403(a). However, a payment pursuant to the provisions of any such plan by reason of the death of an individual who participated in such a plan as a self-employed individual immediately before his retirement or death to the beneficiary or estate of such individual does not qualify for the exclusion provided by section 101(b).

(2) The application of this paragraph may be illustrated by the following examples:

Example 1. From 1950 to 1965, A was an employee of B, a sole proprietor. In 1963, B established a qualified pension plan covering A and all other persons who had been employed by B for more than 3 years. In 1965, A acquired from B a 40-percent interest in the capital and profits of the business. A continued to participate in the pension plan as a self-employed individual. In 1970, A died and his widow, in compliance with one of the provisions of the pension plan, elected to receive all of the benefits accrued to A prior to his death in a lump-sum distribution. As A participated in the plan as a self-employed individual immediately prior to his death, A's widow may not exclude any portion of such distribution from her gross income under section 101(b).

Example 2. A, an attorney, is employed by the X Company in their legal department. He is covered by the pension plan that X has established for its employees. Under the terms of A's contract of employment with X, A is permitted to carry on the private practice of law in his off-duty hours. A establishes his own pension plan with respect to his earnings from his private practice. On A's death, his widow elected to receive a lump-sum distribution with respect to any benefits accrued to A under both X's pension plan and A's own pension plan. To the extent that such payment otherwise complies with the requirements of section 101(b), up to $5,000 of the amount paid by X may be excluded from her gross income. No part of the distribution from A's own pension plan may be excluded from her gross income under section 101(b) because A participated in the plan as a self-employed individual immediately before his death.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6722, 29 FR 5070, Apr. 14, 1964; T.D. 6783, 29 FR 18357, Dec. 24, 1964; T.D. 7352, 40 FR 16666, Apr. 14, 1975; T.D. 7428, 41 FR 34619, Aug. 16, 1976; T.D. 7836, 47 FR 42337, Sept. 27, 1982; T.D. 7955, 49 FR 19975, May 11, 1984; T.D. 8540, 59 FR 30102, 30103, June 10, 1994]

§ 1.101–3 Interest payments.

(a) *Applicability of section 101(c).* Section 101(c) provides that if any amount excluded from gross income by section 101(a) (relating to life insurance proceeds) or section 101(b) (relating to employees' death benefits) is held under an agreement to pay interest thereon, the interest payments shall be included in gross income. This provision applies to payments made (either by an insurer or by or on behalf of an employer) of interest earned on any amount so excluded from gross income which is held without substantial diminution of the principal amount during the period when such interest payments are being made or credited to the beneficiaries or estate of the insured or the employee. For example, if a monthly payment is $100, of which $99 represents interests and $1 represents diminution of the principal amount, the principal amount shall be considered held under an agreement to pay interest thereon and the interest payment shall be included in the gross income of the recipient. Section 101(c) applies whether the election to have an amount held under an agreement to pay interest thereon is made by the insured or employee or by his beneficiaries or estate, and whether or not an interest rate is explicitly stated in the agreement. Section 101(d), relating to the payment of life insurance proceeds at a date later than death, shall not apply to any amount to which section 101(c) applies. See section 101(d)(4). However, both section 101(c) and section 101(d) may apply to payments received under a single life insurance contract. For provisions relating to the application of this rule to payments received under a permanent life insurance policy with a family income rider attached, see paragraph (h) of § 1.101–4.

(b) *Determination of ''present value''.* For the purpose of determining whether section 101(c) or section 101(d) applies, the present value (at the time of the insured's death) of any amount which is to be paid at a date later than death shall be determined by the use of the interest rate and mortality tables used by the insurer in determining the size of the payments to be made.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6577, 26 FR 10127, Oct. 28, 1961]

§ 1.101–4 Payment of life insurance proceeds at a date later than death.

(a) *In general.* (1)(i) Section 101(d) states the provisions governing the exclusion from gross income of amounts (other than those to which section 101(c) applies) received under a life insurance contract and paid by reason of the death of the insured which are paid to a beneficiary on a date or dates later than the death of the insured. However, if the amounts payable as proceeds of life insurance to which section 101(a)(1) applies cannot in any event exceed the amount payable at the time of the insured's death, such amounts are fully excludable from the gross income of the recipient (or recipients) without regard to the actual time of payment and no further determination need be made under this section. Section 101(d)(1)(A) provides an exclusion from gross income of any amount determined by a proration, under applicable regulations, of ''an amount held by an insurer with respect to any beneficiary''. The quoted phrase is defined in section 101(d)(2). For the regulations governing the method of computation of this proration, see paragraphs (c) through (f) of this section. The prorated amounts are to be excluded from the gross income of the beneficiary regardless of the taxable year in which they are actually received (see example (2) of subparagraph (2) of this paragraph).

(ii) Section 101(d)(1)(B) provides an additional exclusion where life insurance proceeds are paid to the surviving spouse of an insured. For purposes of this exclusion, the term ''surviving spouse'' means the spouse of the insured as of the date of death, including a spouse legally separated, but not under a decree of absolute divorce (section 101(d)(3)). To the extent that the total payments, under one or more agreements, made in excess of the amounts determined by proration under section 101(d)(1)(A) do not exceed $1,000 in the taxable year of receipt, they shall be excluded from the gross income of the surviving spouse (whether or not payment of any part of such amounts is guaranteed by the insurer). Amounts excludable under section 101(d)(1)(B) are not ''prorated'' amounts.

(2) The principles of this paragraph may be illustrated by the following examples:

Example 1. A surviving spouse elects to receive all of the life insurance proceeds with respect to one insured, amounting to $150,000, in ten annual installments of $16,500 each, based on a certain guaranteed interest rate. The prorated amount is $15,000 ($150,000÷10). As the second payment, the insurer pays $17,850, which exceeds the guaranteed payment by $1,350 as the result of earnings of the insurer in excess of those required to pay the guaranteed installments. The surviving spouse shall include $1,850 in gross income and exclude $16,000—determined in the following manner:

Fixed payment (including guaranteed interest)	$16,500
Excess interest	1,350
Total payment	17,850
Prorated amount	15,000
Excess over prorated amount	2,850
Annual excess over prorated amount excludable under section 101(d)(1)(B)	1,000
Amount includible in gross income	1,850

Example 2. Assume the same facts as in example (1), except that the third and fourth annual installments, totalling $33,000 (2×$16,500), are received in a single subsequent taxable year of the surviving spouse. The prorated amount of $15,000 of each annual installment, totalling $30,000, shall be excluded even though the spouse receives more than one annual installment in the single subsequent taxable year. However, the surviving spouse is entitled to only one exclusion of $1,000 under section 101(d)(1)(B) for each taxable year of receipt. The surviving spouse shall include $2,000 in her gross income for the taxable year with respect to the above installment payments ($33,000 less the sum of $30,000 plus $1,000).

Example 3. Assume the same facts as in example (1), except that the surviving spouse dies before receiving all ten annual installments and the remaining installments are paid to her estate or beneficiary. In such a case, $15,000 of each installment would continue to be excludable from the gross income of the recipient, but any amounts received in excess thereof would be fully includible.

(b) *Amount held by an insurer.* (1) For the purpose of the proration referred to in section 101(d)(1), an ''amount held by an insurer with respect to any beneficiary'' means an amount equal to the present value to such beneficiary (as of the date of death of the insured) of an agreement by the insurer under a life insurance policy (whether as an option or otherwise) to pay such beneficiary an amount or amounts at a date or dates later than the death of the insured (section 101(d)(2)). The present value of such agreement is to be computed as if the agreement under the life insurance policy had been entered into on the date of death of the insured, except that such value shall be determined by the use of the mortality table and interest rate used by the insurer in calculating payments to be made to the beneficiary under such agreement. Where an insurance policy provides an option for the payment of a specific amount upon the death of the insured in full discharge of the contract, such lump sum is the amount held by the insurer with respect to all beneficiaries (or their beneficiaries) under the contract. See, however, paragraph (e) of this section.

(2) In the case of two or more beneficiaries, the ''amount held by the insurer'' with respect to each beneficiary

depends on the relationship of the different benefits payable to such beneficiaries. Where the amounts payable to two or more beneficiaries are independent of each other, the ''amount held by the insurer with respect to each beneficiary'' shall be determined and prorated over the periods involved independently. Thus, if a certain amount per month is to be paid to A for his life, and, concurrently, another amount per month is to be paid to B for his life, the ''amount held by the insurer'' shall be determined and prorated for both A and B independently, but the aggregate shall not exceed the total present value of such payments to both. On the other hand, if the obligation to pay B was contingent on his surviving A, the ''amount held by the insurer'' shall be considered an amount held with respect to both beneficiaries simultaneously. Furthermore, it is immaterial whether B is a named beneficiary or merely the ultimate recipient of payments for a term of years. For the special rules governing the computation of the proration of the ''amount held by an insurer'' in determining amounts excludable under the provisions of section 101(d), see paragraphs (c) to (f), inclusive, of this section.

(3) Notwithstanding any other provision of this section, if the policy was transferred for a valuable consideration, the total ''amount held by an insurer'' cannot exceed the sum of the consideration paid plus any premiums or other consideration paid subsequent to the transfer if the provisions of section 101(a)(2) and paragraph (b) of §1.101–1 limit the excludability of the proceeds to such total.

(c) *Treatment of payments for life to a sole beneficiary.* If the contract provides for the payment of a specified lump sum, but, pursuant to an agreement between the beneficiary and the insurer, payments are to be made during the life of the beneficiary in lieu of such lump sum, the lump sum shall be divided by the life expectancy of the beneficiary determined in accordance with the mortality table used by the insurer in determining the benefits to be paid. However, if payments are to be made to the estate or beneficiary of the primary beneficiary in the event that the primary beneficiary dies before receiving a certain number of payments or a specified total amount, such lump sum shall be reduced by the present value (at the time of the insured's death) of amounts which may be paid by reason of the guarantee, in accordance with the provisions of paragraph (e) of this section, before making this calculation. To the extent that payments received in each taxable year do not exceed the amount found from the above calculation, they are ''prorated amounts'' of the ''amount held by an insurer'' and are excludable from the gross income of the beneficiary without regard to whether he lives beyond the life expectancy used in making the calculation. If the contract in question does not provide for the payment of a specific lump sum upon the death of the insured as one of the alternative methods of payment, the present value (at the time of the death of the insured) of the payments to be made the beneficiary, determined in accordance with the interest rate and mortality table used by the insurer in determining the benefits to be paid, shall be used in the above calculation in lieu of a lump sum.

(d) *Treatment of payments to two or more beneficiaries*—(1) *Unrelated payments.* If payments are to be made to two or more beneficiaries, but the payments to be made to each are to be made without regard to whether or not payments are made or continue to be made to the other beneficiaries, the present value (at the time of the insured's death) of such payments to each beneficiary shall be determined independently for each such beneficiary. The present value so determined shall then be divided by the term for which the payments are to be made. If the payments are to be made for the life of the beneficiary, the divisor shall be the life expectancy of the beneficiary. To the extent that payments received by a beneficiary do not exceed the amount found from the above calculation, they are ''prorated amounts'' of the ''amount held by an insurer'' with respect to such beneficiary and are excludable from the gross income of the beneficiary without regard to whether he lives beyond any life expectancy used in making the calculation. For the purpose of the calculation described above, both the ''present value'' of the payments to be made periodically and the ''life expectancy'' of the beneficiary shall be determined in accordance with the interest rate and mortality table used by the insurer in determining the benefits to be paid. If payments are to be made to the estate or beneficiary of a primary beneficiary in the event that such beneficiary dies before receiving a certain number of payments or a specified total amount, the ''present value'' of payments to such beneficiary shall not include the present value (at the time of the insured's death) of amounts which may be paid by reason of such a guarantee. See paragraph (e) of this section.

(2) *Related payments.* If payments to be made to two or more beneficiaries are in the nature of a joint and survivor annuity (as described in paragraph (b) of § 1.72–5), the present value (at the time of the insured's death) of the payments to be made to all such beneficiaries shall be divided by the life expectancy of such beneficiaries as a group. To the extent that the payments received by a beneficiary do not exceed the amount found from the above calculation, they are ''prorated amounts'' of the ''amount held by an insurer'' with respect to such beneficiary and are excludable from the gross income of the beneficiary without regard to whether all the beneficiaries involved live beyond the life expectancy used in making the calculation. For the purpose of the calculation described above, both the ''present value'' of the payments to be made periodically and the ''life expectancy'' of all the beneficiaries as a group shall be determined in accordance with the interest rate and mortality table used by the insurer in determining the benefits to be paid. If the contract provides that certain payments are to be made in the event that all the beneficiaries of the group die before a specified number of payments or a specified total amount is received by them, the present value of payments to be made to the group shall not include the present value (at the time of the insured's death) of amounts which may be paid by reason of such a guarantee. See paragraph (e) of this section.

(3) *Payments to secondary beneficiaries.* Payments made by reason of the death of a beneficiary (or beneficiaries) under a contract providing that such payments shall be made in the event that the beneficiary (or beneficiaries) die before receiving a specified number of payments or a specified total amount shall be excluded from the gross income of the recipient to the extent that such payments are made solely by reason of such guarantee.

(e) *Treatment of present value of guaranteed payments.* In the case of payments which are to be made for a life or lives under a contract providing that further amounts shall be paid upon the death of the primary beneficiary (or beneficiaries) in the event that such beneficiary (or beneficiaries) die before receiving a specified number of payments or a specified total amount, the present value (at the time of the insured's death) of all payments to be made under the contract shall not include, for purposes of prorating the amount held by the insurer, the present value of the payments which may be made to the estate or beneficiary of the primary beneficiary. In such a case, any lump sum amount used to measure the value of the amount held by an insurer with respect to the primary beneficiary must be reduced by the value at the time of the insured's death of any amounts which may be paid by reason of the guarantee provided for a secondary beneficiary or the estate of the primary beneficiary before prorating such lump sum over the life or lives of the primary beneficiaries. Such present value (of the guaranteed payment) shall be determined by the use of the interest rate and mortality tables used by the insurer in determining the benefits to be paid.

(f) *Treatment of payments not paid periodically.* Payments made to beneficiaries other than periodically shall be included in the gross income of the recipients, but only to the extent that they exceed amounts payable at the time of the death of the insured to each such beneficiary or, where no such amounts are specified, the present value of such payments at that time.

(g) *Examples*. The principles of this section may be illustrated by the following examples:

Example 1. A life insurance policy provides for the payment of $20,000 in a lump sum to the beneficiary at the death of the insured. Upon the death of the insured, the beneficiary elects an option to leave the proceeds with the company for five years and then receive payment of $24,000, having no claim of right to any part of such sum before the entire five years have passed. Upon the payment of the larger sum, $24,000, the beneficiary shall include $4,000 in gross income and exclude $20,000 therefrom. If it is assumed that the same insurer has determined the benefits to be paid, the same result would obtain if no lump sum amount were provided for at the death of the insured and the beneficiary were to be paid $24,000 five years later. In neither of these cases would the surviving spouse be able to exclude any additional amount from gross income since both cases involve an amount held by an insurer under an agreement to pay interest thereon to which section 101(c) applies, rather than an amount to be paid periodically after the death of the insured to which section 101(d) applies.

Example 2. A life insurance policy provides that $1,200 per year shall be paid the sole beneficiary (other than a surviving spouse) until a fund of $20,000 and interest which accrues on the remaining balance is exhausted. A guaranteed rate of interest is specified, but excess interest may be credited according to the earnings of the insurer. Assuming that the fund will be exhausted in 20 years if only the guaranteed interest is actually credited, the beneficiary shall exclude $1,000 of each installment received ($20,000 divided by 20) and any installments received, whether by the beneficiary or his estate or beneficiary, in excess of 20 shall be fully included in the gross income of the recipient. If, instead, the excess interest were to be paid each year, any portion of each installment representing an excess over $1,000 would be fully includible in the recipient's gross income. Thus, if an installment of $1,350 were received, $350 of it would be included in gross income.

Example 3. Assume that the sole life insurance policy of a decedent provides only for the payment of $5,000 per year for the life of his surviving spouse, beginning with the insured's death. If the present value of the proceeds, determined by reference to the interest rate and the mortality table used by the insurance company, is $60,000, and such beneficiary's life expectancy is 20 years, $3,000 of each $5,000 payment ($60,000 divided by 20) is excludable as the prorated portion of the ''amount held by an insurer''. For each taxable year in which a payment is made, an additional $1,000 is excludable from the gross income of the surviving spouse. Hence, if she receives only one $5,000 payment in her taxable year, only $1,000 is includible in her gross income in that year with respect to such payment ($5,000 less the total amount excludable, $4,000). Assuming that the policy also provides for payments of $2,000 per year for 10 years to the daughter of the insured, the present value of the payments to the daughter is to be computed separately for the purpose of determining the excludable portion of each payment to her. Assuming that such present value is $15,000, $1,500 of each payment of $2,000 received by the daughter is excludable from her gross income ($15,000 divided by 10). The remaining $500 shall be included in the gross income of the daughter.

Example 4. Beneficiaries A and B, neither of whom is the surviving spouse of the insured, are each to receive annual payments of $1,800 for each of their respective lives upon the death of the insured. The contract does not provide for payments to be made in any other manner. Assuming that the present value of the payments to be made to A, whose life expectancy according to the insurer's mortality table is 30 years, is $36,000, A shall exclude $1,200 of each payment received ($36,000 divided by 30). Assuming that the present value of the payments to be made to B, whose life expectancy according to the insurer's mortality table is 20 years, is $27,000, B shall exclude $1,350 of each payment received ($27,000 divided by 20).

Example 5. A life insurance policy provides for the payment of $76,500 in a lump sum to the beneficiary, A, at the death of the insured. Upon the insured's death, however, A selects an option for the payment of $2,000 per year for her life and for the same amount to be paid after her death to B, her daughter, for her life. Assuming that since A is 51 years of age and her daughter is 28 years of age, the insurer determined the amount of the payments by reference to a mortality table under which the life expectancy for the lives of both A and B, joint and survivor, is 51 years, $1,500 of each $2,000 payment to either A or B ($76,500 divided by 51, or $1,500) shall be excluded from the gross income of the recipient. However, if A is the surviving spouse of the insured and no other contracts of insurance whose proceeds are to be paid to her at a date later than death are involved, A shall exclude the entire payment of $2,000 in any taxable year in which she receives but one such payment because of the additional exclusion under section 101(d)(1)(B).

Example 6. Beneficiaries A and B, neither of whom is the surviving spouse of the insured, are each to receive annual payments of $1,800 for each of their respective lives upon the death of the insured, but after the death of either, the survivor is to receive the payments formerly made to the deceased beneficiary until the survivor dies. Assuming that the life expectancy, joint and survivor, of A and B in accordance with the mortality table used by the insurer is 32 years and assuming that the total present value of the benefits to both (determined in accordance with the interest rate used by the insurer) is $80,000, A and B shall each exclude $1,250 of each installment of $1,800 ($80,000 divided by the life expectancy, 32, multiplied by the fraction of the annual payment payable to each, one-half) until the death of either. Thereafter, the survivor shall exclude $2,500 of each installment of $3,600 ($80,000 divided by 32).

Example 7. A life insurance policy provides for the payment of $75,000 in a lump sum to the beneficiary, A, at the death of the insured. A, upon the insured's death, however, selects an option for the payment of $4,000 per year for life, with a guarantee that any part of the $75,000 lump sum not paid to A before his death shall be paid to B (or his estate). A's beneficiary. Assuming that, under the criteria used by the insurer in determining the benefits to be paid, the present value of the guaranteed amount to B is $13,500 and that A's life expectancy is 25 years, the lump sum shall be reduced by the present value of the guarantee to B ($75,000 less $13,500, or $61,500) and divided by A's life expectancy ($61,500 divided by 25, or $2,460). Hence, $2,460 of each $4,000 payment is excludable from A's gross income. If A is the surviving spouse of the insured and no other contracts of insurance whose proceeds are to be paid to her at a date later than death are involved, A shall exclude $3,460 of each $4,000 payment from gross income in any taxable year in which but one such payment is received. Under these facts, if any amount is paid to B by reason of the fact that A dies before receiving a total of $75,000, the residue of the lump sum paid to B shall be excluded from B's gross income since it is wholly in lieu of the present value of such guarantee plus the present value of the payments to be made to the first beneficiary, and is therefore entirely an ''amount held by an insurer'' paid at a date later than death (see paragraph (d)(3) of this section).

Example 8. Assume that an insurance policy does not provide for the payment of a lump sum, but provides for the payment of $1,200 per year for a beneficiary's life upon the death of the insured, and also provides that if ten payments are not made to the beneficiary before death a secondary beneficiary (whether named by the insured or by the first beneficiary) shall receive the remainder of the ten payments in similar installments. If, according to the criteria used by the insurance company in determining the benefits, the present value of the payments to the first beneficiary is $12,000 and the life expectancy of such beneficiary is 15 years, $800 of each payment received by the first beneficiary is excludable from gross income. Assuming that the same figures obtain even though the payments are to be made at the rate of $100 per month, the yearly exclusion remains the same unless more or less than twelve months' installments are received by the beneficiary in a particular taxable year. In such a case two-thirds of the total received in the particular taxable year with respect to such beneficiary shall be excluded from gross income. Under either of the above alternatives, any amount received by the second beneficiary by reason of the guarantee of ten payments is fully excludable from the beneficiary's gross income since it is wholly in lieu of the present value of such guarantee plus the present value of the payments to be made to the first beneficiary and is therefore entirely an ''amount held by an insurer'' paid at a date later than death (see paragraph (d)(3) of this section).

(h) *Applicability of both section 101(c) and 101(d) to payments under a single life insurance contract*—(1) *In general.* Section 101(d) shall not apply to interest payments on any amount held by an insurer under an agreement to pay interest thereon (see sections 101(c) and 101(d)(4) and §1.101–3). On the other hand, both section 101(c) and section 101(d) may be applicable to payments received under a single life insurance contract, if such payments consist both of interest on an amount held by an insurer under an agreement to pay interest thereon and of amounts held by the insurer and paid on a date or dates later than the death of the insured. One instance when both section 101(c) and section 101(d) may be applicable to payments received under a single life insurance contract is in the case of a permanent life insurance policy with a family income rider attached. A typical family income rider is one which provides additional term insurance coverage for a specified number of years from the register date of the basic policy. Under the policy with such a rider, if the insured dies at any time during the term period, the beneficiary is entitled to receive (i) monthly payments of a specified amount commencing as of the date of death and continuing for the balance of the term period, and (ii) a lump sum payment of the proceeds under the basic policy to be paid at the end of the term period. If the insured dies after the expiration of the term period, the beneficiary receives only the proceeds under the basic policy. If the insured dies before the expiration of the term period, part of each monthly payment received by the beneficiary during the term period consists of interest on the proceeds of the basic policy (such proceeds being retained by the insurer until the end of the term period). The remaining part consists of an installment (principal plus interest) of the proceeds of the terms insurance purchased under the family income rider. The amount of term insurance which is provided under the family income rider is, therefore, that amount which, at the date of the insured's death, will provide proceeds sufficient to fund such remaining part of each monthly payment. Since the proceeds under the basic policy are held by the insurer until the end of the term period, that portion of each monthly payment which consists of interest on such proceeds is interest on an amount held by an insurer under an agreement to pay interest thereon and is includible in gross income under section 101(c). On the other hand, since the remaining portion of each monthly payment consists of an installment payment (principal plus interest) of the proceeds of the term insurance, it is a payment of an amount held by the insurer and paid on a date later than the death of the insured to which section 101(d) and this section applies (including the $1,000 exclusion allowed the surviving spouse under section 101(d)(1)(B)). The proceeds of the basic policy, when received in a lump sum at the end of the term period, are excludable from gross income under section 101(a).

(2) *Example of tax treatment of amounts received under a family income rider*. The following example illustrates the application of the principles contained in subparagraph (1) of this paragraph to payments received under a permanent life insurance policy with a family income rider attached:

Example. The sole life insurance policy of the insured provides for the payment of $100,000 to the beneficiary (the insured's spouse) on his death. In addition, there is attached to the policy a family income rider which provides that, if the insured dies before the 20th anniversary of the basic policy, the beneficiary shall receive (i) monthly payments of $1,000 commencing on the date of the insured's death and ending with the payment prior to the 20th anniversary of the basic policy, and (ii) a single payment of $100,000 payable on the 20th anniversary of the basic policy. On the date of the insured's death, the beneficiary (surviving spouse of the insured) is entitled to 36 monthly payments of $1,000 and to the single payment of $100,000 on the 20th anniversary of the basic policy. The value of the proceeds of the term insurance at the date of the insured's death is $28,409.00 (the present value of the portion of the monthly payments to which section 101(d) applies computed on the basis that the interest rate used by the insurer in determining the benefits to be paid under the contract is 2¼ percent). The amount of each monthly payment of $1,000 which is includible in the beneficiary's gross income is determined in the following manner:

(*a*) Total amount of monthly payment	$1,000.00
(*b*) Amount includible in gross income under section 101(c) as interest on the $100,000 proceeds under the basic policy held by the insurer until 20th anniversary of the basic policy (computed on the basis that the interest rate used by the insurer in determining the benefits to be paid under the contract is 2¼ percent)	185.00
(*c*) Amount to which section 101(d) applies ((a) minus (b))	815.00
(*d*) Amount excludable from gross income under section 101(d) ($28,409÷36)	789.14
(*e*) Amount includible in gross income under section 101(d) without taking into account the $1,000 exclusion allowed the beneficiary as the surviving spouse ((c) minus (d))	25.86

The beneficiary, as the surviving spouse of the insured, is entitled to exclude the amounts otherwise includible in gross income under section 101(d) (item (*e*)) to the extent such amounts do not exceed $1,000 in the taxable year of receipt. This exclusion is not applicable, however, with respect to the amount of each payment which is includible in gross income under section 101(c) (item (*b*)). In this example, therefore, the beneficiary must include $185 of each monthly payment in gross income (amount includible under section 101(c)), but may exclude the $25.86 which is otherwise includible under section 101(d). The payment of $100,000 which is payable to the beneficiary on the 20th anniversary of the basic policy will be entirely excludable from gross income under section 101(a).

(3) *Limitation on amount considered to be an ''amount held by an insurer''*. See paragraph (b)(3) of this section for a limitation on the amount which shall be considered an ''amount held by an insurer'' in the case of proceeds of life insurance which are paid subsequent to the transfer of the policy for a valuable consideration.

(4) *Effective date*. The provisions of this paragraph are applicable only with respect to amounts received during

taxable years beginning after October 28, 1961, irrespective of the date of the death of the insured.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6577, 26 FR 10127, Oct. 28, 1961; 26 FR 10275, Nov. 2, 1961]

§ 1.101–5 Alimony, etc., payments.

Proceeds of life insurance policies paid by reason of the death of the insured to his separated wife, or payment excludable as death benefits under section 101(b) paid to a deceased employee's separated wife, if paid to discharge legal obligations imposed by a decree of divorce or separate maintenance, by a written separation agreement executed after August 16, 1954, or by a decree of support entered after March 1, 1954, shall be included in the gross income of the separated wife if section 71 or 682 is applicable to the payments made. For definition of ''wife'', see section 7701(a)(17) and the regulations thereunder.

§ 1.101–6 Effective date.

(a) Except as otherwise provided in paragraph (h)(4) of § 1.101–4, the provisions of section 101 of the Internal Revenue Code of 1954 and §§ 1.101–1, 1.101–2, 1.101–3, 1.101–4, and 1.101–5 are applicable only with respect to amounts received by reason of the death of an insured or an employee occurring after August 16, 1954. In the case of such amounts, these sections are applicable even though the receipt of such amounts occurred in a taxable year beginning before January 1, 1954, to which the Internal Revenue Code of 1939 applies.

(b) Section 22(b)(1) of the Internal Revenue Code of 1939 and the regulations pertaining thereto shall apply to amounts received by reason of the death of an insured or an employee occurring before August 17, 1954, regardless of the date of receipt.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6577, 26 FR 10128, Oct. 28, 1961]

§ 1.101–7 Mortality table used to determine exclusion for deferred payments of life insurance proceeds.

(a) *Mortality table.* Notwithstanding any provision of § 1.101–4 that otherwise would permit the use of a mortality table not described in this section, the mortality table set forth in § 1.72–7(c)(1) must be used to determine—

(1) The amount held by an insurer with respect to a beneficiary for purposes of section 101(d)(2) and § 1.101–4; and

(2) The period or periods with respect to which payments are to be made for purposes of section 101(d)(1) and § 1.101–4.

(b) *Examples.* The principles of this section may be illustrated by the following examples:

Example 1. A life insurance policy provides only for the payment of $5,000 per year for the life of the beneficiary, A, beginning with the insured's death. If A is 59 years of age at the time of the insured's death, the period with respect to which the payments are to be made is 25 years. This period is determined by using the mortality table set forth in § 1.72–7(c)(1), and is shown in Table V of § 1.72–9 (which contains life expectancy tables determined using this mortality table). If the present value of the proceeds, determined by reference to the interest rate used by the insurance company and the mortality table set forth in § 1.72–7(c)(1), is $75,000, $3,000 of each $5,000 payment ($75,000 divided by 25) is excluded from the gross income of A.

Example 2. A life insurance policy provides for the payment of $82,500 in a lump sum to the beneficiary, A, at the death of the insured. Upon the insured's death, however, A selects an option for the payment of $2,000 per year for life and for the same amount to be paid after A's death to B for B's life. If A is 51 years of age and B is 28 years of age at the death of the insured, the period with respect to which the payments are to be made is 55 years. This period is determined by using the mortality table set forth in § 1.72–7(c)(1), and is shown in Table VI of § 1.72–9 (which contains life expectancy tables determined using this mortality table). Accordingly $1,500 of each $2,000 payment ($82,500 divided by 55) is excluded from the gross income of the recipient.

(c) *Effective date.* This section applies to amounts received with respect to deaths occurring after October 22, 1986, in taxable years ending after October 22, 1986.

[T.D. 8161, 52 FR 35415, Sept. 21, 1987. Redesignated and amended by T.D. 8272, 54 FR 47980, Nov. 20, 1989]

§ 1.102–1 Gifts and inheritances.

(a) *General rule.* Property received as a gift, or received under a will or under statutes of descent and distribution, is not includible in gross income, although the income from such property is includible in gross income. An amount of principal paid under a marriage settlement is a gift. However, see section 71 and the regulations thereunder for rules relating to alimony or allowances paid upon divorce or separation. Section 102 does not apply to prizes and awards (see section 74 and §1.74–1) nor to scholarships and fellowship grants (see section 117 and the regulations thereunder).

(b) *Income from gifts and inheritances.* The income from any property received as a gift, or under a will or statute of descent and distribution shall not be excluded from gross income under paragraph (a) of this section.

(c) *Gifts and inheritances of income.* If the gift, bequest, devise, or inheritance is of income from property, it shall not be excluded from gross income under paragraph (a) of this section. Section 102 provides a special rule for the treatment of certain gifts, bequests, devises, or inheritances which by their terms are to be paid, credited, or distributed at intervals. Except as provided in section 663(a)(1) and paragraph (d) of this section, to the extent any such gift, bequest, devise, or inheritance is paid, credited, or to be distributed out of income from property, it shall be considered a gift, bequest, devise, or inheritance of income from property. Section 102 provides the same treatment for amounts of income from property which is paid, credited, or to be distributed under a gift or bequest whether the gift or bequest is in terms of a right to payments at intervals (regardless of income) or is in terms of a right to income. To the extent the amounts in either case are paid, credited, or to be distributed at intervals out of income, they are not to be excluded under section 102 from the taxpayer's gross income.

(d) *Effect of Subchapter J.* Any amount required to be included in the gross income of a beneficiary under sections 652, 662, or 668 shall be treated for purposes of this section as a gift, bequest, devise, or inheritance of income from property. On the other hand, any amount excluded from the gross income of a beneficiary under section 663(a)(1) shall be treated for purposes of this section as property acquired by gift, bequest, devise, or inheritance.

(e) *Income taxed to grantor or assignor.* Section 102 is not intended to tax a donee upon the same income which is taxed to the grantor of a trust or assignor of income under section 61 or sections 671 through 677, inclusive.

§ 1.103–1 Interest upon obligations of a State, territory, etc.

(a) Interest upon obligations of a State, territory, a possession of the United States, the District of Columbia, or any political subdivision thereof (hereinafter collectively or individually referred to as ''State or local governmental unit'') is not includable in gross income, except as provided under section 103 (c) and (d) and the regulations thereunder.

(b) Obligations issued by or on behalf of any State or local governmental unit by constituted authorities empowered to issue such obligations are the obligations of such a unit. However, section 103(a)(1) and this section do not apply to industrial development bonds except as otherwise provided in section 103(c). See section 103(c) and §§1.103–7 through 1.103–12 for the rules concerning interest paid on industrial development bonds. See section 103(d) for rules concerning interest paid on arbitrage bonds. Certificates issued by a political subdivision for public improvements (such as sewers, sidewalks, streets, etc.) which are evidence of special assessments against specific property, which assessments become a lien against such property and which the political subdivision is required to enforce, are, for purposes of this section, obligations of the political subdivision even though the obligations are to be satisfied out of special funds and not out of general funds or taxes. The term ''political subdivision'', for purposes of this section denotes any division of any State or local governmental unit which is a municipal corporation or which has been delegated the right to exercise part of the sovereign power of the unit. As thus defined, a political subdivision of any State or local governmental unit may or may not, for purposes of this section, include special assessment districts so created, such as road, water, sewer, gas, light, reclamation, drainage, irrigation, levee, school, harbor, port improvement, and similar districts and divisions of any such unit.

[T.D. 7199, 37 FR 15486, Aug. 3, 1972]

§ 1.103–2 Dividends from shares and stock of Federal agencies or instrumentalities.

(a) *Issued before March 28, 1942.* (1) Section 26 of the Federal Farm Loan Act of July 17, 1916 (12 U.S.C. 931), provides that Federal land banks and Federal land bank associations, including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from taxation, except taxes upon real estate. Section 7 of the Federal Reserve Act of December 23, 1913 (12 U.S.C. 531), provides that Federal reserve banks, including the capital stock and surplus therein and the income derived therefrom, shall be exempt from taxation, except taxes upon real estate. Section 13 of the Federal Home Loan Bank Act (12 U.S.C. 1433) provides that the Federal Home Loan Bank including its franchise, its capital, reserves, and surplus, its advances, and its income shall be exempt from all taxation, except taxes upon real estate. Section 5(h) of the Home Owners' Loan Act of 1933 (12 U.S.C. 1464(h)) provides that shares of Federal savings and loan associations shall, both as to their value and the income therefrom, be exempt from all taxation (except surtaxes, estate, inheritance, and gift taxes) imposed by the United States. Under the above-mentioned provisions, income consisting of dividends on stock of Federal land banks, Federal land bank associations, Federal home loan banks, and Federal reserve banks is not, in the case of stock issued before March 28, 1942, includable in gross income. Income consisting of dividends on share accounts of Federal savings and loan associations is includable in gross income but, in the case of shares issued before March 28, 1942, is not subject to the normal tax on income. For taxability of such income in the case of such stock or shares issued on or after March 28, 1942, see section 6 of the Public Debt Act of 1942 (31 U.S.C. 742a) and paragraph (b) of this section. For the time at which a stock or share is issued within the meaning of this section, see paragraph (b) of this section.

(2) Regardless of the exemption from income tax of dividends paid on the stock of Federal reserve banks, dividends paid by member banks are treated like dividends of ordinary corporations.

(3) Dividends on the stock of the central bank for cooperatives, the production credit corporations, production credit associations, and banks for cooperatives, organized under the provisions of the Farm Credit Act of 1933 (12 U.S.C. 1138), constitute income to the recipients, subject to both the normal tax and surtax (see section 63 of the Farm Credit Act of 1933 (12 U.S.C. 1138c)).

(b) *Issued on or after March 28, 1942.* (1) By virtue of the provisions of section 6 of the Public Debt Act of 1942 (31 U.S.C. 742a), the tax exemption provisions set forth in paragraph (a) of this section with respect to income consisting of dividends on stock of the Federal land banks, Federal land bank associations, and Federal reserve banks, or on share accounts of Federal savings and loan associations, are not applicable in the case of dividends on such stock or shares issued on or after March 28, 1942.

(2) For the purposes of this section, a stock or share is deemed to be issued at the time and to the extent that payment therefor is made to the agency or instrumentality. The date of issuance of the certificate or other evidence of ownership of such stock or share is not determinative if payment is made at an earlier or later date. Where old stock is retired in exchange for new stock of a different character or preference, the new stock shall be deemed to have been issued at the time of the exchange rather than when the old stock was paid for. These rules may be illustrated by the following examples:

Example 1. A, the owner of an investment share account, consisting of 10 shares, in a Federal savings and loan association, has a single certificate issued before March 28, 1942, evidencing such ownership. In order that A may dispose of half of such shares, the association at his request issues, after March 27, 1942, two 5-share certificates in substitution for the 10-share certificate. The shares evidenced by the two new certificates are deemed to have been issued before March

28, 1942, the shares having been paid for before such date.

Example 2. The X Bank, a member of a Federal reserve bank, owns 50 shares of Federal reserve bank stock, evidenced by a single stock certificate issued before March 28, 1942. On December 31, 1942, the X Bank reduces the amount of its capital stock, as a result of which it is required to reduce the amount of its Federal reserve bank stock to 40 shares. It surrenders the 50-share certificate to the Federal reserve bank and receives a new 40-share certificate. The 40 shares evidenced by such certificate are deemed to have been issued before March 28, 1942. On December 31, 1943, the X Bank increases the amount of its capital stock, as a result of which it is required to purchase 10 additional shares of the Federal reserve bank stock. The Federal reserve bank issues a 10-share certificate evidencing ownership of the new shares. Of the 50 shares then owned by the X Bank, 40 were issued prior to March 28, 1942, and 10 were issued after March 27, 1942.

Example 3. A, the owner of a savings share account in the amount of $100 in a Federal savings and loan association, has a passbook containing a certificate issued prior to March 28, 1942, evidencing such ownership. Subsequent to March 27, 1942, A deposits $10,000 in the account. With respect to the $10,000 deposit, the share is deemed to have been issued after March 27, 1942.

§ 1.103–3 Interest upon notes secured by mortgages executed to Federal agencies or instrumentalities.

Section 26 of the Federal Farm Loan Act (12 U.S.C. 931), and section 210 of such act, as added by section 2 of the act of March 4, 1923 (12 U.S.C. 1111), provide that first mortgages executed to Federal land banks, joint-stock land banks, or Federal intermediate credit banks, and the income derived therefrom, shall be exempt from taxation. Accordingly, income consisting of interest on promissory notes held by such banks and secured by such first mortgages is not subject to the income tax.

§ 1.103–4 Interest upon United States obligations.

(a) *Issued before March 1, 1941.* (1) Interest upon obligations of the United States issued on or before September 1, 1917, is exempt from tax. In the case of obligations issued by the United States after September 1, 1917, and in the case of obligations of a corporation organized under act of Congress, if such corporation is an instrumentality of the United States, the interest is exempt from tax only if and to the extent provided in the acts authorizing the issue thereof, as amended and supplemented.

(2) Interest on Treasury bonds issued before March 1, 1941, is exempt from Federal income taxes except surtaxes imposed upon the income or profits of individuals, associations, or corporations. However, interest on an aggregate of not exceeding $5,000 principal amount of such bonds is also exempt from surtaxes. Interest in excess of the interest on an aggregate of not exceeding $5,000 principal amount of such bonds is subject to surtax and must be included in gross income.

(3) Interest credited to postal savings accounts upon moneys deposited before March 1, 1941, in postal savings banks is wholly exempt from income tax.

(b) *Issued on or after March 1, 1941.* (1) Under the provisions of sections 4 and 5 of the Public Debt Act of 1941 (31 U.S.C. 742a), interest upon obligations issued on or after March 1, 1941, by the United States, or any agency or instrumentality thereof, shall not have any exemption, as such, from Federal income tax except in respect of any such obligations which the Federal Maritime Board and Maritime Administration (formerly United States Maritime Commission) or the Federal Housing Administration has, before March 1, 1941, contracted to issue at a future date. The interest on such obligations so contracted to be issued shall bear such tax-exemption privileges as were at the time of such contract provided in the law authorizing their issuance. For the purposes hereof, under section 4(a) of the Public Debt Act of 1941, a Territory and a possession of the United States (or any political subdivisions thereof), and the District of Columbia, and any agency or instrumentality of any one or more of the foregoing, shall not be considered as an agency or instrumentality of the United States.

(2) In the case of obligations issued as the result of a refunding operation, as, for example, where a corporation exchanges bonds for previously issued bonds, the refunding obligations are deemed, for the purposes of this section, to have been issued at the time of

the exchange rather than at the time the original bonds were issued.

§ 1.103–5 Treasury bond exemption in the case of trusts or partnerships.

(a) When the income of a trust is taxable to beneficiaries, as in the case of a trust the income of which is to be distributed to the beneficiaries currently, each beneficiary is entitled to exemption as if he owned directly a proportionate part of the Treasury bonds held in trust. When, on the other hand, income is taxable to the trustee, as in the case of a trust the income of which is accumulated for the benefit of unborn or unascertained persons, the trust, as the owner of the bonds held in trust, is entitled to the exemption on account of such ownership. In general, see sections 652(b) and 662(b) and the regulations thereunder.

(b) As the income of a partnership is taxable to the individual partners, each partner is entitled to exemption as if he owned directly a proportionate part of the bonds held by the partnership. For rules relating to partially tax-exempt interest see section 702(a)(7) and the regulations thereunder.

§ 1.103–6 Interest upon United States obligations in the case of nonresident aliens and foreign corporations, not engaged in business in the United States.

By virtue of section 4 of the Victory Liberty Loan Act of March 3, 1919 (31 U.S.C. 750), amending section 3 of the Fourth Liberty Bond Act of July 9, 1918 (31 U.S.C. 750), the interest received on and after March 3, 1919, on bonds, notes, and certificates of indebtedness of the United States while beneficially owned by a nonresident alien individual, or a foreign corporation, partnership, or association, if such individual, corporation, partnership, or association is not engaged in business in the United States, is exempt from income taxes. Such exemption applies only to such bonds, notes, or certificates as have been issued before March 1, 1941. Interest derived by a nonresident alien individual, or by a foreign corporation, partnership, or association on such bonds, notes, or certificates issued on or after March 1, 1941, is subject to tax as in the case of taxpayers generally as provided in paragraph (b) of § 1.103–4.

§ 1.103–7 Industrial development bonds.

(a) *In general.* Under section 103(c)(1) and this section, an industrial development bond issued after April 30, 1968, shall be treated as an obligation not described in section 103(a)(1) and § 1.103–1. Accordingly, interest paid on such a bond is includable in gross income unless the bond was issued by a State, or local governmental unit to finance certain exempt facilities (see section 103(c)(4) and § 1.103–8), to finance an industrial park (see section 103(c)(5) and § 1.103–9), or as part of an exempt small issue (see section 103(c)(6) and § 1.103–10). For applicable rules when an industrial development bond is held by a substantial user (or a person related to a substantial user) of such an exempt facility, or an industrial park, or a facility financed with the proceeds of such an exempt small issue, see section 103(c)(7) and § 1.103–11. See also § 1.103–12 for the transitional provisions concerning the interest paid on certain industrial development bonds issued before January 1, 1969, and certain other industrial development bonds. Even if section 103(c) does not prevent a bond from being treated as an obligation described in section 103(a)(1) and § 1.103–1, such bond shall nevertheless be treated as an obligation which is not described in section 103(a)(1) and § 1.103–1 if under section 103(d) it is an arbitrage bond. For purposes of section 103(c), the term ''issue'' includes a single obligation such as a single note issued in connection with a bank loan as well as a series of notes or bonds.

(b) *Industrial development bonds*—(1) *Definition.* For purposes of this section, the term ''industrial development bond'' means any obligation—

(i) Which is issued as part of an issue all or a major portion of the proceeds of which are to be used directly or indirectly in any trade or business carried on by any person who is not an exempt person (as defined in subparagraph (2) of this paragraph), and

(ii) The payment of the principal or interest on which, under the terms of such obligation or any underlying arrangement (as described in subparagraph (4) of this paragraph), is in whole or in major part (*i.e.*, major portion)—

(*a*) Secured by any interest in property used or to be used in a trade or business,

(*b*) Secured by any interest in payments in respect of property used or to be used in a trade or business, or

(*c*) To be derived from payments in respect of property, or borrowed money, used or to be used in a trade or business.

See subparagraphs (3) and (4) of this paragraph for the trade or business test and the security interest test respectively. See §1.103–8(a)(6) to determine the amount of proceeds of an issue for which the amount payable during each annual period over the term of the issue is less than the amount of interest accruing thereon in such period, e.g., in the case of an issue sold by the issuer for less than its face amount.

(2) *Exempt person.* The term ''exempt person'' means a governmental unit as defined in this subparagraph, or an organization which is described in section 501(c)(3) and this subparagraph and is exempt from taxation under section 501(a). For purposes of this subparagraph, the term ''governmental unit'' means a State or local governmental unit (as defined in §1.103–1). For purposes of this subparagraph, the term ''governmental unit'' also includes the United States of America (or an agency or instrumentality of the United States of America), but only in the case of obligations (i) issued on or before August 3, 1972, or (ii) issued after August 3, 1972, with respect to which a bond resolution or any other official action was taken and in reliance on such action either (*a*) construction of such facility to be financed with such obligations commenced or (*b*) a binding contract was entered into, or an irrevocable bid was submitted, prior to August 3, 1972, or (iii) issued after August 3, 1972, with respect to a program approved by Congress prior to such date but only if (*a*) a portion of such program has been financed by obligations issued prior to such date, to which section 103(a) applied pursuant to a ruling issued by the Commissioner or his delegate prior to such date and (*b*) construction of one or more facilities comprising a part of such program commenced prior to such date. For purposes of this subparagraph, a tax-exempt organization is an exempt person only with respect to a trade or business it carries on which is not an unrelated trade or business. Whether a particular trade or business carried on by a tax-exempt organization is an unrelated trade or business is determined by applying the rules of section 513(a) (relating to general rule for unrelated trade or business) and the regulations thereunder to the tax-exempt organization without regard to whether the organization is an organization subject to the tax imposed by section 511 (relating to imposition of tax on unrelated business income of charitable, etc., organizations).

(3) *Trade or business test.* (i) The trade or business test relates to the use of the proceeds of a bond issue. The test is met if all or a major portion of the proceeds of a bond issue is used in a trade or business carried on by a nonexempt person. For example, if all or a major portion of the proceeds of a bond issue is to be loaned to one or more private business users, or is to be used to acquire, construct, or reconstruct facilities to be leased or sold to such private business users, and such proceeds or facilities are to be used in trades or businesses carried on by them, such proceeds are to be used in a trade or business carried on by persons who are not exempt persons, and the debt obligations comprising the bond issue satisfy the trade or business test. If, however, less than a major portion of the proceeds of an issue is to be loaned to nonexempt persons or is to be used to acquire or construct facilities which will be used in a trade or business carried on by a nonexempt person, the debt obligations will not be industrial development bonds. Also, when publicly-owned facilities which are intended for general public use, such as toll roads or bridges, are constructed with the proceeds of a bond issue and used by nonexempt persons in their trades or businesses on the same basis as other members of the public, such use does not constitute a use in the trade or business of a nonexempt person for purposes of the trade or business test.

(ii) In determining whether a debt obligation meets the trade or business test, the indirect, as well as the direct, use of the proceeds is to be taken into account. For example, the debt obligations comprising a bond issue do not fail to satisfy the trade or business test merely because the State or local governmental unit uses the proceeds to engage in a series of financing transactions for property to be used by private business users in trades or businesses carried on by them. Similarly, if such proceeds are to be used to construct facilities to be leased or sold to any nonexempt person for use in a trade or business it carries on, such proceeds are to be used in a trade or business carried on by a nonexempt person and the debt obligations comprising such issue satisfy the trade or business test. If such proceeds are to be used to construct facilities to be leased or sold to an exempt person who will, in turn, lease or sell the facilities to a nonexempt person for use in a trade or business, such proceeds are to be used in a trade or business carried on by a nonexempt person and the debt obligations comprising such issue satisfy the trade or business test. In addition, proceeds will be treated as being used in the trade or business of a nonexempt person in situations involving other arrangements, whether in a single transaction or in a series of transactions, whereby a nonexempt person uses property acquired with the proceeds of a bond issue in its trade or business.

(iii) The use of more than 25 percent of the proceeds of an issue of obligations in the trades or businesses of nonexempt persons will constitute the use of a major portion of such proceeds in such manner. In the case of the direct or indirect use of the proceeds of an issue of obligations or the direct or indirect use of a facility constructed, reconstructed, or acquired with such proceeds, the use by all nonexempt persons in their trades or businesses must be aggregated to determine whether the trade or business test is satisfied. If more than 25 percent of the proceeds of a bond issue is used in the trades or businesses of nonexempt persons, the trade or business test is satisfied. For special rules with respect to the acquisition of the output of facilities, see subparagraph (5) of this paragraph.

(4) *Security interest test.* The security interest test relates to the nature of the security for, and the source of, the payment of either the principal or interest on a bond issue. The nature of the security for, and the source of, the payment may be determined from the terms of the bond indenture or on the basis of an underlying arrangement. An underlying arrangement to provide security for, or the source of, the payment of the principal or interest on an obligation may result from separate agreements between the parties or may be determined on the basis of all the facts and circumstances surrounding the issuance of the bonds. The property which is the security for, or the source of, the payment of either the principal or interest on a debt obligation need not be property acquired with bond proceeds. The security interest test is satisfied if, for example, a debt obligation is secured by unimproved land or investment securities used, directly or indirectly, in any trade or business carried on by any private business user. A pledge of the full faith and credit of a State or local governmental unit will not prevent a debt obligation from otherwise satisfying the security interest test. For example, if the payment of either the principal or interest on a bond issue is secured by both a pledge of the full faith and credit of a State or local governmental unit and any interest in property used or to be used in a trade or business, the bond issue satisfies the security interest test. For rules with respect to the acquisition of the output of facilities see subparagraph (5) of this paragraph.

(5) *Trade or business test and security interest test with respect to certain output contracts.* (i) The use by one or more nonexempt persons of a major portion of the subparagraph (5) output of facilities such as electric energy, gas, or water facilities constructed, reconstructed, or acquired with the proceeds of an issue satisfies the trade or business test and the security interest test if such use has the effect of transferring to nonexempt persons the benefits of ownership of such facilities, and the burdens of paying the debt service on governmental obligations used directly

or indirectly to finance such facilities, so as to constitute the indirect use by them of a major portion of such proceeds. Such benefits and burdens are transferred and a major portion of the proceeds of an issue is used indirectly by the users of the subparagraph (5) output of such a facility which is owned and operated by an exempt person where—

(*a*)(*1*) One nonexempt person agrees pursuant to a contract to take, or to take or pay for, a major portion (more than 25 percent) of the subparagraph (5) output (within the meaning of subdivision (ii) of this subparagraph) of such a facility (whether or not conditional upon the production of such output) or (*2*) two or more nonexempt persons, each of which pays annually a guaranteed minimum payment exceeding 3 percent of the average annual debt service with respect to the obligations in question, agree, pursuant to contracts, to take, or to take or pay for, a major portion (more than 25 percent) of the subparagraph (5) output of such a facility (whether or not conditioned upon the production of such output), and

(*b*) Payment made or to be made with respect to such contract or contracts by such nonexempt person or persons exceeds a major part (more than 25 percent) of the total debt service with respect to such issue of obligations.

(ii) For purposes of this subparagraph—

(*a*) Where a contract described in subdivision (i) of this subparagraph may be extended by the issuer of obligations described therein, the term of the contract shall be considered to include the period for which such contract may be so extended.

(*b*) The subparagraph (5) output of a facility shall be determined by multiplying the number of units produced or to be produced by the facility in 1 year by the number of years in the contract term of the issue of obligations issued to provide such facility. The number of units produced or to be produced by a facility in 1 year shall be determined by reference to its nameplate capacity (or where there is no nameplate capacity, its maximum capacity) without any reduction for reserves or other unutilized capacity. The contract term of an issue begins on the date the output of a facility is first taken, pursuant to a take or a take or pay contract, by a nonexempt person and ends on the latest maturity date of any obligation of the issue (determined without regard to any optional redemption dates). If, however, on or before the date of issue of a prior issue of governmental obligations issued to provide a facility, the issuer makes a commitment in the bond indenture or related document to refinance such prior issue with one or more subsequent issues of governmental obligations, then the contract term of the issue shall be determined with regard to the latest redemption date of any obligation of the last such refinancing issue with respect to such facility (determined without regard to any optional redemption dates). Where it appears that the term of an issue (or the terms of two or more issues) is extended for purposes of extending the contract term of an issue and thereby increasing the subparagraph (5) output of the facility provided by such issue, the subparagraph (5) output of such facility shall be determined by the Commissioner without regard to the provisions of this subdivision (*b*).

(*c*) The total debt service with respect to an issue of obligations shall be the total dollar amount (excluding any penalties) payable with respect to such issue over its entire term. The entire term of an issue begins on its date of issue and ends on the latest maturity date of any obligation of the issue (determined without regard to any optional redemption dates). If, however, on or before the date of issue of a prior issue of governmental obligations the issuer makes a commitment in the bond indenture or related document to refinance such prior issue with one or more subsequent issues of governmental obligations, the entire term of the issue shall be determined with regard to the latest redemption date of any obligation of the last such refinancing issue (determined without regard to any optional redemption dates).

(*d*) Two or more nonexempt persons who are related persons (within the meaning of section 103(c)(6)(C)) shall be treated as one nonexempt person.

(c) *Examples.* The application of the rules contained in section 103(c) (2) and (3) and paragraph (b) of this section are illustrated by the following examples:

Example 1. State A and corporation X enter into an arrangement under which A is to provide a factory which X will lease for 20 years. The arrangement provides (1) that A will issue $10 million of bonds, (2) that the proceeds of the bond issue will be used to purchase land and to construct and equip a factory in accordance with X's specifications, (3) that X will rent the facility (land, factory, and equipment) for 20 years at an annual rental equal to the amount necessary to amortize the principal and pay the interest on the outstanding bonds, and (4) that such payments by X and the facility itself will be the security for the bonds. The bonds are industrial development bonds since they are part of an issue of obligations (1) all of the proceeds of which are to be used (by purchasing land and constructing and equipping the factory) in a trade or business by a nonexempt person, and (2) the payment of the principal and interest on which is secured by the facility and payments to be made with respect thereto.

Example 2. The facts are the same as in example (1) except that (1) X will purchase the facility, and (2) annual payments equal to the amount necessary to amortize the principal and pay the interest on the outstanding bonds will be made by X. The bonds are industrial development bonds for the reasons set forth in example (1).

Example 3. State B and corporation X enter into an arrangement under which B is to loan $10 million to X. The arrangement provides (1) that B will issue $10 million of bonds, (2) that the proceeds of the bond issue will be loaned to X to provide additional working capital and to finance the acquisition of certain new machinery, (3) that X will repay the loan in annual installments equal to the amount necessary to amortize the principal and pay the interest on the outstanding bonds, and (4) that the payments on the loan and the machinery will be the security for only the payment of the principal on the bonds. The bonds are industrial development bonds since they are part of an issue of obligations (1) all of the proceeds of which are to be used in a trade or business by a nonexempt person, and (2) the payment of the principal on which is secured by payments to be made in respect of property to be used in a trade or business. The result would be the same if only the payment of the interest on the bonds were secured by payments on the loan and machinery.

Example 4. The facts are the same as in example (1), (2), or (3) except that the annual payments required to be made by corporation X exceed the amount necessary to amortize the principal and pay the interest on the outstanding bonds. The bonds are industrial development bonds for the reasons set forth in such examples. The fact that corporation X is required to pay an amount in excess of the amount necessary to pay the principal and interest on the bonds does not affect their status as industrial development bonds. Similarly, if the annual payments required to be made by corporation X were sufficient to pay only a major portion of either the principal or the interest on the outstanding bonds, the bonds would be industrial development bonds for the reasons set forth in such examples.

Example 5. The facts are the same as in example (1), (2), (3), or (4) except that the issuer is a political subdivision which has taxing power and the bonds are general obligation bonds. Since both the trade or business and the security interest tests are met, the bonds are industrial development bonds notwithstanding the fact that they constitute an unconditional obligation of the issuer payable from its general revenues.

Example 6. (a) State C issues its general obligation bonds to purchase land and construct a hotel for use by the general public (*i.e.*, tourists, visitors, travelers on business, etc.). The bond indenture provides (1) that C will own and operate the project for the period required to redeem the bonds, and (2) that the project itself and the revenues derived therefrom are the security for the bonds. The bonds are not industrial development bonds since (1) the proceeds are to be used by an exempt person in a trade or business carried on by such person, and (2) a major portion of such proceeds is not to be used, directly or indirectly, in a trade or business carried on by a nonexempt person. Use of the hotel by hotel guests who are travelling in connection with trades or businesses of nonexempt persons is not an indirect use of the hotel by such nonexempt persons for purposes of section 103(c).

(b) The facts are the same as in paragraph (a) of this example except that corporation Y enters into a long-term agreement with C that Y will rent more than one-fourth of the rooms on an annual basis for a period approximately equal to one half of the term of the bonds. The bonds are industrial development bonds because (1) a major portion of the proceeds used to construct the hotel is to be used in the trade or business of corporation Y (a nonexempt person) and (2) a major portion of the principal and interest on such issue will be derived from payments in respect of the property used in the trade or business of Y.

Example 7. (a) State D and corporation Y enter into an agreement under which Y will lease for 20 years three floors of a 12- story office building to be constructed by D on land which it will acquire. D will occupy the grade floor and the remaining eight floors of the building. The portion of the costs of acquiring the land and constructing the building which are allocated to the space to be leased by Y is not in excess of 25 percent of the total costs of acquiring the land and constructing the building. Such costs, whether attributable to the acquisition of land or the construction of the building, were allocated to leased space in the same proportion that the reasonable rental value of such leased space bears to the reasonable rental value of the entire building. From the facts and circumstances presented, it is determined that such allocation was reasonable. The arrangement between D and Y provides that D will issue $10 million of bonds, that the proceeds of the bond issue will be used to purchase land and construct an office building, that Y will lease the designated floor space for 20 years at its reasonable rental value, and that such rental payments and the building itself shall be security for the bonds. The bonds are not industrial development bonds since a major portion of the proceeds is not to be used, directly or indirectly, in the trade or business of a nonexempt person.

(b) The facts are the same as in paragraph (a) of this example except that corporation Y will lease four floors, and the costs allocated to these floors are in excess of 25 percent of D's investment in the land and building. The bonds are industrial development bonds because (1) a major portion of the building is to be used in the trade or business of a nonexempt person, and (2) a major portion of the principal and interest on such issue is secured by the rental payments on the building.

Example 8. The facts are the same as in paragraph (b) of example (7) except that, instead of leasing any space to corporation Y, State D will lease the four floors to numerous unrelated private business users to be used in their trades or businesses. No lease will have a term exceeding 2 years. A major portion of the principal and interest will be paid from the revenues that D will derive from such leases. The fact that the activities of D, an exempt person, may amount to a trade or business of leasing property is not material, and the bonds are industrial development bonds for the reasons set forth in paragraph (b) of example (7). The result would be the same in the case of long-term leases.

Example 9. State E issues its obligations to finance the construction of dormitories for educational institution Z which is an organization described in section 501(c)(3) and exempt from tax under section 501(a). The dormitories are to be owned and operated by Z and their operation does not constitute an unrelated trade or business. The bonds are not industrial development bonds since the proceeds are to be used by an exempt person in a trade or business carried on by such person which is not an unrelated trade or business, as determined by applying section 513(a) to Z.

Example 10. State F issues its obligations to finance the construction of a toll road and the cost of erecting related facilities such as gasoline service stations and restaurants. Such related facilities represent less than 25 percent of the total cost of the project and are to be leased or sold to nonexempt persons. The toll road is to be owned and operated by F. The revenues from the toll road and from the rental of related facilities are the security for the bonds. The bonds are not industrial development bonds since a major portion of the proceeds is not to be used, directly or indirectly, in the trades or businesses of nonexempt persons. The fact that vehicles owned by nonexempt persons engaged in their trades or businesses may use the road in common with, or as a part of, the general public is not material.

Example 11. City G issues its obligations to finance the construction of a municipal auditorium which it will own and operate. The use of the auditorium will be open to anyone who wishes to use it for a short period of time on a rate-scale basis. The rights of such a user are only those of a transient occupant rather than the full legal possessory interests of a lessee. It is anticipated that the auditorium will be used by schools, church groups, and fraternities, and numerous commercial organizations. The revenues from the rentals of the auditorium and the auditorium building itself will be the security for the bonds. The bonds are not industrial development bonds because such use is not a use in the trade or business of a nonexempt person.

Example 12. The facts are the same as in example (11) except that one nonexempt person will have a 20-year rental agreement providing for exclusive use of the entire auditorium for more than 3 months of each year at a rental comparable to that charged short-term users. The bonds are industrial development bonds since such use is a use in the trade or business of a nonexempt person and, therefore, a major portion of the proceeds of the issue will be used in the trade or business of a nonexempt person and a major portion of the principal or interest on such issue will be secured by a facility used in such trade or business and by payments with respect to such facility.

Example 13. In order to construct an electric generating facility of a size sufficient to take advantage of the economies of scale: (1) City H will issue $50 million of its 25-year bonds and Z (a privately owned electric utility) will use $100 million of its funds for construction of a facility they will jointly own as tenants in common. (2) Each of the participants will share in the ownership, output, and operating expenses of the facility in proportion to its contribution to the cost of the facility, that is, one-third by H and two-thirds by Z. (3) H's bonds will be secured by H's ownership in the facility and by revenues to be derived from the sale of H's share of the annual output of the facility. (4) Because H will need only 50 percent of its share of the annual output of the facility, it agrees to sell to Z 25 percent of its share of such annual output for a period of 20 years pursuant to a contract under which Z agrees to take or pay for such power in all events. The facility will begin operation, and Z will begin to receive power, 4 years after the City H obligations are issued. The contract term of the issue will, therefore, be 21 years. (5) H also agrees to sell the remaining 25 percent of its share of the annual output to numerous other private utilities under a prevailing rate schedule including demand charges. (6) No contracts will be executed obligating any person other than Z to purchase any specified amount of the power for any specified period of time and no one such person (other than Z) will pay a demand charge or other minimum payment under conditions which, under paragraph (b)(5) of this section, result in a transfer of the benefits of ownership and the burdens of paying the debt service on obligations used directly or indirectly to provide such facilities. The bonds are not industrial development bonds because H's one-third interest in the facility (financed with bond proceeds) shall be treated as a separate property interest and, although 25 percent of H's interest in the annual output of the facility will be used directly or indirectly in the trade or business of Z, a nonexempt person, under the rule of paragraph (b)(5) of this section, such portion constitutes less than a major portion of the subparagraph (5) output of the facility. If more than 25 percent of the subparagraph (5) output of the facility were to be sold to Z pursuant to the take or pay contract, the bonds would be industrial development bonds since they would be secured by H's ownership in the facility and revenues therefrom, and under the rules of paragraph (b)(5) of this section a major portion of the proceeds of the bond issue would be used in the trade or business of Z, a nonexempt person.

Example 14. J, a political subdivision of a State, will issue several series of bonds from time to time and will use the proceeds to rehabilitate urban areas. More than 25 percent of the proceeds of each issue will be used for the rehabilitation and construction of buildings which will be leased or sold to nonexempt persons for use in their trades or businesses. There is no limitation either on the number of issues or the aggregate amount of bonds which may be outstanding. No group of bondholders has any legal claim prior to any other bondholders or creditors with respect to specific revenues of J, and there is no arrangement whereby revenues from a particular project are paid into a trust or constructive trust, or sinking fund, or are otherwise segregated or restricted for the benefit of any group of bondholders. There is, however, an unconditional obligation by J to pay the principal and interest on each issue of bonds. Further, it is apparent that J requires the revenues from the lease or sale of buildings to nonexempt persons in order to pay in full the principal and interest on the bonds in question. The bonds are industrial development bonds because a major portion of the proceeds will be used in the trades or businesses of nonexempt persons and, pursuant to an underlying arrangement, payment of the principal and interest is, in major part, to be derived from payments in respect of property or borrowed money used in the trades or businesses of nonexempt persons.

Example 15. Power Authority K, a political subdivision created by the legislature in State X to own and operate certain power generating facilities, sells all of the power from its existing facilities to four private utility systems under contracts executed in 1970, whereby such four systems are required to take or pay for specified portions of the total power output until the year 2000. Currently, existing facilities supply all of the present needs of the four utility systems but their future power requirements are expected to increase substantially. K issues 20-year general obligation bonds to construct a large nuclear generating facility. A fifth private utility system contracts with K to take or pay for 30 percent of the subparagraph (5) output of the new facility. The balance of the power output of the new facility will be available for sale as required, but initially it is not anticipated there will be any need for such power. The revenues from the contract with the fifth private utility system will be sufficient to pay less than 25 percent of the principal or interest on the bonds. The balance, which will exceed 25 percent of the principal or interest on such bonds, will be paid from revenues from the contracts with the four systems from sale of power produced by the old facilities. The bonds will be industrial development bonds because a major portion of the proceeds will be used in the trade or business of a nonexempt person, and payment of the principal and interest, pursuant to an underlying arrangement, will be derived in major part from payments in respect of property used in the trades or businesses of nonexempt persons.

(d) *Certain refunding issues*—(1) *General rule.* In the case of an issue of obligations issued to refund the outstanding face amount of an issue of obligations, the proceeds of the refunding issue will be considered to be used for the purpose for which the proceeds of the issue to be refunded were used. The rules of this subparagraph shall apply regardless of the date of issuance of the issue to be refunded and shall apply to refunding issues to be issued to refund prior refunding issues.

(2) *Obligations issued prior to effective date.* In the case of an issue of obligations issued to refund the outstanding face amount of an issue of obligations issued on or before April 30, 1968 (or before January 1, 1969, if the transitional rules of § 1.103–12 are applicable) which would have been industrial development bonds within the meaning of section 103(c)(2) had they been issued after such date, the refunding issue shall not be considered to be an issue of industrial development bonds if it does not make funds available for any purpose other than the debt service on the obligations. For rules as to arbitrage bonds, see section 103(d).

(3) *Examples.* The provisions of this paragraph may be illustrated by the following examples:

Example 1. In 1969, State A issued $20 million of 20-year revenue bonds the proceeds of which were used to contruct a sports facility which qualifies as an exempt facility described in section 103(c)(4)(B) and paragraph (c) of § 1.103–8. The sports facility will be owned and operated by X, a nonexempt person, for the use of the general public. In 1975, A issues $15 million of revenue bonds in order to refund the outstanding face amount of the 1969 issue. Since the proceeds of the 1969 issue were used for an exempt facility, the proceeds of the 1975 refunding issue will be considered to be used for the same purposes and section 103(c)(1) shall not apply to the 1975 refunding issue. The result would have been the same if the original issue had been issued in 1965. For rules as to a refunding obligation held by substantial users of facilities constructed with the proceeds of the issue refunded, see section 103(c)(7) and § 1.103–11.

Example 2. In 1967, prior to the effective date of section 103(c), city B issued $10 million of revenue bonds the proceeds of which were used to construct a manufacturing facility for corporation Y, a nonexempt person. Lease payments by Y were security for the bonds. In 1975, B issue $7 million of revenue bonds in order to retire the outstanding face amount of the 1967 issue. The interest rate of the 1975 issue is one and one-half percentage points lower than the interest rate on the 1967 issue. Both issues sold at par. All of the terms of the 1975 issue are the same as the terms of the 1967 issue with the exception of the interest rate. The 1975 refunding issue will not be considered to be an issue of industrial development bonds since the refunding issue will not make funds available for any purpose other than the debt service on the outstanding obligations.

Example 3. The facts are the same as in example (2) except that the interest rate on the refunding issue is the same as the interest rate on the issue to be refunded. Assume further that city B issued the 1975 refunding issue in order to extend the term of the obligations issued in 1967 as the result of its inability to pay such obligations due to insufficient revenues. The results will be the same as in example (2) for the reasons stated therein.

[T.D. 7199, 37 FR 15486, Aug. 3, 1972; 37 FR 16177, Aug. 11, 1972, as amended by T.D. 7869, 48 FR 1708, Jan. 14, 1983]

§ 1.103–8 Interest on bonds to finance certain exempt facilities.

(a) *In general*—(1) *General rule.* (i) Under section 103(b)(4), interest paid on an issue of obligations issued by a State or local governmental unit (as defined in § 1.103–1) is not includable in gross income if substantially all of the proceeds of such issue is to be used to provide one or more of the exempt facilities listed in subparagraphs (A) through (J) of section 103(b)(4) and in this section. However, interest on an obligation of such issue is includable in gross income if the obligation is held by a substantial user or a related person (as described in section 103(b)(13) and § 1.103–11). If substantially all of the proceeds of a bond issue is to be used to provide such exempt facilities, the debt obligations are treated as obligations described in section 103(a)(1) and § 1.103–1 even though such obligations are industrial development bonds as defined in section 103(b)(2) and § 1.103–7. Substantially all of the proceeds of an issue of governmental obligations are used to provide an exempt facility if 90 percent or more of such proceeds are so used. For purposes of this ''substantially all'' test, two rules apply. First, proceeds are reduced by amounts properly allocable on a pro rata basis between providing the exempt facility and other uses of the proceeds. Second, amounts used to provide an exempt facility include amounts paid or incurred which are chargeable to the facility's capital account or would be so chargeable either with a proper election by a taxpayer (for example, under section 266) or but for a proper election by a taxpayer to deduct such amounts. In the event the amount payable with respect to an issue during each annual period over its term is less than the amount of interest accruing thereon in such period, e.g., in the case of an issue sold by the issuer for less than its face amount, see paragraph (a)(6) of this section to determine the amount of proceeds of the issue.

(ii) The provisions of subdivision (i) of this subparagraph shall also apply to an issue of obligations substantially all of the proceeds of which is to be used to provide exempt facilities described in this section and for either or both of the following purposes: (*a*) To acquire or develop land as the site for an industrial park described in section 103(b)(5) and §1.103–9, (*b*) to provide facilities to be used by an exempt person.

(iii) Section 103(b)(4) only becomes applicable where the bond issue meets both the trade or business and the security interest tests so that obligations are industrial development bonds within the meaning of section 103(b)(2). For rules as to exempt facilities including property functionally related and subordinate to such facilities, see subparagraph (3) of this paragraph. For rules with respect to the ultimate use of proceeds of obligations, see subparagraph (4) of this paragraph. For rules which limit the application of the provisions of this section see subparagraph (5) of this paragraph. For the interrelationship of the rules provided in this section and the exemption for certain small issues provided in section 103(b)(6), see §1.103–10.

(2) *Public use requirement.* To qualify under section 103(b)(4) and this section as an exempt facility, a facility must serve or be available on a regular basis for general public use, or be a part of a facility so used, as contrasted with similar types of facilities which are constructed for the exclusive use of a limited number of nonexempt persons in their trades or businesses. For example, a private dock or wharf owned by or leased to, and serving only a single manufacturing plant would not qualify as a facility for general public use, but a hangar or repair facility at a municipal airport, or a dock or a wharf, would qualify even if it is owned by, or leased or permanently assigned to, a nonexempt person provided that such nonexempt person directly serves the general public, such as a common passenger carrier or freight carrier. Similarly, an airport owned or operated by a nonexempt person for general public use is a facility for public use, as is a dock or wharf which is a part of a public port. However, a landing strip which, by reason of a formal or informal agreement or by reason of geographic location, will not be available for general public use does not satisfy the public use requirement. Sewage or solid waste disposal facilities and air or water pollution control facilities, described in sections 103(b)(4) (E) and (F) and paragraphs (f) and (g) of this section, will be treated in all events as serving a general public use although they may be part of a nonpublic facility such as a manufacturing facility used in the trade or business of a nonexempt user.

(3) *Functionally related and subordinate.* An exempt facility includes any land, building, or other property functionally related and subordinate to such facility. Property is not functionally related and subordinate to a facility if it is not of a character and size commensurate with the character and size of such facility. Since substantially all of the proceeds of a bond issue must be used for the exempt facility (or for any combination of exempt facilities, industrial parks, and facilities to be used by exempt persons), including property functionally related and subordinate thereto, an insubstantial amount of the proceeds of a bond issue may be used for facilities which are neither exempt facilities (or a combination of exempt facilities, industrial parks and facilities to be used by exempt persons) nor functionally related and subordinate to exempt facilities. Thus, for example, where substantially all of the proceeds of an urban redevelopment bond issue are to be used by a State urban redevelopment agency for residential real property for family units within the meaning of section 103(b)(4)(A) and paragraph (b) of this section, an insubstantial amount may be used for an industrial or commercial project or for any other purpose that is not functionally related and subordinate to the residential real property for family units.

(4) *Ultimate use of proceeds.* The question whether substantially all of the proceeds of an issue of obligations are to be used to provide one or more of the exempt facilities listed in subparagraphs (A) through (J) of section 103(b)(4) and in this section is to be resolved by reference to the ultimate use of such proceeds. For example, such proceeds will be treated as used to provide residential rental property whether the State or local governmental unit (i) constructs such property and leases or sells it to any person who is not an exempt person for use in such person's trade or business of leasing such property; (ii) lends the proceeds to any such person for such purpose; or (iii) lends the proceeds to banks or other financial institutions in order to increase the supply of funds for mortgage lending under conditions requiring such banks or other financial institutions to use such proceeds only for further lending for residential rental property.

(5) *Limitation.* (i) A facility qualifies under this section only to the extent that there is a valid reimbursement allocation under §1.150–2 with respect to expenditures that are incurred before the issue date of the bonds to provide the facility and that are to be paid with the proceeds of the issue. In addition, if the original use of the facility begins before the issue date of the bonds, the facility does not qualify under this section if any person that was a substantial user of the facility at any time during the 5-year period before the issue date or any related person to that user receives (directly or indirectly) 5 percent or more of the proceeds of the issue for the user's interest in the facility and is a substantial user of the facility at any time during the 5-year period after the issue date, unless—

(A) An official intent for the facility is adopted under §1.150–2 within 60 days after the date on which acquisition, construction, or reconstruction of that facility commenced; and

(B) For an acquisition, no person that is a substantial user or related person after the acquisition date was also a substantial user more than 60 days before the date on which the official intent was adopted.

(ii) A facility, the original use of which commences (or the acquisition of which occurs) on or after the issue date of bonds to provide that facility, qualifies under this section only to the extent that an official intent for the facility is adopted under §1.150–2 by the issuer of the bonds within 60 days after the commencement of the construction, reconstruction, or acquisition of that facility. Temporary construction or other financing of a facility prior to the issuance of the bonds to provide that facility will not cause that facility to be one that does not qualify under this paragraph (a)(5)(ii).

(iii) For purposes of paragraph (a)(5)(i) of this section, *substantial user* has the meaning used in section 147(a)(1), *related person* has the meaning used in section 144(a)(3), and a user that is a governmental unit within the meaning of §1.103–1 is disregarded.

(iv) Except to the extent provided in §§1.142–4(d), 1.148–11A(i), and 1.150–2(j), this paragraph (a)(5) applies to bonds issued after June 30, 1993, and sold before July 8, 1997. See §1.142–4(d) for rules relating to bonds sold on or after July 8, 1997.

(6) *Deep discount obligations.* (i) Except as otherwise provided in paragraph (a)(7) of this section, the proceeds of any issue of obligations sold by the issuer after June 4, 1982, shall include any imputed proceeds of the issue. The imputed proceeds of an issue equal the sum of the amounts of imputed proceeds for each annual period (hereinafter, bond year) over the term of the issue.

(ii) The amount of imputed proceeds for a bond year equals—

(*a*) The sum of the amounts of interest that will accrue with respect to each obligation that is part of the issue in such year, reduced (but not below zero) by

(*b*) The sum of the amounts of principal and interest that become payable with respect to the issue in that bond year.

(iii) Interest will be deemed to accrue with respect to an obligation on an amount that, as of the commencement of that year, is equal to the sum of—

(*a*) The purchase price (as defined in §1.103–13(d)(2)) allocable to the obligation and (*b*) The aggregate of the amounts of interest accruing in each prior bond year with respect to the obligation, reduced by all amounts that became payable with respect to the obligation in prior bond years. Any amount that becomes payable during the 30 day period following any bond year will be deemed to have become payable in such bond year. Thus, to the extent interest on an obligation accruing during a bond year does not become payable within 30 days from the end of such year, it is treated as reinvested under the same terms as the obligation. For purposes of this subparagraph (6), the rate at which such interest accrues is equal to the yield of the obligation. Yield is computed in the same manner as set forth in §1.103–13(c)(1)(ii) for computing yield on governmental obligations (assuming annual compounding of interest). Such computations shall be made without regard to optional call dates.

(7) *Deep discount obligations; special rules.* (i) There are no imputed proceeds with respect to an obligation if—

(*a*) The obligation does not have a stated interest rate (determinable at the date of issue) that increases over the term of the obligation, and

(*b*) The purchase price of the obligation is at least 95 percent of its face amount.

At the option of the issuer, any obligation described in the preceding sentence may be disregarded in computing the imputed proceeds of the issue. Payments with respect to such obligations are also disregarded in determining the amount payable with respect to the issue in that bond year. If each obligation which is part of an issue is described in this subdivision (i), there are no imputed proceeds with respect to the issue.

(ii) If the actual rate at which interest is to accrue over the term of an obligation is indeterminable at the date of issue then, in computing the yield of the obligation for purposes of this paragraph, such rate shall be determined as if the conditions as of the date of issue will not change over the term of the obligation. Thus, for example, if interest on an obligation is to be paid semiannually at a rate equal to 80 percent of the yield on six month Treasury bills at the most recent public sale immediately prior to the corresponding interest payment date and the yield on six month Treasury bills sold immediately preceding the issue date is 10 percent, then the six month Treasury bill rate is deemed to be a constant 10 percent for purposes of determining the amount of imputed proceeds of the issue. Therefore, all interest payments on the obligation would be deemed to be made at a rate of 8 percent.

(8) *Examples.* The principles of this paragraph may be illustrated by the following examples:

Example 1. State A issues its bonds and plans to use substantially all of the proceeds from such bond issue to purchase land and build a facility which will be used for one of the purposes described in section 103(b)(4) and this section. The arrangement provides that (1) A will issue bonds with a face amount of $21 million and with all accrued interest payable annually, the proceeds of which (after deducting bond election costs, costs of publishing notices, attorneys' fees, printing costs, trustees' fees for fiscal agents, and similar expenses) will be $20 million; (2) $18 million of the proceeds of the bond issue will be used to purchase land and to construct such facility; (3) $2 million of the proceeds will be used for an unrelated facility which will be used by X, a nonexempt person, in a separate trade or business and for a purpose not described in section 103(b)(4) or (5); (4) X will rent both facilities for 20 years at an annual rental equal to the amount necessary to amortize the principal and pay the interest annually on the outstanding bonds; and (5) such payments by X and the facilities will be the security for the bonds. On these facts, substantially all of the proceeds will be used in connection with an exempt facility described in section 103(b)(4) and this section. Accordingly, section 103(b)(1) does not apply to the bonds unless such bonds are thereafter held by a person who is a substantial user of the facilities or a related person within the meaning of section 103(b)(13) and §1.103–11.

Example 2. On July 1, 1982, State B sells an issue of its obligations to an underwriter in anticipation of a public offering. The initial offering price is $18,627,639.69 of which $17,000,000 is to be used to construct a pollution control facility described in section 103(b)(4)(F). X Corporation, a nonexempt person, is to use the facility and, in exchange, is obligated to pay an amount equal to the face amount of the issue when it becomes due. The obligations are issued on August 1, 1982. The face amount of the issue is $30,000,000. The issue is a term issue with all obligations maturing on August 1, 1987. The issue bears no stated rate of interest; there are no interest coupons on the obligations. The bonds are industrial development bonds with a yield (based upon annual compounding) of ten percent. Based on these facts, the amount of imputed proceeds with respect to the issue is determined as follows:

Date	Purchase price plus accumulated interest	Interest	Imputed proceeds
Aug. 1, 1983	$18,627,639.69	$1,862,763.97	$1,862,763.97
Aug. 1, 1984	20,490,403.68	2,049,040.37	2,049,040.37
Aug. 1, 1985	22,539,444.03	2,253,944.40	2,253,944.40
Aug. 1, 1986	24,793,388.43	2,479,338.84	2,479,338.84
Aug. 1, 1987	27,272,727.27	2,727,272.73	0
Total imputed proceeds			8,645,087.58

Therefore, proceeds of the issue equal $27,272,727.27 less issuance costs. Substantially all of the bond proceeds are not used to provide an exempt facility, and section 103(b)(1) applies to the issue.

Example 3. The facts are the same as example (2) except that the issue has a face amount and purchase price of $18,500,000. The issue also provides for one payment in addition to the redemption payment, in the amount of $10,267,668 payable on or after August 1, 1986, one year before maturity. Section 103(b)(1) applies to the issue.

Example 4. On July 1, 1982, City E sells an issue of industrial development bonds to provide for a convention facility, as described in section 103(b)(4)(C). Assume that the bonds are issued on that date as well. The issue has a face amount of $15,240,000 and a purchase price of $11,929,382.53. The estimated cost of the facility is $11,000,000. The bonds are ''zero coupon'' bonds, *i.e.*, there are no interest coupons. Each series is initially offered for less than 95 percent of its face amount. The issue matures serially over a five year period, with each series being allocated a part of the purchase price of the issue. The following chart indicates the purchase price and yield for each series and debt service for the issue:

[Amount allocable to each series]

Date	1983 series at 8 percent	1984 series at 8.5 percent	1985 series at 8.75 percent	1986 series at 9.25 percent	1987 series at 9.75 percent	Interest accruing on issue*	Amount due	Imputed proceeds
July 1, 1983	2,939,814.82	2,697,020.54	2,468,629.60	2,228.732.51	1,595,185.06			0
	235,185.18	229,246.75	216,005.09	206,157.76	155,530.54	1,042,125.32	3,175,000	
July 1, 1984		2,926,267.29	2,684,634.69	2,434,890.27	1,750,715.60			0
		248,732.71	234,905.54	225,227.35	170,694.77	879,560.37	3,175,000	
July 1, 1985			2,919,540.23	2,660,117.62	1,921,410.37			0
			255,459.77	246,060.88	187,337.51	688,858.16	3,175,000	
July 1, 1986				2,906,178.50	2,108,747.88			0
				268,821.50	205,602.92	474,424.42	3,175,000	
July 1, 1987					2,314,350.80			0
					225,649.20	225,649.20	2,540,000	
Total							15,240,000	

*This column (interest accruing on the issue) contains the sums of the interest that accrues on each series in each bond year. The amount of interest accruing on the issue is computed by adding the amount of interest accruing on each series outstanding for that bond year (the bottom number in the line for each bond year). The amount of interest annually accruing on each series also is added to the purchase price of the series to determine the amount of interest accruing in subsequent years, inasmuch as there are no payments with respect to the outstanding series prior to maturity. Thus, the "principal" amount, of the top of the two numbers given in such line for each bond year, is the purchase price allocable to that series plus the amount of interest that accrued on that series in prior years.

There are no imputed proceeds because the amount payable on the issue in each bond year exceeds the total amount of interest accruing on the issue during such bond year. Section 103(b)(1) does not apply to the bonds unless such bonds are held by a person who is a substantial user of the facility or a related person within the meaning of section 103(b)(13) and §1.103–11.

Example 5. On July 1, 1982, City C issues industrial development bonds in the face amount of $30 million to construct a sports facility described in section 103(b)(4)(B) to be leased to D, a nonexempt person, with payments on the bonds secured by the lease. C receives $30 million in exchange for the bonds which will be used to provide the facility. The bonds mature on July 1, 2002. Each bond provides for an annual interest payment equal to ten percent of the face amount of the bond, with the last payment thereon (on July 1, 2002) including a return of the principal amount of the bond. The proceeds of the issue are $30 million. Section 103(b)(1) does not apply to the bonds unless such bonds are held by a person who is a substantial user of the facility or a related person within the meaning of section 103(b)(13) and §1.103–11.

Example 6. The facts are the same as example (5) except that each bond provides for an annual interest payment equal to nine percent of its face amount and is sold with the option to tender the bond to D for purchase at par 5 years after the sale date of July 1, 1982 (*i.e.*, the bonds are sold with a ''put'' option). Such bonds also provide a put option annually thereafter. There are no imputed proceeds (without regard to §1.103–8(a)(7)), and the result is the same as example (5).

Example 7. On July 1, 1982, City F sells an issue of industrial development bonds in the face amount of $20 million to acquire a parking facility as described in section 103(b)(4)(D). The estimated cost of the facility is $17,800,000. The issue is issued on the same date and will mature serially over the following ten years. Each bond that is part of the issue bears annual interest coupons, each of which is in an amount equal to ten percent of the face amount of the bond. Each maturity has a face amount of $2,000,000. The issue is initially offered to the public for $19,700,000, allocable to each maturity as follows:

Maturity	Purchase price
July 1, 1983	$1,990,000
July 1, 1984	$1,980,000
July 1, 1985	$1,980,000
July 1, 1986	$1,970,000
July 1, 1987	$1,970,000
July 1, 1988	$1,970,000
July 1, 1989	$1,960,000
July 1, 1990	$1,960,000
July 1, 1991	$1,960,000
July 1, 1992	$1,960,000

Based on the foregoing issue proceeds equal $19,700,000 less issuance costs. There are no imputed proceeds with respect to this issue inasmuch as each bond pays interest at a constant rate in each bond year and the purchase price of each bond is at least 95 percent of its face amount. Substantially all of the proceeds are to be used to provide the exempt facility. Accordingly, section 103(b)(1) does not apply to the bonds unless such bonds are thereafter held by a person who is a substantial user of the facility or a related person within the meaning of section 103(b)(13) and §1.103–11.

(b) *Residential rental property*—(1) *General rule for obligations issued after April 24, 1979.* Section 103(b)(1) shall not apply to any obligation which is issued after April 24, 1979, and is part of an issue substantially all of the proceeds of which are to be used to provide a residential rental project in which 20 percent or more of the units are to be occupied by individuals or families of low or moderate income (as defined in paragraph (b)(8)(v) of this section). In the case of a targeted area project, the minimum percentage of units which are to be occupied by individuals of low or moderate income is 15 percent. See generally §1.103–7 for rules relating to refunding issues.

(2) *Registration requirement.* Any obligation (including any refunding obligation) issued after December 31, 1981, to provide a residential rental project must be issued as part of an issue, each obligation of which is in registered form (as defined in paragraph (b)(8)(ii) of this section).

(3) *Transitional rule.* For purposes of this section, obligations issued after April 24, 1979, may be treated as issued before April 25, 1979, if the transitional requirements of section 1104 of the Mortgage Subsidy Bond Tax Act of 1980 (94 Stat. 2670) are satisfied.

(4) *Residential rental project.* (i) *In general.* A residential rental project is a building or structure, together with any functionally related and subordinate facilities, containing one or more similarly constructed units—

(*a*) Which are used on other than a transient basis, and (*b*) Which satisfy the requirements of paragraph (b)(5)(i) of this section and are available to members of the general public in accordance with the requirement of paragraph (a)(2) of this section.

Substantially all of each project must contain such units and functionally related and subordinate facilities. Hotels, motels, dormitories, fraternity and sorority houses, rooming houses, hospitals, nursing homes, sanitariums, rest homes, and trailer parks and courts for use on a transient basis are not residential rental projects.

(ii) *Multiple buildings*. (*a*) Proximate buildings or structures (hereinafter ''buildings'') which have similarly constructed units are treated as part of the same project if they are owned for Federal tax purposes by the same person and if the buildings are financed pursuant to a common plan.

(*b*) Buildings are proximate if they are located on a single tract of land. The term ''tract'' means any parcel or parcels of land which are contiguous except for the interposition of a road, street, stream or similar property. Otherwise, parcels are contiguous if their boundaries meet at one or more points.

(*c*) A common plan of financing exists if, for example, all such buildings are provided by the same issue or several issues subject to a common indenture.

(iii) *Functionally related and subordinate facilities*. Under paragraph (a)(3) of this section, facilities that are functionally related and subordinate to residential rental projects include facilities for use by the tenants, for example, swimming pools, other recreational facilities, parking areas, and other facilities which are reasonably required for the project, for example, heating and cooling equipment, trash disposal equipment or units for resident managers or maintenance personnel.

(iv) *Owner-occupied residences*. For purposes of section 103 (b)(4)(A) and this paragraph (b), the term ''residential rental project'' does not include any building or structure which contains fewer than five units, one unit of which is occupied by an owner of the units.

(5) *Requirement must be continuously satisfied*—(i) *Rental requirement*. Once available for occupancy, each unit (as defined in paragraph (b)(8)(i) of this section) in a residential rental project must be rented or available for rental on a continuous basis during the longer of—

(*a*) The remaining term of the obligation, or

(*b*) The qualified project period (as defined in paragraph (b)(7) of this section).

(ii) *Low or moderate income occupancy requirement*. Individuals or families of low or moderate income must occupy that percentage of completed units in such project applicable to the project under paragraph (b)(1) of this section continuously during the qualified project period. For this purpose, a unit occupied by an individual or family who at the commencement of the occupancy is of low or moderate income is treated as occupied by such an individual or family during their tenancy in such unit, even though they subsequently cease to be of low or moderate income. Moreover, such unit is treated as occupied by an individual or family of low or moderate income until reoccupied, other than for a temporary period, at which time the character of the unit shall be redetermined. In no event shall such temporary period exceed 31 days.

(6) *Effect of post-issuance noncompliance*—(i) *In general*. Unless corrected within a reasonable period, noncompliance with the requirements of this paragraph (b) shall cause the project to be treated as other than a project described in section 103 (b)(4)(A) and this paragraph (b) as of the date of issue. After an issue to provide such project ceases to qualify, subsequent conformity with the requirements will not alter the taxable status of such issue.

(ii) *Correction of noncompliance*. If the issuer corrects any noncompliance arising from events occurring after the issuance of the obligation within a reasonable period, such noncompliance (e.g., an unauthorized sublease) shall not cause the project to be a project not described in this paragraph (b). A reasonable period is at least 60 days after such error is first discovered or would have been discovered by the exercise of reasonable diligence.

(iii) *Involuntary loss.* (*a*) The requirements of paragraph (b) shall cease to apply to a project in the event of involuntary noncompliance caused by fire, seizure, requisition, foreclosure, transfer of title by deed in lieu of foreclosure, change in a Federal law or an action of a Federal agency after the date of issue which prevents an issuer from enforcing the requirements of this paragraph, or condemnation or similar event but only if, within a reasonable period, either the obligation used to provide such project is retired or amounts received as a consequence of such event are used to provide a project which meets the requirement of section 103 (b)(4)(A) and this paragraph (b).

(*b*) The provisions of paragraph (b)(6)(iii)(*a*) of this section shall cease to apply to a project subject to foreclosure, transfer of title by deed in lieu of foreclosure or similar event if, at anytime during that part of the qualified project period subsequent to such event, the obligor on the acquired purpose obligation (as defined in §1.103–13(b)(4)(iv)(*a*)) or a related person (as defined in §1.103–10(e)) obtains an ownership interest in such project for tax purposes.

(7) *Qualified project period.* The term ''qualified project period'' means—

(i) For obligations issued after April 24, 1979, and prior to September 4, 1982, a period of 20 years commencing on the later of the date that the project becomes available for occupancy or the date of issue of the obligations. The requirement of paragraph (b)(5)(ii) of this section shall be deemed met if the owner of the project contracts with a Federal or state agency to maintain at least 20 percent (or 15 percent in the case of targeted areas) of the units for low or moderate income individuals or families (as defined in paragraph (b)(8)(v) of this section) for 20 years in consideration for rent subsidies for such individuals or families for such period.

(ii) For obligations issued after September 3, 1982, a period beginning on the later of the first day on which at least 10 percent of the units in the project are first occupied or the date of issue of an obligation described in section 103(b)(4)(A) and this paragraph and ending on the later of the date—

(*a*) Which is 10 years after the date on which at least 50 percent of the units in the project are first occupied,

(*b*) Which is a qualified number of days after the date on which any of the units in the project is first occupied, or

(*c*) On which any assistance provided with respect to the project under section 8 of the United States Housing Act of 1937 terminates.

For purposes of this paragraph (b)(7)(ii), the term ''qualified number of days'' means 50 percent of the total number of days comprising the term of the obligation with the longest maturity in the issue used to provide the project. In the case of a refunding of such an issue, the longest maturity is equal to the sum of the period the prior issue was outstanding and the longest term of any refunding obligations.

(8) *Other definitions.* For purposes of this paragraph—

(i) *Unit.* The term ''unit'' means any accommodation containing separate and complete facilities for living, sleeping, eating, cooking, and sanitation. Such accommodations may be served by centrally located equipment, such as air conditioning or heating. Thus, for example, an apartment containing a living area, a sleeping area, bathing and sanitation facilities, and cooking facilities equipped with a cooking range, refrigerator, and sink, all of which are separate and distinct from other apartments, would constitute a unit.

(ii) *In registered form.* The term ''in registered form'' has the same meaning as in section 6049. With respect to obligations issued after December 31, 1982, such term shall have the same meaning as prescribed in section 103(j) (including the regulations thereunder).

(iii) *Targeted area project.* The term ''targeted area project'' means a project located in a qualified census tract (as defined in §6a.103A–2(b)(4)) or an area of chronic economic distress (as defined in §6a.103A–2(b)(5)).

(iv) *Building or structure.* The term ''building or structure'' generally means a discrete edifice or other manmade construction consisting of an independent foundation, outer walls, and roof. A single unit which is not an entire building but is merely a part of a building is not a building or structure within the meaning of this section. As such, while single townhouses are not buildings if their foundation, outer walls, and roof are not independent, detached houses and rowhouses are buildings.

(v) *Low or moderate income.* Individuals and families of low or moderate income shall be determined in a manner consistent with determinations of lower income families under section 8 of the United States Housing Act of 1937, as amended, except that the percentage of median gross income which qualifies as low or moderate income shall be 80 percent. Therefore, occupants of a unit are considered individuals or families of low or moderate income only if their adjusted income (computed in the manner prescribed with §1.167(k)–3(b)(3)) does not exceed 80 percent of the median gross income for the area. Notwithstanding the foregoing, the occupants of a unit shall not be considered to be of low or moderate income if all the occupants are students (as defined in section 151(e)(4)), no one of whom is entitled to file a joint return under section 6013. The method of determining low or moderate income in effect on the date of issue will be determinative for such issue, even if such method is subsequently changed. In the event programs under section 8(f) of the Housing Act of 1937, as amended, are terminated prior to the date of issue, the applicable method shall be that in effect immediately prior to the date of such termination.

(9) *Examples.* The following examples illustrate the application of this paragraph (b).

Example 1. In August 1982, City X issues $10 million of registered bonds with a term of 20 years to be used to finance the construction of an apartment building to be available to members of the general public. X loans the proceeds of the bonds to Corporation M, the tax owner of the project. The loan is secured by a promissory note from M and a mortgage on the project. The mortgage requires annual payments sufficient to amortize the principal and interest on the bonds. Corporation M maintains 20 percent of the units in the project for low or moderate income individuals and meets all of the requirements of this section until 2002, at which time M converts the project to offices. The bonds are industrial development bonds, but because the proceeds are used for construction of residential rental property, which is an exempt facility under section 103(b)(4)(A) and paragraph (b) of this section, section 103(b)(1) does not apply.

Example 2. The facts are the same as in example (1), except that the building is constructed adjacent to a factory, and the factory employees are to be given preference in selecting tenants. The bonds are industrial development bonds and the facility is not an exempt facility under section 103(b)(4)(A) and paragraph (b) of this section because it is not a facility constructed for use by the general public.

Example 3. The facts are the same as in example (1), except that the proceeds of the obligation are provided to N, a cooperative housing corporation, to finance the construction of a cooperative housing project. N sells stock in such cooperative to shareholders, some of whom occupy the units in the cooperative and some of whom rent the units to other persons. Such project is not a residential rental project within the meaning of section 103(b)(4)(A) and §1.103–8(b) because less than all of the units in the building are used for rental. Further, the bonds are mortgage subsidy bonds under section 103A because more than a significant portion of the proceeds are used to provide financing for residences, some of which are owner-occupied and some of which are used in the trade or business of rental.

Example 4. On February 1, 1984, County Z issues registered obligations with a term of 3 years and loans the proceeds to Corporation V to construct a garden apartment project for tenants who are 65 years or older. The mortgage on the project secures the loan. At the end of 3 years, V obtains permanent financing for the project from a commercial lender. The project is not a targeted area project. V has not contracted with any Federal or State agency to provide rental assistance under section 8 of the United States Housing Act of 1937. As a condition for providing financing for construction, Z requires that the deed to the project contain a covenant that requires the project be used for elderly tenants and restricts occupancy of 20 percent of the units in the project to individuals or families of low or moderate income. Further, the deed provides that ''Such covenant shall run with and bind the land, from the date that ten percent of the units in the project are first occupied until ten years after the date that at least half the units are first occupied. The right to enforce these restrictions is vested in County Z.'' In 1990, however, less than 20 percent of the units are occupied by families or individuals of low or moderate incomes, and three months after learning of this condition County Z had not commenced enforcement of the covenant. Although on the date of issue the proceeds of the obligation were used to provide a residential rental project, the obligation will not be treated as providing a residential rental project within the meaning of section 103(b)(4)(A) as of February 1, 1984, because the project did not meet the requirements of this paragraph for at least 10 years after at least 50 percent of the units are first occupied.

Example 5. On January 15, 1983, State X issues registered obligations with a term of 15 years, the proceeds of which are loaned to Corporation P to construct an apartment building. The project will be a ''targeted area project'', within the meaning of §1.103–8(b)(8)(iii). Corporation P intends to rent all the units to individuals for their residences, maintaining 15 percent of the units in the project for individuals having low or moderate incomes, for 15 years. In 1988, however, Corporation P converts 80 percent of the units to condominiums. Corporation P repays the loan to State X which, in turn, redeems the obligations. The obligations are not used to provide a residential rental project within the meaning of section 103(b)(4)(A), and all the interest paid or to be paid on such obligations will be includable in gross income.

Example 6. On January 15, 1984, State Z issues registered obligations with a term of 15 years the proceeds of which will be used to acquire and renovate a residential apartment building. Z sells the project to Corporation U and receives a 30-year mortgage. On June 1, 1985, the first occupants of the project commence their tenancies. At least 50 percent of the units in the project are occupied on July 1, 1985. On January 15, 1988, Z issues 35-year refunding bonds the proceeds of which are used to retire the obligations issued in 1984. The prior issue will be discharged by March 15, 1988. In order to meet the requirement of §1.103–8(b)(5)(ii), at least 20 percent of such units must be occupied by individuals of low or moderate income until January 1, 2005.

Example 7. The facts are the same as in example (6) except that in 1987, the apartment building is substantially destroyed by fire. The building was insured at its fair market value. U does not intend to reconstruct the building but uses a portion of the insurance proceeds to repay the unpaid balance of the mortgage. Z uses this amount to redeem the outstanding bonds at the first available call date. Since the project was substantially destroyed by fire and the outstanding bonds are retired at the first available call date, the requirements of section 103(b)(4)(A) and this paragraph (b) are satisfied with respect to the obligations.

Example 8. The facts are the same as in example (6) except that in 1987 U defaults on the mortgage, and Z obtains title to the project without instituting foreclosure proceedings. Z sells the project to S and uses the proceeds to retire the outstanding bonds. Since S did not obtain the project with obligations described in section 103(b)(4), S is not required to meet the requirements of section 103(b)(4)(A) and this paragraph. Further, the 1984 obligations are obligations described in section 103(b)(4)(A).

Example 9. In September 1983, State W issues $10 million of registered bonds with a term of 3 years, the proceeds of which are to be loaned to Corporation V to finance the construction of an apartment building in a rural community. At the end of 3 years, V obtains permanent financing from Federal Agency T. Agency T will not allow the deed to contain any restrictive covenant relating to the use of the project. Under Federal law, however, T requires that V maintain all of the units in the project for rental to low-income farmworkers for the term of the mortgage, which is 20 years. Further, the mortgage between T and V provides that if T determines that low-income housing is no longer required in the community in which the project is constructed then the repayment of the mortgage may be accelerated. T determines as of the date of issue that low-income housing will be needed in the community for at least 20 years. In 1987, the project fails to meet the requirements of section 1.103–8(b)(5)(ii), relating to occupancy by individuals or families of low or moderate income. Further, T does not require V to correct the failure. Based on the foregoing, the bonds issued by W will be treated as described in section 103(b)(4)(A).

Example 10. The facts are the same as in example (9) except that in 1987, the Federal law is amended to provide that Agency T may not enforce its low-income occupancy requirement. The result is the same.

Example 11. The facts are the same as in example (9) except that in 1987 Agency T determines that due to a change in circumstances in the community in which the project is located low-income rental housing is no longer required. As such, T requires V to repay the mortgage. Since the obligations have been repaid, W has no legal right to enforce the requirements of paragraph (b) with respect to the project. Subsequent nonconformity of the project with the requirements of §1.103–8(b) under these circumstances will not cause the obligations issued by W to be industrial development bonds within the meaning of section 103(b)(1).

(10) *Obligations issued before April 25, 1979*—(i) *General rules.* Section 103(b)(1) shall not apply to obligations issued before April 25, 1979, which are part of an issue substantially all of the proceeds of which are to be used to provide residential real property for family units. In order to qualify under this

paragraph (b) as an exempt facility, the facility must satisfy the public use requirement of paragraph (a)(2) of this section by being available for use by members of the general public.

(ii) *Family units defined.* For purposes of this paragraph (b) the term ''family unit'' means a building or any portion thereof which contains complete living facilities which are to be used on other than a transient basis by one or more persons, and facilities functionally related and subordinate thereto. Thus, an apartment which is to be used on other than a transient basis as a residence by a single person or by a family and which contains complete facilities for living, sleeping, eating, cooking, and sanitation, constitutes a family unit. Such a unit may be served by centrally located machinery and equipment as in a typical apartment building. To qualify as a family unit, the living facilities must be a separate, self-contained building or constitute one unit in a building substantially all of which consists of similar units, together with functionally related and subordinate facilities and areas. Hotels, motels, dormitories, fraternity and sorority houses, rooming houses, hospitals, sanitariums, rest homes, and trailer parks and courts for use on a transient basis do not constitute residential real property for family units.

(iii) *Functionally related and subordinate facilities.* Under paragraph (a)(3) of this section, facilities which are functionally related and subordinate to residential real property actually used for family units include, for example, facilities for use by the occupants such as a swimming pool, a parking area, and recreational facilities.

(c) *Sports facilities*—(1) *General rule.* Section 103(b)(4)(B) provides that section 103(b)(1) shall not apply to obligations issued by a State or local governmental unit which are part of an issue substantially all of the proceeds of which are to be used to provide sports facilities. In order to qualify as an exempt facility under section 103(b)(4)(B) and this paragraph, the facility must satisfy the public use requirement of paragraph (a)(2) of this section by being available for use by members of the general public either as participants or as spectators.

(2) *Sports facility defined.* (i) For purposes of section 103(b)(4)(B) and this paragraph, the term ''sports facilities'' includes both outdoor and indoor facilities. The facility may be designed either as a spectator or as a participation facility. For example, the term includes both indoor and outdoor stadiums for baseball, football, ice hockey, or other sports events, as well as facilities for the participation of the general public in sports activities, such as golf courses, ski slopes, swimming pools, tennis courts, and gymnasiums. The term does not include, however, facilities such as a golf course, swimming pool, or tennis court, which are constructed for use by members of a private club or as integral or subordinate parts of a hotel or motel, or the use of which will be restricted to a special class or group or to guests of a particular hotel or motel, since they are not facilities for the use of the general public as required by paragraph (a)(2) of this section.

(ii) Under paragraph (a)(3) of this section, facilities which are functionally related and subordinate to a sports facility, such as a parking lot, clubhouse, ski slope warming house, bath house, or ski tow, are considered to be part of a sports facility. A ski lodge which consists primarily of overnight accommodations is not functionally related and subordinate to a sports facility.

(d) *Convention or trade show facilities*—(1) *General rule.* Section 103(b)(4)(C) provides that section 103(b)(1) shall not apply to obligations issued by a State or local governmental unit which are a part of an issue substantially all of the proceeds of which are to be used to provide convention or trade show facilities. In order to qualify under section 103(b)(4)(C) and this paragraph as an exempt facility, the facility must satisfy the public use requirement of paragraph (a)(2) of this section by being available for an appropriate charge or rental, on a rate scale basis, for use by members of the general public. The public use requirement is not satisfied if the use of a convention or trade show facility is limited by long-term leases to a single user or group of users.

(2) *Convention or trade show facilities defined.* For purposes of section 103(b)(4)(C) and this paragraph, the

term ''convention or trade show facilities'' means special-purpose buildings or structures, such as meeting halls and display areas, which are generally used to house a convention or trade show, including, under paragraph (a)(3) of this section, facilities functionally related and subordinate to such facilities such as parking lots or railroad sidings. A hotel or motel which is available to the general public, whether or not it is intended primarily to house persons attending or participating in a convention or trade show, is neither a convention or trade show facility nor functionally related and subordinate thereto.

(e) *Certain transportation facilities*—(1) *General rule.* Section 103(b)(4)(D) provides that section 103(b)(1) shall not apply to obligations issued by a State or local governmental unit which are part of an issue substantially all of the proceeds of which are to be used to provide (i) airports, docks, wharves, mass commuting facilities, or public parking facilities, or (ii) storage or training facilities directly related to any such facility. In order to qualify under section 103(b)(4)(D) and this paragraph as an exempt facility, the facility must satisfy the public use requirement of paragraph (a)(2) of this section by being available for use by members of the general public or for use by common carriers or charter carriers which serve members of the general public. A dock or wharf which is part of a public port (or a public port to be constructed in accordance with a plan which has been finally adopted on the date the obligations in question are issued) satisfies the public use test. A parking lot will be available for use by the general public unless more than an insubstantial portion thereof will be used exclusively by or for the benefit of a nonexempt person by reason of a formal or informal agreement or by reason of the remote geographic location of the facility.

(2) *Definitions.* For purposes of section 103(b)(4)(D) and this paragraph—

(i) With respect to bonds sold at or before 5:00 p.m. EST on December 29, 1978, an airport includes service accommodations for the public such as terminals, retail stores in such terminals, runways, hangars, loading facilities, repair shops, parking areas, and facilities which, under paragraph (a)(3) of this section, are functionally related and subordinate to the airport, such as facilities for the preparation of in-flight meals, restaurants, and accommodations for temporary or overnight use by passengers, and other facilities functionally related to the needs or convenience of passengers, shipping companies, and airlines. The term ''airport'' does not include a landing strip which, by reason of a formal or informal agreement, or by reason of geographic location, will not be available for general public use.

(ii) With respect to bonds sold after 5:00 p.m. EST on December 29, 1978—

(*a*) An airport includes facilities which are directly related and essential to—

(*1*) Servicing aircraft or enabling aircraft to take off and land, or

(*2*) Transferring passengers or cargo to or from aircraft.

A facility does not satisfy either of the foregoing requirements if the facility need not be located at, or in close proximity to, the take-off and landing area in order to perform its function. Examples of facilities which satisfy those requirements are terminals, runways, hangars, loading facilities, repair shops, and land-based navigation aids such as radar installation.

(*b*) Under paragraph (a)(3) of this section, an airport includes facilities other than those described in paragraph (e)(2)(ii)(*a*) only if they are functionally related and subordinate to an airport (as defined in paragraph (e)(2)(ii)(*a*)). A facility (or part thereof) is not functionally related and subordinate to an airport if the facility (or part thereof)—

(*1*) Is not of a character and size commensurate with the character and size of the airport at or adjacent to which the facility is located, or

(*2*) Is not located at or adjacent to that airport.

A facility may satisfy the character and size requirement although it provides minimal benefits to other airports. For example, a facility for the preparation of in-flight meals which has capacity sufficient to prepare all in-flight meals for aircraft departing the airport where the facility is located qualifies although some meals may be consumed in transit between other airports. Other examples of facilities functionally related and subordinate to an airport are restaurants and retail stores located in terminals, ground transportation parking areas, and accommodations for temporary or overnight use by passengers. Unimproved land (including agricultural land) that is adjacent to an airport and that is impaired by a significant level of airport noise is functionally related and subordinate to the airport if after its acquisition that land will not be converted to a use that is incompatible with the level of airport noise. Adjacent land with existing improvements also may be functionally related and subordinate to an airport by reason of impairment by a significant level of airport noise but only if the use of such land before its acquisition is incompatible with the airport noise level, its use after acquisition is to be compatible, and the post-acquisition use will be essentially different from the pre-acquisition use. Notwithstanding the foregoing, an interest in such improved land acquired solely to mitigate damages attributable to airport noise is treated as functionally related and subordinate to the airport. Thus, for example, amounts allocated to imposing a servitude on improved land adjacent to an airport restricting its future use to uses compatible with airport noise are treated as amounts allocated to property functionally related and subordinate to an airport. For the purpose of determining whether land is impaired by a significant level of airport noise, any generally accepted noise estimating methodology may be used. For example, a Noise Exposure Forecast (NEF), a method for composite noise rating recommended by the Federal Aviation Administration to measure the impact of airport noise, may be used for this purpose. Compatibility may be determined by reference to regulations or general guidelines published by the Federal Aviation Administration under section 102 of the Aviation Safety and Noise Abatement Act of 1979 (49 U.S.C. 2102), or sections 11(3)(C) and 18(a)(4) of the Airport and Airway Development Act of 1970, as amended (49 U.S.C. 1711(3)(C) and 1718(a)(4)), concerning uses of land impaired by a significant level of airport noise, or, where available, by reference to the airport compatibility plan specifically addressing what constitutes a compatible use of that land.

(*c*) As an illustration of the rules of this paragraph (e)(2)(ii), an office building (or office space within a building) or a computer facility, either of which serves a system-wide or regional function of an airline, is not considered part of an airport since that facility is not described in either paragraph (e)(2)(ii)(*a*) or (*b*). However, a maintenance or overhaul facility which services aircraft is considered part of an airport under paragraph (e)(2)(ii)(*a*) since that facility is directly related and essential to servicing aircraft and must be located where aircraft take off and land in order to perform its function.

(*d*) A hotel located at or adjacent to an airport satisfies the requirements of paragraph (e)(2)(ii)(*b*), that is, it is of a character and size commensurate with the character and size of the airport at or adjacent to which it is located, if the number of guest rooms in the hotel is reasonable for the size of the airport, taking into account the current and projected passenger usage of the terminal facility. If the hotel contains meeting rooms, the number and size of these rooms must be in reasonable proportion to the number of guest rooms in the hotel. Limited recreational facilities will not prevent the hotel from being of a character and size commensurate with the character and size of the airport.

(iii) A dock or wharf includes property which, under paragraph (a)(3) of this section, is functionally related and subordinate to a dock or wharf such as the structure alongside which a vessel docks, the equipment needed to receive and to discharge cargo and passengers from the vessel, such as cranes and conveyors, related storage, handling, office, and passenger areas, and similar facilities.

(iv) A mass commuting facility includes real property together with improvements and personal property used therein, such as machinery, equipment, and furniture, serving the general public commuting on a day-to-day basis by bus, subway, rail, ferry, or other conveyance which moves over prescribed routes. Such property also includes terminals and facilities which, under paragraph (a)(3) of this section, are functionally related and subordinate to the mass commuting facility, such as parking garages, car barns, and repair shops. Use of mass commuting facilities by noncommuters in common with commuters is immaterial. Thus, a terminal leased to a common carrier bus line which serves both commuters and long distance travelers would qualify as an exempt facility.

(3) *Related storage or training facility.* Section 103 (b)(4)(D) includes only those storage and training facilities which are both (i) directly related to a facility to which subparagraph (1)(i) or (ii) of this paragraph applies and (ii) physically located on or adjacent to such a facility. For example, a storage facility would include a grain elevator, silo, warehouse, or oil and gas storage tank used in connection with a dock or wharf and located on or adjacent to such dock or wharf. Similarly, a training facility would include a building located at or adjacent to an airport for the training of flight personnel or a paved area immediately adjoining a bus garage used to train bus drivers.

(4) *Examples.* The principles of this paragraph may be illustrated by the following examples:

Example 1. B Airport Authority, a political subdivision of State A, owns and operates B Airport. B Airport Authority adds several runways. In view of the expanded area impaired by significant levels of airport noise, the Authority proposes to issue bonds the proceeds of which are to be used to acquire a hospital located adjacent to the airport. The noise level on the acquired property is 40 NEF. By reference to a noise exposure map setting forth noncompatible land uses and by reference to guidelines published by the Federal Aviation Administration, it is established that continued use of the land for a hospital is not compatible with the noise level. Prior to issuing the bonds, B contracts to lease the property to Corporation C to be used for warehouse space. Within 18 months of the bonds' issuance C will remodel the hospital (previously owned by D, who is unrelated to C) with its own funds and rent the facility as a warehouse. Use as a warehouse is determined to be compatible with the level of airport noise impairing the land. The improved land and prospective revenues from the facility's rental are security for the proposed issuance. Based on the foregoing, the acquired land satisfies the public use test. Furthermore, it is functionally related and subordinate to the airport because the improvements are to be used in an essentially different manner than prior to the land's acquisition. The bonds are industrial development bonds. However, section 103(b)(1) does not apply unless the provisions of section 103(b)(13) and §1.103–11 apply.

Example 2. The facts are the same as in Example (1) except that a substantial portion of the proceeds of the bond issue is allocated to the acquisition of a limited interest in an additional tract of land (also impaired by airport noise measured at 40 NEF) on which an office building stands. The limited interest holds B harmless for damages caused by airport noise and restricts uses of the tract after the building is retired to those compatible with noise levels caused by the airport. Based on the foregoing, such interest satisfies the public use test. Furthermore, the interest is functionally related and subordinate to the airport because it is solely to mitigate damage attributable to airport noise, in part by restricting future land uses. The bonds are industrial development bonds. However, section 103(b)(1) does not apply unless the provisions of section 103(b)(13) or §1.103–11 apply.

Example 3. On June 1, 1982, M Airport Authority, a political subdivision of State O, issues obligations, the proceeds of which are loaned to X Corporation, a nonexempt person. X uses the proceeds to construct a hotel adjacent to the main terminal building at M Airport. X will be unconditionally liable for repayment of the proposed obligations. The hotel will be used to provide temporary and overnight accommodations for airline passengers using M Airport. The number of rooms in the hotel is reasonable for an airport of M's size, taking into account the current and projected passenger usage of the terminal facility. In addition to guest rooms, the hotel will contain a restaurant, small retail stores (such as a gift shop and newstand), and limited recreation facilities (such as a swimming pool). The hotel will also contain several multipurpose rooms suitable for use as meeting rooms. The number and size of these rooms will be in reasonable proportion to the number and size of the guest rooms in the hotel. Use of the guest rooms, restaurant and stores, recreational facilities, and meeting rooms by air passengers arriving at or departing from M Airport will be incidental to the use of the hotel by air passengers for temporary and overnight accommodations. The hotel is of a character and size commensurate with the character and size of M Airport. Consequently, applying the provisions of §1.103–8(e)(2), the hotel is functionally related and subordinate to M Airport. The obligations are industrial development bonds. Section

103(b)(1) does not apply to the obligations, however, unless the provisions of section 103(b)(10) and §1.103–11 apply.

Example 4. On June 1, 1982, N Airport Authority, a political subdivision of State P, issues obligations the proceeds of which are loaned to Y Corporation, a nonexempt person. Y uses the proceeds to construct a hotel adjacent to the main terminal building at N Airport. Y Corporation will be unconditionally liable for repayment of the proposed obligations. The hotel will contain extensive recreational facilities, including a large rooftop swimming pool, tennis courts, and a health club. In addition, facilities for conferences consisting of a ballroom-sized meeting room capable of being partitioned by movable panels and several smaller meeting rooms will be constructed. The number of rooms in the hotel will substantially exceed the number which is reasonably based on the current and projected passenger usage of the terminal facility. Because of the presence of extensive recreational and conference facilities, as well as the presence of on excessive number of rooms at the hotel, the hotel fails to be of a character and size commensurate with the character and size of N Airport. The result would be the same if the hotel did not have extensive recreational facilities. Consequently, the hotel is not functionally related and subordinate to N Airport under §1.103–8(e)(2). The obligations are industrial development bonds and interest thereon is not excluded from gross income by reason of subsection (a)(1) or (b)(4) of section 103.

(f) *Certain public utility facilities*—(1) *General rule.* (i) Section 103(b)(4)(E) provides that section 103(b)(1) shall not apply to obligations issued by a State or local governmental unit which are part of an issue substantially all of the proceeds of which are to be used to provide sewage disposal facilities, solid waste disposal facilities, or facilities for the local furnishing of electric energy or gas. In order to qualify under section 103(b)(4)(E) as an exempt facility, the facility must satisfy the public use requirement of paragraph (a)(2) of this section. A public utility facility described in this subparagraph (with the exception of sewage and solid waste disposal facilities which will be treated in all events as serving the general public) will satisfy the public use requirement only if such facility, or the output thereof, is available for use by members of the general public.

(ii) A facility for the local furnishing of electric energy or gas is, for purposes of applying the public use test in paragraph (a)(2) of this section, available for use by members of the general public if (*a*) the owner or operator of the facility is obligated, by a legislative enactment, local ordinance, regulation, or the equivalent thereof, to furnish electric energy or gas to all persons who desire such services and who are within the service area of the owner or operator of such facility, and (*b*) it is reasonably expected that such facility will serve or be available to a large segment of the general public in such service area. For rules with respect to facilities for the furnishing of water, see paragraph (h) of this section.

(2) *Definitions.* For purposes of section 103(b)(4)(E) and this paragraph—

(i) The term ''sewage disposal facilities'' means any property used for the collection, storage, treatment, utilization, processing, or final disposal of sewage.

(ii) The term ''facilities for the local furnishing of electric energy or gas'' means property which—

(*a*) Is either property of a character subject to the allowance for depreciation provided in section 167 or land,

(*b*) Is used to produce, collect, generate, transmit, store, distribute, or convey electric energy or gas.

(*c*) Is used in the trade or business of furnishing electric energy or gas, and

(*d*) Is a part of a system providing service to the general populace of one or more communities or municipalities, but in no event more than 2 contiguous counties (or a political equivalent) whether or not such counties are located in one State.

For purposes of this subdivision, a city which is not within, or does not consist of, one or more counties (or a political equivalent) shall be treated as a county (or a political equivalent). A facility for the generation of electric energy otherwise qualifying under this subdivision will not be disqualified because it is connected to a system for interconnection with other public utility systems for the emergency transfer of electric energy. The facilities need not be located in the area served by them. Also, the term ''facilities for the local furnishing of electric energy or gas'' does not include coal, oil, gas, nuclear cores, or other materials performing a similar function.

(g) *Air or water pollution control facilities*—(1) *General rule.* Section 103(b)(4)(F) provides that section 103(b)(1) shall not apply to obligations issued by a State or local governmental unit which are part of an issue substantially all of the proceeds of which are to be used to provide air or water pollution control facilities. Such facilities are in all events treated as serving the general public and, thus, satisfy the public use requirement of paragraph (a)(2) of this section.

(2) *Definitions.* (i) For purposes of section 103(b)(4)(F) and this paragraph, property is a pollution control facility to the extent that the test of either subdivision (iii) or (iv) of this subparagraph is satisfied, but only if—

(*a*) It is property which is described in subdivision (ii) of this subparagraph and is either of a character subject to the allowance for depreciation provided in section 167 or land, and

(*b*) Either (*1*) a Federal, State, or local agency exercising jurisdiction has certified that the facility, as designed, is in furtherance of the purpose of abating or controlling atmospheric pollutants or contaminants, or water pollution, as the case may be, or (*2*) the facility is designed to meet or exceed applicable Federal, State, and local requirements for the control of atmospheric pollutants or contaminants, or water pollution, as the case may be, in effect at the time the obligations, the proceeds of which are to be used to provide such facilities, are issued.

(ii) Property is described in this subdivision if it is property to be used, in whole or in part, to abate or control water or atmospheric pollution or contamination by removing, altering, disposing, or storing pollutants, contaminants, wastes, or heat. In the case of property to be used to control water pollution, such property includes the necessary intercepting sewers, pumping, power, and other equipment, and their appurtenances. For rules relating to facilities which remove pollutants from fuel or certain other items, see subdivision (vi) of this subparagraph.

(iii) In the case of an expenditure for property which is designed for no significant purpose other than the control of pollution, the total expenditure for such property satisfies the test of this subdivision. Thus, where property which is to serve no function other than the control of pollution is to be added to an existing manufacturing or production facility, the total expenditure for such property satisfies the test of this subdivision. Also, if an expenditure for property would not be made but for the purpose of controlling pollution, and if the expenditure has no significant purpose other than the purpose of pollution control, the total expenditure for such property satisfies the test of this subdivision even though such property serves one or more functions in addition to its function as a pollution control facility.

(iv) In the case of property to be placed in service for the purpose of controlling pollution and for a significant purpose other than controlling pollution, only the incremental cost of such facility satisfies the test of this subdivision. The ''incremental cost'' of property is the excess of its total cost over that portion of its cost expended for a purpose other than the control of pollution.

(v) An expenditure has a significant purpose other than the control of pollution if it results in an increase in production or capacity, or in a material extension of the useful life of a manufacturing or production facility or a part thereof.

(h) *Water facilities*—(1) *General rule.* Section 103(b)(4)(G) provides that section 103(b)(1) shall not apply to obligations issued by a State or local governmental unit which are part of an issue substantially all of the proceeds of which are to be used to provide facilities for the furnishing of water which are available, on reasonable demand, to members of the general public. A water facility will satisfy the public use test of paragraph (a)(2) of this section if it will provide water, on reasonable demand, to any member of the general public within the service area of the water system of which such facility is a part.

(2) *Definition.* For purposes of section 103(b)(4)(G) and this paragraph, the ''water facilities'' include artesian wells, reservoirs, dams, related equipment and pipelines, and other facilities used to furnish water for domestic, industrial, irrigation, or other purposes.

(3) *Effective date.* The provisions of this paragraph apply in the case of facilities provided by obligations issued after January 1, 1969. In the case of facilities provided by obligations issued on or before such date to which section 103(b) is applicable, the provisions of paragraph (f) of this section shall apply. For such purposes, wherever the term ''local furnishing of electric energy or gas'' appears in paragraph (f) of this section, such term shall be deemed to read ''local furnishing of electric energy, gas, or water.''

(i) *Examples.* The application of section 103(b)(4) and this section are illustrated by the following examples:

Example 1. City B plans to issue $10 million of bonds to be used to construct a sports stadium. The revenues from the facility and the facility itself will be the security for the bonds. A professional football team rents the facility on a long-term leasee for part of the year and a professional baseball team rents the sports facility for the remainder of the year. Tickets are sold by the teams to the general public. The bonds are industrial development bonds, but since the proceeds are used for a spectator facility for general public use, which is an exempt facility under section 103(b)(4)(B) and paragraph (c) of this section, section 103(b)(1) does not apply unless the provisions of section 103(b)(13) and §1.103–11 apply.

Example 2. City C plans to issue $10 million of bonds to be used to construct a convention hall which it will own. City C plans to lease the convention hall for 25 years to corporation Y, a nonexempt person, which will operate and maintain it. The terms of the lease obligate Y to make the convention hall generally available for civic, business, and recreational shows, meetings, performances, and similar activities serving or benefiting the community. Lease payments from Y and the facility will be security for the bonds. The bonds are industrial development bonds, but since the proceeds are to be used for a facility for general public use, which is an exempt facility under section 103(b)(4)(C) and paragraph (d) of this section, section 103(b)(1) does not apply unless the provisions of section 103(b)(13) and §1.103–11 apply.

Example 3. City D issues $100 million of its bonds and uses the proceeds to finance construction of an airport for the use of the general public. D will own and operate the airport. A major portion of the rentable space in the terminal building is leased on a long-term basis to common carrier and non-scheduled airlines. The bonds will be secured by the airport landing and runway charges and by payments with respect to such long-term leases from such commercial airlines. Such commercial airline payments are expected to constitute more than 50 percent of the total revenues from the airport. The bonds are industrial development bonds, but since the proceeds are to be used for an airport for use by the general public and by carriers serving the general public, which is an exempt facility under section 103(b)(4)(D) and paragraph (e) of this section, section 103(b)(1) does not apply unless the provisions of section 103(b)(13) and §1.103–11 apply. The result would be the same if D hired an airport management firm to operate the airport.

Example 4. City E issues $6 million of its bonds and uses the proceeds to finance construction of a landing strip for airplanes to be located adjacent to the factories of corporations Y and Z. The landing strip will be used in the trades or businesses of Y and Z and by any member of the general public wishing to use it. However, due to its location, general public use will be negligible. The lease payments by Y and Z for the use of the facility are the security for the bonds. The bonds are industrial development bonds and the facility is not an exempt facility under section 103(b)(4)(D) and paragraph (c) of this section because it is not a facility constructed for general public use.

Example 5. State F and corporation Z enter into an arrangement which provides that F will issue $10 million of its bonds and use the proceeds to construct a facility for Z the only purpose of which is to control air and water pollution at Z's plant. The principal and interest on the bonds will be secured by the charges which F will impose on Z. The bonds are industrial development bonds, but since the proceeds are to be used for air and water pollution facilities designed to abate pollution by private persons, such facilities are for the benefit of the general public and are exempt facilities under section 103(b)(4)(F) and paragraph (g) of this section. Accordingly, section 103(b)(1) does not apply unless the provisions of section 103(b)(13) and §1.103–11 apply.

Example 6. City G issues $20 million of its bonds and will use $6 million to finance residential rental property which qualifies as an exempt facility under section 103(b)(4)(A) and paragraph (b) of this section, $9 million to finance construction of a stadium which qualifies as an exempt facility under section 103(b)(4)(B) and paragraph (c) of this section, and $5 million for convention facilities which qualify as exempt facilities under section 103(b)(4)(C) and paragraph (d) of this section. The facilities will be used in the trades or businesses of nonexempt persons and rental payments with respect to such facilities and the facilities themselves will be the security for the bonds. The bonds are industrial development bonds, but since all the proceeds are to be used for facilities which are exempt facilities under section 103(b)(4), section 103(b)(1) does not apply unless the provisions of section 103(b)(10) and §1.103–11 apply. The result would be the same, if; instead of using $9 million to finance construction of a stadium, the $9 million were used to finance construction of a capitol building. [Reg. §1.103–8].

[T.D. 7199, 37 FR 15490, Aug. 3, 1972]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §1.103–8, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov*.

§ 1.103–9 Interest on bonds to finance industrial parks.

(a) *General rule*. (1) Under section 103(c)(5), interest paid on an issue of obligations issued by a State or local governmental unit (as defined in §1.103–1) is not includable in gross income if substantially all of the proceeds of such issue is to be used to finance the acquisition or development of land as the site for an industrial park (referred to in this section as ''industrial park bonds''). However, interest on an obligation of such an issue is includable in gross income if the obligation is held by a substantial user or a related person (as described in section 103(c)(7) and §1.103–11). If substantially all of the proceeds of a bond issue is to be so used to finance an industrial park, the debt obligations are treated as obligations described in section 103(a)(1) and §1.103–1 even though such obligations are industrial development bonds within the meaning of section 103(c)(2) and §1.103–7. Whether substantially all of the proceeds of an issue of governmental obligations are used to finance an industrial park is determined consistently with the rules for exempt facilities in §1.103–8(a)(1)(i).

(2) The provisions of subparagraph (1) of this paragraph shall also apply to an issue of obligations substantially all of the proceeds of which is to be used to acquire or develop land as the site for an industrial park described in section 103(c)(5) and this section and for either or both of the following purposes: (i) To finance exempt facilities described in section 103(c)(4) and §1.103–8, (ii) to finance facilities to be used by an exempt person.

(3) Section 103(c)(5) only becomes applicable where the bond issue meets both the trade or business and the security interest tests so that the obligations are industrial development bonds within the meaning of section 103(c)(2). For the interrelationship of the rules provided in this section and the exemption for certain small issues provided in section 103(c)(6), see §1.103–10.

(b) *Definition of an industrial park*. For purposes of section 103(c)(5) and this section, the term ''industrial park'' means a tract of land, other than a tract of land intended for use by a single enterprise, suitable primarily for use as building sites by a group of enterprises engaged in industrial, distribution, or wholesale businesses if either—

(1) The control and administration of the tract is vested in an exempt person (within the meaning of paragraph (b)(2) of §1.103–7), or

(2) The uses of the tract are normally (i) regulated by protective minimum restrictions, ordinarily including the size of individual sites, parking and loading regulations, and building setback lines, and (ii) designed to be compatible, under a comprehensive plan, with the community in which the industrial park is located and with the uses of the surrounding land.

(c) *Development of land defined*. For purposes of section 103(c)(5) and this section, the term ''development of land'' includes the provision of certain improvements to an industrial park site if such improvements are incidental to the use of the land as an industrial park. Such incidental improvements include the building or installation of incidental water, sewer, sewage and waste disposal, drainage, or similar facilities (whether surface, subsurface, or both). Such incidental improvements include the provision of incidental transportation facilities, such as hard-surface roads (including curbs and gutters) and railroad spurs and sidings; power distribution facilities, such as gas and electric lines; and communication facilities. The provision of structures or buildings of any kind is not included within the meaning of the term ''development of land,'' except for those structures or buildings which are necessary in connection with the incidental improvements encompassed by the term, such as, for example, a water pumphouse and storage tank needed in connection with the incidental provision of water facilities in an industrial park.

(d) *Examples.* The application of the rules contained in section 103(c)(5) and this section are illustrated by the following examples:

Example 1. City A and corporations X, Y, and Z (unrelated companies) enter into an arrangement under which A is to acquire a tract of land suitable for use as an industrial park. The arrangement provides that: (1) A will issue $10 million of bonds to be used for the acquisition and development of a suitable tract of land; (2) the tract will be controlled and administered by A, pursuant to a comprehensive zoning plan, for the use of a group of enterprises; (3) A will install necessary water, sewer, and drainage facilities on the tract; (4) A will sell substantial portions of the developed tract to X for use as a factory site and to Y for use as a warehouse site; (5) A will lease a sizeable portion of the tract to Z for 20 years as a distribution center site; and (6) the developed tract and the proceeds from the sale or lease of parts of the tract will be the security for the bonds. The bonds are industrial development bonds. Since, however, the proceeds of the issue are to be used for the acquisition and development of a tract of land as the site for an industrial park under section 103(c)(5), section 103(c)(1) does not apply unless the provisions of section 103(c)(7) and §1.103–11 apply.

Example 2. The facts are the same as in example (1) except that $1 million of the proceeds of the $10 million issue are to be used for the construction of a factory by corporation W or X. The bonds are industrial development bonds. Under these circumstances, substantially all of the proceeds are treated as used or to be used for the acquisition and development of a tract of land as the site for an industrial park described in section 103(c)(5). Accordingly, section 103(c)(1) does not apply unless the provisions of section 103(c)(7) and §1.103–11 apply.

[T.D. 7199, 37 FR 15494, Aug. 3, 1972, as amended by T.D. 7511, 42 FR 54285, Oct. 5, 1977]

§ 1.103–10 Exemption for certain small issues of industrial development bonds.

(a) *In general.* Section 103(b)(6) applies to certain industrial development bond issues (referred to in this section as ''exempt small issues'') and bonds issued to refund certain issues (referred to in this section as ''exempt small refunding issues''). If an issue is an exempt small issue or an exempt small refunding issue, then under the requirements of section 103(b)(6) and this section the interest paid on the debt obligations is not includable in gross income, and the obligations are treated as obligations described in section 103(a)(1) and §1.103–1, even though such obligations are industrial development bonds as defined in section 103(b)(2) and §1.103–7. However, interest on an obligation of such an issue is includable in gross income if the obligation is held by a substantial user of the financed facilities or a related person (as described in section 103(b)(7) and §1.103–11). Section 103(b)(6) only becomes applicable where the bond issue meets both the trade or business and the security interest tests so that the obligations are industrial development bonds within the meaning of section 103(b)(2). For bonds issued before January 1, 1979, in taxable years ending before such date, and for capital expenditures made before January 1, 1979, with respect to such bonds, paragraphs (b), (c), and (d) of this section shall be applied by substituting $5 million for $10 million.

(b) *Small issue exemption*—(1) *$1 million or less.* Section 103(b)(6)(A) provides that section 103(b)(1) shall not apply to any debt obligation issued by a State or local governmental unit as part of an issue where—

(i) The aggregate authorized face amount of such issue (determined by aggregating the outstanding face amount of any prior exempt small issues described in paragraph (d) of this section and the face amount of the issue of obligations in question) is $1 million or less; and

(ii) Substantially all of the proceeds of such issue is to be used for the acquisition, construction, reconstruction, or improvement of land or property of a character subject to the allowance for depreciation under section 167. Proceeds which are loaned to a borrower for use as working capital or to finance inventory are not used in the manner described in the preceding sentence. Whether substantially all of the proceeds of an issue of governmental obligations are used in such manner is determined consistently with the rules for exempt facilities in §1.103–8(a)(1)(i). Any obligation which is an industrial development bond within the meaning of section 103(b)(2) and which satisfies the $1 million small issue exemption requirements is an exempt small issue. See paragraph (c)(1) of this section for the treatment of refunding issues of $1 million or less.

(2) *$10 million or less.* (i) Under section 103(b)(6)(D), the issuing State or local governmental unit may elect to have an aggregate authorized face amount of $10 million or less, in lieu of the $1 million exemption otherwise provided for in section 103(b)(6)(A), with respect to issues of obligations that are industrial development bonds (within the meaning of section 103(b)(2)) issued after October 24, 1968. If the election is made in a timely manner, the bonds will be treated as obligations of a State or local governmental unit described in section 103(a)(1) and § 1.103–1 if the sum of—

(*a*) The aggregate face amount of the issue including the aggregate outstanding face amount of any prior $1 million or $10 million exempt small issues taken into account under section 103(b)(6)(B) and paragraph (d) of this section, and

(*b*) The aggregate amount of ''section 103(b)(6)(D) capital expenditures'' (within the meaning of paragraph (b)(2)(ii) of this section),

is $10 million or less. In the case of an issue of obligations that qualified for exemption under section 103(b)(6)(A) and this paragraph, if a section 103(b)(6)(D) capital expenditure made after the date of issue has the effect of making taxable the interest on the issue, under section 103(b)(6)(G) the loss of tax exemption for the interest shall begin only with the date on which the expenditure that caused the issue to cease to qualify under the $10 million limit was paid or incurred. See paragraph (b)(2)(vi) of this section for the time and manner in which the issuer may elect the $10 million exemption. See section 103(b)(6)(H) and paragraph (c)(2) of this section for the treatment of certain refinancing issues of $10 million of less.

(ii) The term ''section 103(b)(6)(D) capital expenditure'' is defined in this subdivision. Special rules for applying such definition in the case of certain expenditures paid or incurred by a State or local governmental unit are prescribed in subdivision (iii) of this subparagraph. Except as excluded by subdivision (iv) or (v) of this subparagraph, an expenditure (regardless of how paid, whether in cash, notes, or stock in a taxable or nontaxable transaction) is a section 103(b)(6)(D) capital expenditure if—

(*a*) The capital expenditure was financed other than out of the proceeds of issues to the extent such issues are taken into account under paragraph (b)(2)(i)(*a*) of this section.

(*b*) The capital expenditures were paid or incurred during the 6-year period which begins 3 years before the date of issuance of the issue in question and ends 3 years after such date,

(*c*) The principal user of the facility in connection with which the property resulting from the capital expenditures is used and the principal user of the facility financed by the proceeds of the issue in question is the same person or are two or more related persons (as defined in section 103(b)(6)(C) and paragraph (e) of this section),

(*d*) Both facilities referred to in (*c*) of this subdivision were (during the period described in (*b*) of this subdivision or a part thereof) located in the same incorporated municipality or in the same county outside of the incorporated municipalities in such county), and

(*e*) The capital expenditures were properly chargeable to the capital account of any person or State or local governmental unit (whether or not such person is the principal user of the facility or a related person) determined, for this purpose, without regard to any rule of the Code which permits expenditures properly chargeable to capital account to be treated as current expenses. With respect to obligations issued on or after August 8, 1972, determinations under the preceding sentence shall be made by including any expenditure which may, under any rule or election under the Code, be treated as a capital expenditure (whether or not such expenditure is so treated). With respect to obligations issued on or after August 8, 1972, for purposes of this subparagraph, capital expenditures made with respect to a contiguous or integrated facility which is located on both sides of a border between two or more political jurisdictions are made with respect to a facility located in all such jurisdictions and, therefore, shall be treated as if they were made in each such political jurisdiction.

(iii) Amounts properly chargeable to capital account under subdivision (ii)(*e*) of this subparagraph include capital expenditures made by a State or local governmental unit with respect to an exempt facility or an industrial park, within the 6-year period described in subdivision (ii)(*b*) of this subparagraph, out of the proceeds of bond issues to which section 103(b)(1) did not apply by reason of section 103(b) (4) or (5) (relating to certain exempt activities and industrial parks). Thus, for example, the cost to the lessor of a leased plantsite financed out of the proceeds of an issue for an exempt air pollution control facility under section 103(b)(4)(F) and paragraph (g) of §1.103–8 would constitute a section 103(b)(6)(D) capital expenditure. However, in the case of an industrial park, only the land costs allocated on an area basis to the plantsite and the actual cost of any improvements made on the plantsite, or to be used principally in connection with the actual plantsite occupied by a principal user or a related person, shall be taken into account as capital expenditures. Where the actual amount of capital expenditures made with respect to a facility by a person (including a State or local governmental unit) other than the user of such facility (or a related person) cannot be ascertained, the fair market value of the property with respect to which the capital expenditures were made, at the time of such capital expenditures, shall be deemed to be the amount of such capital expenditures. In the case of a transaction which is not in form a purchase but which is treated as a purchase for Federal income tax purposes, the purchase price for Federal income tax purposes shall constitute a capital expenditure.

(iv) A section 103(b)(6)(D) capital expenditure shall not include any ''excluded expenditure'' described in (*a*) through (*e*) of this subdivision (iv).

(*a*) A capital expenditure is an excluded expenditure if either it is made by a public utility company which is not the principal user of the facility financed by the proceeds of the issue in question (or a related person) with respect to property of such company, or it is made by a State or local governmental unit with respect to property of such unit, and if in either case it meets all of the following three conditions: Such property of such company or unit (as the case may be) must be used to provide gas, water, sewage disposal services, electric energy, or telephone service. Such property must be installed in, or connected to, the facility but must not consist of property which is such an integral part of the facility that the cost of such property is ordinarily included as part of the acquisition, construction, or reconstruction cost of such facility. Such property must be of a type normally paid for by the user (or a related person) in the form of periodic fees based upon time or use.

(*b*) A capital expenditure is an excluded expenditure if it is made by a person other than the user, a related person, or a State or local governmental unit and if it is made with respect to tangible personal property (within the meaning of paragraph (c) of §1.48–1), or intangible personal property, leased to the user (or a related person) of a facility. However, the preceding sentence shall apply only if such personal property is leased by the manufacturer of such tangible or intangible personal property, or by a person in the trade or business of leasing property the same as, or similar to, such personal property, and only if, pursuant to general business practice, property of such type is ordinarily the subject of a lease.

(*c*) A capital expenditure is an excluded expenditure if it is made to replace property damaged or destroyed by fire, storm, or other casualty, to the extent that these expenditures do not exceed in dollar amount the fair market value (determined immediately before the casualty) of the property replaced.

(*d*) A capital expenditure is an excluded expenditure if it is required by a change made after the date of issue in a Federal or State law, or a local ordinance which has general application, or if it is required by a change made after such date in rules and regulations of general application issued under such law or ordinance.

(*e*) A capital expenditure is an excluded expenditure if it is required by or arises out of circumstances which could not reasonably be foreseen on the date of issue or which arise out of a mistake of law or fact. However, the aggregate dollar amount taken into account under this subdivision (*e*) with respect to any issue may not exceed $1 million. With respect to expenditures incurred prior to December 11, 1971, the dollar amount specified in the preceding sentence shall be $250,000.

(v)(*a*) If the assets of a corporation are acquired by another corporation in a transaction to which section 381(a) (relating to carryovers in certain corporate acquisitions) applies, the exchange of consideration by the acquiring corporation for such assets is not a section 103(b)(6)(D) capital expenditure by such acquiring corporation.

(*b*) However, if an exchange referred to in (*a*) of this subdivision occurs during the 6-year period beginning 3 years before the date of issuance of an issue of obligations and ending 3 years after such date, the transferor and transferee shall be treated as having been related persons for the portion of such 6-year period preceding the date of the exchange for purposes of determining whether section 103(b)(6)(D) capital expenditures have been made. For purposes of this subdivision (*b*), the date of an exchange to which section 381 applies shall be the date of distribution or transfer within the meaning of paragraph (b) of §1.381(b)–1.

(*c*) If section 351(a) applies to a transfer of property to a corporation solely in exchange for its stock or securities, the issuance of such stock or securities in such exchange is not a section 103(b)(6)(D) capital expenditure by such corporation.

(*d*) However, if such a transfer referred to in (*c*) of this subdivision occurs during the 6-year period beginning 3 years before the date of issuance of an issue of obligations and ending 3 years after such date, and if, with respect to the property transferred, expenditures made within such period would have been section 103(b)(6)(D) capital expenditures if the transferor and transferee had been related persons for such period, then such expenditures shall be considered to be section 103(b)(6)(D) capital expenditures made by the transferee. In addition, if a transferor and transferee are related persons immediately following such transfer, such transferor and transferee shall also be treated as having been related persons for the portion of such 6-year period preceding the date of such transfer.

(*e*) For purposes of this subdivision (v), the term ''issue of obligations'' means an issue being tested for purposes of qualifying or continuing to qualify under an election pursuant to section 103(b)(6)(D) as to which an amount which would be a section 103(b)(6)(D) capital expenditure solely by reason of (*b*) or (*d*) of this subdivision must be taken into account.

(*f*) If with respect to an issue of obligations an expenditure would not have been a section 103(b)(6)(D) capital expenditure but for the application of (*b*) or (*d*) of this subdivision, and if such section 103(b)(6)(D) capital expenditure has the effect of making taxable the interest on an issue of obligations which qualified for exemption under section 103(b)(6)(A) and this paragraph, the loss of tax exemption for such interest shall begin not earlier than the date of such exchange or transfer referred to in this subdivision (v).

(vi) The issuer may make the election provided by section 103(b)(6)(D) and this paragraph (b)(2) (assuming that the bonds otherwise qualify under section 103(b)(6) by noting the election affirmatively at or before the time of issuance of the issue in question on its books or records with respect to the issue. The term ''books or records'' includes the bond resolution or other similar legislation for the issue in question as well as the bond transcript or other compilation of bond and bond-related documents. If the issuer fails to make an election at the time and in the manner prescribed in this paragraph (b)(2), the issue will not be treated as described in section 103(b)(6)(D), and interest thereon will be includible in gross income.

(c) *Refunding or refinancing issue exemption*—(1) *$1 million or less refunding* *issue.* Section 103(b)(6)(A) also provides that section 103(b)(1) shall not apply to any debt obligation issued by a State or local governmental unit as part of an issue the aggregate authorized face amount of which is $1 million or less, if substantially all of the proceeds of such issue are to be used—

(i) To redeem part of all of a prior issue substantially all of the proceeds of which were used to acquire, construct, reconstruct, or improve land or property of a character subject to the allowance for depreciation, or

(ii) To redeem part or all of a prior exempt small refunding issue.

(2) *10 million or less refinancing issue.* Section 103(b)(6)(H) provides that section 103(b)(1) shall not apply to any debt obligation issued by a governmental unit as part of an issue which is $10 million or less if the condition of section 103(b)(6)(H) is met and if substantially all of the proceeds are to be used—

(i) To redeem part or all of one or more prior exempt small issues, or

(ii) To redeem part or all of one or more prior exempt small refunding issues.

The condition of section 103(b)(6)(H) is that an election by the issuer of the $10 million exemption in lieu of the $1 million limit for a refunding issue may be made only if each prior issue being redeemed is an issue which qualified either for the $1 million exemption or, by reason of an election under section 103(b)(6)(D), for the $10 million exemption. In addition, in applying the capital expenditures test under section 103(b)(6)(D)(ii) and paragraph (b)(2)(i)(*b*) of this section to refinancing issues, section 103(b)(6)(D) capital expenditures are taken into account only for purposes of determining whether prior issues which were made under the section 103(b)(6)(D) election qualified under section 103(b)(6)(A) and would have continued to qualify under that section but for the redemption.

(d) *Certain prior issues taken into account*—(1) *In general.* Section 103(b)(6)(B) provides, in effect, that if (i) a prior issue specified in subparagraph (2) of this paragraph is an exempt small issue (including for this purpose an exempt small refunding issue) under section 103(b)(6)(A) and this section, and (ii) such prior issue is outstanding at the time of issuance of a subsequent issue, then in determining the aggregate face amount of such subsequent issue (for purposes of determining whether such issue is a $1 million or $10 million exempt small issue under section 103(b)(6)(A) and this section) there shall be taken into account the outstanding face amount of such prior exempt small issue. For purposes of this paragraph, the outstanding face amount of a prior exempt small issue does not include the face amount of any obligation which is to be redeemed from the proceeds of such subsequent issue.

(2) *Prior issues specified.* The face amount of an outstanding prior exempt small issue is taken into account under subparagraph (1) of this paragraph if—

(i) The proceeds of both the prior exempt small issue and of the subsequent issue (whether or not the State or local governmental unit issuing such obligation is the same unit for each such issue) are or will be used primarily with respect to facilities located or to be located in the same incorporated municipality or located or to be located in the same county outside of an incorporated municipality in such county (and, for purposes of this subdivision, on or after August 8, 1972, a contiguous or integrated facility which is located on both sides of a border between two or more political jurisdictions shall be treated as if it is entirely within each such political jurisdiction), and

(ii) The principal user of the financed facilities referred to in subdivision (i) of this subparagraph is or will be the same person or two or more related persons (as defined in section 103(b)(6)(C) and paragraph (e) of this section).

(3) *Rules of application.* The rules of this paragraph shall apply—

(i) Only in the case of outstanding prior exempt small issues which are industrial development bonds to which section 103(b)(1) would have applied but for the provisions of section 103(b)(6). Thus, for example, the provisions of this paragraph do not apply in respect of a prior issue of obligations issued on or before April 30, 1968. In addition, the provisions of this paragraph do not apply in respect of a prior issue for an exempt facility under section 103(b)(4) and §1.103–8, or for an industrial park under section 103(b)(5) and §1.103–9, whether or not the issue might also have qualified as an exempt small issue under section 103(b)(6)(A) and this section.

(ii) To all prior exempt small issues which meet the requirements of this paragraph. Thus, for example, in determining the aggregate face amount of an issue under section 103(b)(6)(A), the outstanding face amount of prior $1 million or $10 million exempt small issues which meet the requirements of this paragraph shall be taken into account in determining the aggregate face amount of a subsequent issue being tested for the $1 million small issue exemption. Similarly, in determining the aggregate face amount of an issue under section 103(b)(6)(A) and (D), the outstanding face amount of prior $1 million or $10 million exempt small issues which meet the requirements of this paragraph shall be taken into account in determining the aggregate face amount of a subsequent issue being tested for the $10 million small issue exemption.

(e) *Related persons.* For purposes of section 103(b) and §§1.103–7 through 1.103–11, the term ''related person'' means a person who is related to another person if, on the date of issue of an issue of obligations—

(1) The relationship between such persons would result in a disallowance of losses under section 267 (relating to disallowance of losses, etc., between related taxpayers) and section 707(b) (relating to losses disallowed, etc., between partners and controlled partnerships) and the regulations thereunder, or

(2) Such persons are members of the same controlled group of corporations, as defined in section 1563(a), relating to definition of controlled group of corporations (except that ''more than 50 percent'' shall be substituted for ''at least 80 percent'' each place it appears in section 1563(a)) and the regulations thereunder.

(f) *Disqualification of certain small issues.* (1) Section 103(b)(6) shall not apply to any obligation issued after April 24, 1979, which is part of an issue, a significant portion of the proceeds of which are to be used directly or indirectly to provide residential real property for family units. For purposes of the preceding sentence, the term ''residential real property for family units'' means residential rental projects (within the meaning of §1.103–8(b)) and owner-occupied residences (within the meaning of section 103A).

(2) For purposes of paragraph (f)(1), a significant portion of the proceeds of an issue are used to provide residential real property for family units if 5 percent or more of the proceeds are so used.

(g) *Examples.* The application of the rules contained in section 103(b)(6) and this section are illustrated by the following examples:

Example 1. County A and corporation X enter into an arrangement under which the county will provide a factory which X will lease for 25 years. The arrangement provides (1) that A will issue $1 million of bonds on March 1, 1970, (2) that the proceeds of the bond issue will be used to acquire land in County A (but not in an incorporated municipality) and to construct and equip a factory on such land in accordance with X's specifications, (3) that X will rent the facility for 25 years at an annual rental equal to the amount necessary to amortize the principal and pay the interest on the outstanding bonds, and (4) that such payments by X and the facility itself shall be the security for the bonds. Although the bonds issued are industrial development bonds, the bonds are an exempt small issue under section 103(b)(6)(A) and this section since the aggregate authorized face amount of the bond issue is $1 million or less and all of the proceeds of the bond issue are to be used to acquire and improve land and acquire and construct depreciable property. The result would be the same if the arrangement provided that X would purchase the facility from A.

Example 2. The facts are the same as in example (1) except that, instead of acquiring land and constructing a new factory, the arrangement provides that A will acquire a vacant existing factory building and rebuild and equip the building in accordance with X's specifications. The bonds are an exempt small issue for the same reasons as in example (1).

Example 3. The facts are the same as in example (1) or (2) except that the financed facilities are additions to facilities which were financed by an issue of bonds to which section 103(b)(1) does not apply because such bonds were issued prior to May 1, 1968, or were subject to the transitional provisions of §1.103–12. The bonds are an exempt small issue since neither of the prior bond issues are taken into account under section 103(b)(6)(B) and this section in determining the status of industrial development bonds which are issued after April 30, 1968, and which are not subject to the transitional provisions of § 1.103–12.

Example 4. The facts are the same as in example (1) except that, subsequently, corporation X proposes to County A that A build a $400,000 warehouse located in Town M (an unincorporated town located in County A) for X under terms similar to the factory arrangement described in example (1). On the proposed issue date of the subsequent bond issue, $600,000 of the first exempt small issue will be outstanding. If A issues $400,000 of bonds for such purposes, the bonds will be an exempt small issue under section 103(b)(6) and this section since, under the rules of section 103(b)(6)(B) and paragraph (d) of this section, if the aggregate authorized face amount of the new issue and the outstanding prior exempt small issue will be $1 million or less, the new issue will be an exempt small issue. If, however, the aggregate authorized face amount of the prior issue outstanding on the date of the subsequent issue were in excess of $600,000, the subsequent issue would not qualify as an exempt small issue because (1) the combined aggregate face amount of the outstanding prior issue and the new issue would be in excess of $1 million, (2) the facilities financed by both issues are to be located in unincorporated areas in the same county, (3) the same taxpayer will be the principal user of both facilities, and (4) but for the rules of section 103(b)(6)(B) and paragraph (d) of this section the prior issue would be an exempt small issue.

Example 5. The facts are the same as in example (1) except that subsequently corporation X proposes to City P and City R (incorporated municipalities located in County A) that P and R each issue bonds and each build $1 million facilities to be located in Cities P and R for the use of X under terms similar to the arrangement in example (1). Each of the $1 million issues will be an exempt small issue because each proposed facility is located within a different incorporated municipality and the proceeds of the prior outstanding exempt small issue were used to construct facilities outside of an incorporated area.

Example 6. The facts are the same as in example (1) except that $95,000 of the $1 million will be used by the corporation as working capital. The bonds are an exempt small issue for the same reason as in example (1) since substantially all of the proceeds will be used for the acquisition of land and the construction of depreciable property.

Example 7. The facts are the same as in example (1) except that on November 1, 1969, County A issued $10 million of industrial development bonds, all of the proceeds of which were issued for the acquisition of land as the site for an industrial park within the meaning of section 103(b)(5) and § 1.103–9. The proceeds of the $1 million of bonds issued in 1970 will be used to construct a factory for corporation X to be located in the industrial park. The bonds issued in 1970 are industrial development bonds within the meaning of section 103(b)(2) and § 1.103–7. Since, however, the prior 1969 issue is not an issue to which section 103(b)(6)(A) applied (see paragraph (d)(3)(i) of this section), the bonds issued in 1970 are an exempt small issue for the reasons stated in example (1).

Example 8. County B enters into three separate arrangements with three unrelated corporations whereby the county will provide separate storage facilities for each corporation. The arrangement provides (1) that the county will issue bonds and loan to each corporation $250,000 of the proceeds which will be used to acquire land in the county and to construct the facilities, (2) that the rental payments by the corporations will be equal to the amount necessary to amortize the principal and pay the interest on any outstanding bonds issued by the county, and (3) that the payments by the corporations and the facilities themselves shall be the security for the industrial development bonds. For convenience, the county issues one series of bonds in the face amount of $750,000 rather than three separate series of bonds of $250,000 each. The issue is an exempt small issue under section 103(b)(6)(A) and paragraph (b)(1) of this section since the aggregate authorized face amount of the bond issue is $1 million or less, and all of the proceeds of the bond issue are to be used to acquire and improve land and acquire and construct depreciable property.

Example 9. City C and corporation Y enter into an arrangement under which C will provide a factory which Y will lease for 25 years. The arrangement provides (1) that C will issue $4 million of bonds on March 1, 1969, after making the election under section 103(b)(6)(D) and paragraph (b)(2) of this section, (2) that the proceeds of the bond issue will be used to acquire land in the city and to construct and equip a factory on such land in accordance with Y's specifications, (3) that Y will rent the facilities for 25 years at an annual rental equal to the amount necessary to amortize the principal and pay the interest on the outstanding bonds, (4) that such payments by Y and the facility itself shall be the security for the bonds, and (5) that, if corporation Y pays or incurs capital expenditures in excess of $1 million within 3 years from the date of issue which disqualify the bonds as an exempt small issue under section 103(b)(6)(D), it will either furnish funds to C to redeem such bonds at par or at a premium, or increase the rental payments to C in an amount sufficient to pay a premium interest rate. Although the bonds issued are industrial development bonds, they are an exempt small issue under section 103(b)(6)(A) by reason of the election under section 103(b)(6)(D) and paragraph (b)(2) of this section, since the aggregate authorized face amount of the bond issue is $5 million or less and all of the proceeds of the bond issue are to be used to acquire and improve land and acquire and construct depreciable property. The provisions for redemption of the bonds or an increase in rental if the bonds are disqualified as an exempt small issue under section 103(b)(6)(A) will not disqualify an otherwise valid election under section 103(b)(6)(D) and paragraph (b)(2) of this section.

Example 10. The facts are the same as in example (9) except that corporation Y subsequently proposed to the city that it build a $1 million warehouse next to the plant for the use of Y under terms similar to the factory arrangement. Assume further that the factory building was completed by March 1, 1970, and that on January 15, 1972, the proposed issue date of the subsequent bond issue, $2 million of the first exempt small issue will be outstanding. In determining the aggregate authorized face amount of the new issue, the original face amount of a prior outstanding issue must be reduced by that portion which is to be redeemed before it is added to the face amount of the new issue. Therefore, if the city issues $3 million of bonds to redeem the remaining $2 million of bonds and to construct the warehouse the bonds will be an exempt small issue under section 103(b)(6)(A) if an election is made under section 103(b)(6)(D) and paragraph (b)(2) of this section since (1) the face amount of the new issue ($3 million), plus (2) the face amount of the prior outstanding exempt small issue minus the amount of such issue to be refunded ($2 million minus $2 million), plus (3) capital expenditures during the preceding 3 years financed other than out of the proceeds of outstanding issues to which section 103(b)(6)(A) and paragraph (b) of this section applied ($2 million), do not exceed $5 million. If, however, the amount of the January 15, 1972, issue were $3½ million, the issue would not qualify as an exempt small issue under section 103(b)(6)(A) and paragraph (b)(2) of this section.

Example 11. The facts are the same as in example (9), except that on June 15, 1971, Y purchases from an unrelated motor carrier business a warehouse terminal in the same city at a cost of $250,000 and tractor-trailers and other automotive equipment based at the terminal at a cost of $1 million. This subsequent expenditure by Y has the effect of making the interest on the city C bonds includable in the gross income of the holders of such bonds as of June 15, 1971, because the face amount of the March 1, 1969, issue ($4 million) plus the subsequent capital expenditures within 3 years of the date of issue ($1,250,000) exceed $5 million. (See section 103(b)(6)(D) and paragraph (b)(2)(i) of this section.)

Example 12. The facts are the same as in example (9), except that in March, 1970, Y will move $3 million of additional used machinery and equipment into the factory from its factory in another city. The expenditures for such machinery and equipment were incurred by Y more than 3 years prior to the date of issue of the bonds. The transfer of such used equipment into city C does not constitute a section 103(b)(6)(D) capital expenditure within the meaning of paragraph (b)(2)(ii) of this section since the expenditures with respect to such property were incurred more than 3 years prior to the date of issue of the bonds. Had the capital expenditures with respect to such property been incurred during the 6-year period beginning 3 years before the date of issue of the bonds and in the 3 years after such date, they would constitute section 103(b)(6)(D) capital expenditures.

Example 13. The facts are the same as in example (9), except that in March 1970, corporation Y enters into an arrangement with respect to machinery and equipment to be used in the facility. The arrangement is labeled by the parties as a lease but is treated as a sale for Federal income tax purposes. The amount treated as the purchase price of the machinery and equipment is a section 103(b)(6)(D) capital expenditure.

Example 14. On February 1, 1970, city D issues $5 million of its bonds to finance construction of an addition to the manufacturing plant of corporation Z. The bonds will be secured by the facility and lease payments to be made by Z which will be sufficient to pay the principal and interest on such bonds. Assume that the bonds qualify as an exempt small issue under section 103(b)(6)(A) pursuant to an election under section 103(b)(6)(D) and paragraph (b)(2) of this section. On February 1, 1971, D plans to issue $1 million of its bonds to construct a pollution control facility to be leased to Z for use at its manufacturing plant. The rental payments from the lease will be sufficient to pay the principal and interest on the bonds. The bonds will be secured by such facility and the lease payments. Capital expenditures for the pollution control facility will be paid or incurred beginning before February 1, 1973. Although the pollution control facility is an exempt facility under section 103(b)(4)(F) and paragraph (g) of §1.103–8, amounts used for the pollution control facility shall be considered to be a section 103(b)(6)(D) capital expenditure and the interest on the February 1, 1970, issue will become taxable as of the date such capital expenditure began to be paid or incurred. See section 103(b)(6)(G) and paragraph (b)(2)(i) of this section.

Example 15. On February 1, 1970, City E issues $500,000 of its bonds to acquire and develop an industrial park within the meaning of section 103(b)(5) and paragraph (b) of §1.103–9. The park consists of 100 acres and is divided into one 50 acre plantsite and 4 smaller sites. The aggregate acquisition cost of the undeveloped land is $150,000 or an average per acre cost of $1,500. Roads, sidewalks, sewers, utilities, sewage, and waste disposal facilities serving the entire industrial park cost $300,000. On September 1, 1970, E leases to corporation Y for 30 years the 50 acre plantsite (with an allocated cost of $75,000) and a railroad spur track from the railroad right of way to Y's plantsite for Y's exclusive use. The spur track was constructed using $50,000 of the proceeds of the industrial park bond issue. E also proposes to issue on September 1, 1970, $4,875,000 of its bonds to construct and equip a building on the leased plantsite to be leased to Y at an additional rental sufficient to pay the principal and interest on this issue of bonds. The September 1, 1970, issue will be an exempt small issue under section 103(b)(6)(A) pursuant to an election under section 103(b)(6)(D) and paragraph (b)(2) of this section since the sum of the amount of the second issue ($4,875,000) and the capital expenditures allocated to the plantsite ($75,000 for 50 acres of land plus $50,000 for the railroad spur tract, totaling $125,000) does not exceed $5 million. The sum of $300,000 which was spent in development of the industrial park provided facilities which will serve or benefit the users generally and hence under paragraph (b)(2)(iii) of this section is not considered to have provided facilities as to which Y will be the principal user.

Example 16. On June 1, 1970, corporation Z simultaneously enters into separate arrangements with City F and City G under which each city will issue a $5 million exempt small issue of bonds the proceeds of which will be used by Z to construct separate facilities in each city. By June 1, 1971, the facilities have been completed in the respective cities. On January 1, 1972, Cities F and G, through a valid legal proceeding, merge into a new City FG. Since in this case F and G were separate cities on June 1, 1970 (the date of the bond issues), the factories are not considered to be located in the same incorporated municipality. Accordingly, each $5 million issue by City F and G will continue to qualify as an exempt small issue.

Example 17. On June 1, 1973, City H issues an exempt small issue of $4.75 million to finance a facility of corporation S to be located in City H. On October 1, 1974, S and corporation T, previously unrelated to S, consummated a statutory merger which qualifies as a reorganization described in section 368(a)(1)(A) and thus as a transaction described in section 381(a). In the transaction, T transferred to S assets with a fair market value of $1.5 million in exchange for stock of S, $300,000 of securities of S, and $100,000 cash. On March 23, 1971, T made $400,000 of capital expenditures for an addition to its factory located in City H. For purposes of testing the H issue of June 1, 1973, such expenditures would have been section 103(b)(6)(D) capital expenditures if T and S had been related persons. Under the provisions of paragraph (b)(2)(v)(*a*) of this section, the exchange of $1.5 million of stock, securities, and cash by S does not constitute a section 103(b)(6)(D) capital expenditure. Since, however, S and T are treated as related persons starting 3 years prior to the date of issue of the obligations, the $400,000 of expenditures by T constitute section 103(b)(6)(D) capital expenditures. Thus, the interest on the June 1, 1973, issue of obligations would become taxable (since the $5 million limit would be exceeded) on the date of the merger.

Example 18. In 1965 City I issues $10 million of industrial development bonds to construct and equip a factory for corporation Z. In 1975 the remaining principal amount of the bonds outstanding is $4.1 million. If I issues $4.5 million of bonds to redeem the balance of the prior issue, and for other purposes, such issue cannot qualify as an exempt small issue under section 103(b)(6)(D) and paragraph (b)(2) of this section even though at the time of issue the interest on the 1965 bonds was tax-exempt since the prior issue must be one which qualified under section 103(b)(6)(A) and this section. Further, the 1975 issue will be an issue of industrial development bonds notwithstanding the provisions of paragraph (d)(2) of §1.103–7 which provides that certain bonds issued to refund an issue of obligations issued on or before April 30, 1968 (or January 1, 1969, in certain cases) will not be so treated. Paragraph (d)(2) of §1.103–7 is not applicable because the 1975 issue makes funds available for a purpose other than the debt service obligation on the 1965 bonds.

Example 19. In 1969 City J issues $4 million of industrial development bonds which qualify as an exempt small issue under section 103(b)(6)(A) pursuant to an election under section 103(b)(6)(D) and paragraph (b)(2) of this section. In 1971, by reason of a $2 million addition to the factory built with the proceeds of the issue, the 1969 exempt small issue loses its tax-exempt status. In 1972, the city issues a $5 million issue to redeem the prior 1969 issue. The redemption issue will not qualify as an exempt small issue since the prior 1969 issue did not continue to qualify under section 103(b)(6)(A) and this section.

[T.D. 7199, 37 FR 15494, Aug. 3, 1972; 37 FR 16177, Aug. 11, 1972; 37 FR 17826, Sept. 1, 1972, as amended by T.D. 7511, 42 FR 54285, Oct. 5, 1977; T.D. 7840, 47 FR 46084, Oct. 15, 1982; 51 FR 16299, May 2, 1986]

§ 1.103–11 Bonds held by substantial users.

(a) *In general.* Section 103(c) (4), (5), or (6) (relating respectively to interest on bonds to finance certain exempt facilities, interest on bonds to finance industrial parks, and the exemption for certain small issues of industrial development bonds) does not apply, as provided in section 103(c)(7), with respect to any obligation for any period during which such obligation is held either by a person who is a substantial user of the facilities with respect to which the proceeds of such obligation were used or by a related person (within the meaning of section 103(c)(6)(C) and paragraph (e) of §1.103–10). Therefore, in such a case, interest paid on such an obligation is includable in the gross income of a substantial user (or related person) for any period during which such obligation is held by such user (or related person).

(b) *Substantial user.* In general, a substantial user of a facility includes any nonexempt person who regularly uses a part of such facility in his trade or business. However, unless a facility, or a part thereof, is constructed, reconstructed, or acquired specifically for a nonexempt person or persons, such a nonexempt person shall be considered to be a substantial user of a facility only if (1) the gross revenue derived by such user with respect to such facility is more than 5 percent of the total revenue derived by all users of such facility or (2) the amount of area of the facility occupied by such user is more than 5 percent of the entire usable area of the facility. Under certain facts and circumstances, where a nonexempt person has a contractual or preemptive right to the exclusive use of property or a portion of property, such person may be a substantial user of such property. A substantial user may also be a lessee or sublessee of all or any portion of the facility. A licensee or similar person may also be a substantial user where his use is regular and is not merely a casual, infrequent, or sporadic use of the facility. Absent special circumstances, individuals who are physically present on or in the facility as employees of a substantial user shall not be deemed to be substantial users.

(c) *Examples.* The application of section 103(c)(7) and this section are illustrated by the following examples:

Example 1. Pursuant to an arrangement with corporation X, County A issues $4 million of its bonds (an exempt small issue under section 103(c)(6)(A) pursuant to an election under section 103(c)(6)(D) and paragraph (b)(2) of §1.103–10) and will use the proceeds to finance construction of a manufacturing facility which is to be leased to X for an annual rental of $500,000. X subleases space to a restaurant operator at an annual rental of $25,000 for the operation of a canteen and lunch counter for the convenience of X's employees. The canteen is required to be open at least 5 days each week (except holidays) from 8:30 a.m. to 5 p.m., and the lunch counter must be in operation during the noon hour. The canteen regularly sells cigarettes, candy, and soft drinks, and uses advertising displays and dispensers with product names. The space physically occupied and the amount of revenue derived by the restaurant operator are more than 5 percent of the respective amounts with respect to the entire facility. Both X and the restaurant operator are substantial users. However, absent special circumstances none of X's employees, the employees of the restaurant operator, or the customers or salesmen who regularly visit the premises to do business either with X or the restaurant operator are substantial users. Similarly, the manufacturers, distributors, and dealers of products sold in the canteen ordinarily are not substantial users.

Example 2. The facts are the same as in example (1) except that X rents food and beverage vending machines from a local dealer. The machines are regularly serviced by the local dealer under a contract with X. Title to and ownership of the machines are retained by the dealer. The local dealer is not deemed to be a substantial user if the revenue derived by such dealer from, and the space occupied by, such machines do not exceed 5 percent of the respective amounts with respect to the entire facility.

Example 3. City B proposes to issue $2 million of bonds which qualify as an exempt small issue under section 103(c)(6)(A) pursuant to an election under section 103(c)(6)(D) and paragraph (b)(2) of §1.103–10 in order to construct a medical building for certain physicians and dentists. The facility will contain 30 offices to be leased on equal terms and for the same rental rates to each physician or dentist for use in his trade or business. Each physician or dentist will be a substantial user of the facility since the facility is being constructed specifically for such physicians and dentists. The result would be the same in the case of an office building for general commercial use.

Example 4. City C proposes to expand the airport it owns and operates with the proceeds of its bonds which qualify as bonds issued for an exempt facility under section 103(c)(4)(D) and paragraph (e) of §1.103–8 and which are secured by a pledge of airport revenues. The airport is serviced by several commercial airlines which have long-term agreements with C for the use of runways, terminal space, and hangar and storage facilities. Each of the airlines either occupies more than 5 percent of the usable space of, or derives more than 5 percent of the revenue derived with respect to, the airport. C also leases counter and vehicle servicing and parking areas to car rental companies, space for restaurants, kiosks for the sale of newspapers and magazines, and space for the operations of a charter plane company. The latter operates its own planes, offers flying lessons and services, and stores private planes for local businesses and individuals. An airport limousine company has an exclusive franchise for passenger pickup at the terminal. Other taxi, transfer, freight, and express companies regularly deliver passengers and freight to the terminal but do not have space regularly assigned to them, nor do they have operating agreements with C. Various business concerns have advertising product displays in the terminal building. In addition to regular telephone service, coin-operated telephones, provided by the telephone company, are located throughout the terminal, at locations specified by C. None of the above exceed the 5-percent limitations of paragraph (b) of this section and the bond proceeds will not be specifically used for any of them. Only the commercial airlines, which violate the 5-percent limitations, are substantial users of the airport.

Example 5. City D issues $25 million of its revenue bonds and will use $10 million of the proceeds to finance construction of a sports facility which qualifies as an exempt facility under section 103(c)(4)(B) and paragraph (c) of §1.103–8, $8 million to acquire and develop land as the site for an industrial park within the meaning of section 103(c)(5) and §1.103–9, and $7 million to finance the construction of an office building to be used exclusively by the city, an exempt person. The revenues from the sports facility and the industrial park and all the facilities themselves will be the security for the bonds. The sports facility and the industrial park sites will be used in the trades of businesses of nonexempt persons. The bonds are industrial development bonds, but under the provisions of paragraph (a)(1) of §1.103–8 and paragraph (a) of §1.103–9, the interest on the $25 million issue will not be includable in gross income. However, the interest on bonds held shall be includable in the gross income of a substantial user of either the sports facility or the industrial park if such substantial user holds any of the obligations of the $25 million issue. The 5-percent limitations of paragraph (b) of this section are applied separately with respect to each facility.

Example 6. Authority E issues $4 million of bonds which qualify as an exempt small issue under section 103(c)(6)(A) pursuant to an election under section 103(c)(6)(D) and paragraph (b)(2) of §1.103–10 in order to construct a bank building on the grounds of an airport. In addition, E issues $40 million to expand the airport. The bank will not derive revenue in excess of 5 percent of the revenue derived with respect to the airport nor will it occupy more than 5 percent of the usable area of such airport. The bank will be a substantial user of the bank building constructed with the proceeds of the $4 million issue since the facility was constructed specifically for the bank. However, the bank will not be a substantial user with respect to the airport because it does not exceed the 5-percent limitations of paragraph (b) of this section. Had E issued one issue of $44 million in order to expand the airport and construct a bank building, the bank would be a substantial user of the entire facility since the $44 million issue was being used to construct a facility a portion of which was specifically for the bank.

[T.D. 7199, 37 FR 15499, Aug. 3, 1972; 37 FR 16177, Aug. 11, 1972]

§ 1.103–16 Obligations of certain volunteer fire departments.

(a) *General rule.* An obligation of a volunteer fire department issued after December 31, 1980, shall be treated as an obligation of a political subdivision of a State for purposes of section 103(a)(1) if—

(1) The volunteer fire department is a qualified volunteer fire department within the meaning of paragraph (b) of this section, and

(2) Substantially all of the proceeds of the issue of which the obligation is a part are to be used for the acquisition, construction, reconstruction, or improvement of a fire house or fire truck used or to be used by the qualified volunteer fire department.

An obligation of a volunteer fire department shall not be treated as an obligation of a political subdivision of a State for purposes of section 103(a)(1) unless both conditions set forth in this paragraph (a) are satisfied.

Thus, for example, if an obligation is issued by an ambulance and rescue squad that is a qualified volunteer fire department as required by paragraph (a)(1) of this section, but substantially all of the proceeds of the issue of which the obligation is a part are to be used for the furnishing of emergency medical services, rather than for the purposes specified in paragraph (a)(2) of this section, the obligation shall not be treated as an obligation of a political subdivision of a State for purposes of section 103(a)(1).

(b) *Definition of qualified volunteer fire department.* For purposes of this section, the term ''qualified volunteer fire department'' means an organization—

(1) That is organized and operated to provide firefighting services or emergency medical services in an area within the jurisdiction of a political subdivision, and

(2) That is required to furnish firefighting services by written agreement with the political subdivision, and

(3) That serves persons in an area within the jurisdiction of the political subdivision that is not provided with any other firefighting services.

The requirement of paragraph (b)(2) of this section that a qualified volunteer fire department be required to furnish firefighting services by written agreement with the political subdivision may be satisfied by an ordinance or statute of the political subdivision that establishes, regulates, or funds the volunteer fire department. A volunteer fire department does not fail to satisfy the requirement of pargraph (b)(3) of this section by furnishing or receiving firefighting services on an emergency basis, or by cooperative agreement with other fire departments, to or from areas outside of the area that the volunteer fire department is organized and operated to serve. The fact that tax revenues of a political subdivision served by a volunteer fire department contribute toward the support of the volunteer fire department in the form of salary, purchase of equipment, or other defrayment of expenses will not prevent the volunteer fire department from being a ''qualified volunteer fire department'' within the meaning of this paragraph (b). Moreover, an obligation of a volunteer fire department receiving such support may qualify as an obligation of a political subdivision within the meaning of section 103(a)(1) independently of section 103(i) and this section if the requirements of section 103(a)(1) are satisfied. See §1.103–1(b) for rules relating to qualification under section 103(a)(1).

(c) *''Substantially all'' test.* Substantially all of the proceeds of an issue are used for the purposes specified in paragraph (a)(2) of this section if 90 percent or more of the proceeds are so used. Thus, for example, if more than 10 percent of the proceeds of an obligation issued by a qualified volunteer fire department are used for the purchase of an ambulance or for rescue equipment not to be used in providing fire fighting services, interest on the obligation is not exempt from tax under section 103(i) and this section. In computing this percentage—

(1) Costs are allocated between providing a firehouse or firetruck and other uses of the proceeds on a pro rata basis; and

(2) The rules set forth in §1.103–8(a)(1)(i), relating to amounts allocable to exempt and nonexempt uses and amounts chargeable to capital account, apply.

(d) *Refunding issues.* An obligation which is part of an issue issued by a qualified volunteer fire department after December 31, 1980, part or all of the proceeds of which issue are used directly or indirectly to pay principal, interest, call premium, or reasonable incidental costs of refunding a prior issue qualifies as an obligation of a political subdivision under section 103(i) and this section only if—

(1) The prior issue was issued by a qualified volunteer fire department;

(2) Substantially all of the proceeds of the prior issue were used for the purposes described in paragraph (a)(2) of this section;

(3) The prior issue was issued after December 31, 1980; and

(4) The refunding issue is issued not more than 180 days before the date on which the last obligation of the prior issue is discharged (within the meaning of §1.103–13)(b)(11)).

(e) *Examples.* The provisions of this section may be illustrated by the following examples:

Example 1. The County M Volunteer Fire and Rescue Association provides firefighting, ambulance, and emergency medical services in County M. The board of county commissioners of County M contracts with the County M Volunteer Fire and Rescue Association for these services, and County M is not served by any other firefighting association. On August 1, 1981, the Association issues an obligation for funds to purchase a new fire truck, a new ambulance, and rescue equipment not to be used for fighting fires. Funds to be used for the purchase of the ambulance and rescue equipment constitute more than 10 percent of the proceeds of the obligation. Thus, substantially all of the proceeds of the obligations are not used for one of the purposes described in paragraph (a)(2) of this section. Although the County M Volunteer Fire and Rescue Association is a qualified volunteer fire department under paragraph (b) of this section because it provides firefighting and emergency medical services in an area within County M which is not provided with any other firefighting services and is required to provide these services by written agreement with County M, the August 1, 1981, obligation of County M Volunteer Fire and Rescue Association will not be treated as an obligation of a political subdivision of a State under section 103(i) and paragraph (a) of this section because substantially all of the proceeds of the obligation are not to be used for a purpose described in section 103(i)(1)(B) and paragraph (a)(2) of this section. Accordingly, interest on the August 1, 1981, obligation of County M Volunteer Fire and Rescue Association is not exempt from gross income under section 103(a)(1).

Example 2. County N Volunteer Fire Department provides firefighting services in County N by contract with the county, which is not served by any other firefighting association. On June 15, 1982, County N Volunteer Fire Department issues its obligation for funds to construct an addition to its firehouse to house a rescue squad, the rescue squad's vehicle, and rescue equipment not to be used in firefighting. Although the County N Volunteer Fire Department is a qualified volunteer fire department under paragraph (b) of this section, interest on its June 15, 1982, obligation will not be exempt from tax under section 103(i) and this section because the proceeds of this obligation will not be used for the purposes described in paragraph (a) of this section.

Example 3. The County O Volunteer Fire and Rescue Association provides firefighting, ambulance, and emergency medical services in County O. The board of county commissioners of County O contracts with the County O Volunteer Fire and Rescue Association for these services, and County O is not served by any other firefighting association. On September 1, 1983, the Association issues its obligations for funds to construct a new building to house its firefighting, ambulance, and rescue functions. Although the ambulance and rescue equipment will occupy space in the projected facility, the cost allocable on a pro rata basis to providing housing for the ambulance and rescue equipment represents less than 10 percent of the proceeds of the obligations. Thus, substantially all of the proceeds of the obligations are used for one of the purposes described in paragraph (a)(2) of this section. The County O Volunteer Fire and Rescue Association is a qualified volunteer fire department under paragraph (b) of this section because it provides firefighting and emergency medical services in an area within County O which is not provided with any other firefighting services and is required to provide these services by written agreement with County O. The obligations of County O Volunteer Fire and Rescue Association will be treated as obligations of a political subdivision of a State under section 103(i) and paragraph (a) of this section because the obligations are those of a qualified volunteer fire department and because substantially all of the proceeds of the obligations are to be used for a purpose described in section 103(i)(1)(B) and paragraph (a)(2) of this section. Accordingly, interest on the September 1, 1983, issue of obligations of County O Volunteer Fire and Rescue Association is exempt from gross income under section 103(a)(1).

[T.D. 7901, 48 FR 32981, July 20, 1983]

§ 1.103(n)–1T Limitation on aggregrate amount of private activity bonds (temporary).

Q–1: What does section 103(n) provide?

A–1: Interest on an issue of private activity bonds will not be tax exempt unless the aggregrate amount of bonds issued pursuant to that issue, when added to (i) the aggregrate amount of private activity bonds previously issued by the issuing authority during the calendar year and (ii) the portion of that year's private activity bond limit that the issuing authority has elected to carry forward to a future year, does not exceed the issuing authority's private activity bond limit for that calendar year. See A–4 of §1.103(n)–4T with respect to private activity bonds issued under a carryforward election.

Q–2: What is the effective date of section 103(n)?

A–2: In general, section 103(n) applies to private activity bonds issued after December 31, 1983. Section 103(n) does not apply to any issue of obligations, however, if there was an inducement resolution (or other comparable preliminary approval) for the project before June 19, 1984, and the issue for such project is issued before January 1, 1985. An issue of obligations will be considered to be issued for the project pursuant to the inducement resolution in existence before June 19, 1984, to the extent that the nature, character, and purpose of the facility has not changed in any material way, and to the extent that the capacity of the facility has not increased materially; in addition, the issue of obligations must be for the same or a related initial owner, manager, or operator. See §1.103–10(e) for the definition of related persons. See A–16 of §1.103(n)–3T with respect to certain projects preliminarily approved before October 19, 1983. The transitional rules provided by section 631(c) of the Tax Reform Act of 1984 do not apply to section 103(n). See §1.103–13(b)(6) for the rules relating to the date of issue of obligations.

Q–3: If an issue of private activity bonds causes the issuer's private activity bond limit to be exceeded, what is the effect on that issue?

A–3: If an issue of private activity bonds causes the issuing authority's private activity bond limit to be exceeded, no portion of that issue will be treated as obligations described in section 103(a), and interest paid on the issue will be subject to Federal income taxation.

Q–4: If an issue of private activity bonds causes the issuer's private activity bond limit to be exceeded, what is the effect on previous issues of private activity bonds that met the requirements of section 103(n) when issued?

A–4: Private activity bonds issued as part of an issue that met the private activity bond limit when issued continue to meet the requirements of section 103(n) even though a subsequent issue causes the aggregate amount of private activity bonds issued by an issuing authority to exceed the authority's private activity bond limit for the calendar year.

Example. The following example illustrates the provisions of A–3 and A–4 of this §1.103(n)–1T:

Example. The State ceiling for State Z for 1986 is $200 million. City M, within the State, and State Z itself are authorized to issue private activity bonds. Under the allocation formula provided by the Governor of State Z, City M has a private activity bond limit of $50 million; the balance of the State ceiling is allocated to State Z. On June 1, 1986, City M issues a $75 activity bonds. On September 1, 1986, State Z issues a $150 million issue of private activity bonds. Based on these facts, the obligations of City M do not meet the requirements of section 103(n) since the aggregate amount of private activity bonds issued by City M in 1986 exceeded its private activity bond limit for such year; thus, such obligations are not described in section 103(a). That the State Z issue caused the aggregate amount of private activity bonds issued in the State during 1986 to exceed the State ceiling does not cause such obligations to fail to meet the requirements of section 103(n).

Q–5: What is the aggregate amount of private activity bonds issued as part of an issue?

A–5: The aggregate amount of private activity bonds issued as part of an issue is the face amount of the issue.

(Secs. 103(n) and 7805 of the Internal Revenue Code of 1954 (98 Stat. 916, 26 U.S.C. 103(n); 68A Stat. 917, 26 U.S.C. 7805))

[T.D. 7981, 49 FR 39316, Oct. 5, 1984]

§ 1.103(n)–2T Private activity bond defined (temporary).

Q–1: What is the definition of the term ''private activity bond''?

A–1: In general, for purposes of §§1.103(n)–1T through 1.103(n)–6T, the term ''private activity bond'' means any industrial development bond or student loan bond the interest on which is exempt from tax under section 103(a) (without application of section 103(n)). See §1.103–7(b) for the definition of the term ''industrial development bond.'' See A–17 of this §1.103(n)–2T for the definition of the term ''student loan bond.'' There are five exceptions to the general definition of the term ''private activity bond''; the exceptions include the exception for the Texas Veterans' Bond Program, the residential rental property exception, the exception for certain facilities described in section 103(b)(4) (C) or (D), and the refunding obligation exception. These exceptions are described in A–2 through A–16 of this §1.103(n)–2T. In addition, the term ''private activity bond'' does not include any issue of obligations if there was an inducement resolution (or other comparable preliminary approval) for the project before June 19, 1984, and the issue for that project is issued before January 1, 1985. See A–2 of § 1.103(n)–1T.

Q–2: To which obligations does the exception for the Texas Veterans' Bond Program apply?

A–2: The term ''private activity bond'' does not include general obligation bonds issued under the Texas Veterans' Bond Program if the proceeds of the issue, other than an amount that is not a major portion of the proceeds, are used to make loans of up to $20,000 for the purchase of land for purposes authorized by such program as in effect on June 19, 1984. The use of the proceeds may be established by the affidavit of the veteran receiving the loan. For purposes of this exception to the definition of the term ''private activity bond,'' the use of more than 25 percent of the proceeds of an issue of obligations will constitute the use of a major portion of such proceeds.

Q–3: To which obligations does the residential rental property exception apply?

A–3: The term ''private activity bond'' does not include any obligation issued to provide projects for residential rental property (including property functionally related and subordinate to any such facility), as described in section 103(b)(4)(A) and § 1.103–8(b). In addition, the term ''private activity bond'' does not include any housing program obligation under section 11(b) of the United States Housing Act of 1937.

Q–4: To which obligations does the exception for certain facilities described in section 103(b)(4) (C) or (D) apply?

A–4: Section 103(n)(7)(C) provides that the term ''private activity bond'' does not include any obligation issued as part of an issue to provide convention or trade show facilities, as described in section 103(b)(4)(C) and § 1.103–8(d) (including property functionally related and subordinate to any such facilities), if the property so described is owned by, or on behalf of, a governmental unit. In addition, the term ''private activity bond'' does not include any obligation issued as part of an issue to provide airports, docks, wharfs, mass commuting facilities, or storage or training facilities directly related to any of the foregoing facilities, as described in section 103(b)(4)(D) and § 1.103–8(e) (including property functionally related and subordinate to any such facilities), if the property so described is owned by, or on behalf of, a governmental unit. See § 1.103–8(a)(3), in general, for the definition of the term ''functionally related and subordinate.'' For purposes of this exception to the definition of the term ''private activity bond,'' the term ''mass commuting facilities'' includes ''qualified mass commuting vehicles,'' as defined in section 103(b)(9), that are associated with a mass commuting facility described in § 1.103–8(e)(2)(iv). Obligations issued as part of an issue to provide parking facilities, as described in section 103(b)(4)(D), are not excepted from the definition of the term ''private activity bond;'' however, parking facilities may be functionally related and subordinate to another facility described in section 103(b)(4) (C) or (D).

Q–5: When is property described in section 103(b)(4) (C) or (D) owned by, or on behalf of, a governmental unit?

A–5: In general, property described in section 103(b)(4) (C) or (D) will be considered to be owned by a governmental unit if a governmental unit is the owner of the property for Federal income tax purposes generally. See A–5 of § 1.103(n)–3T for the definition of the term ''governmental unit''. In general, property described in section 103(b)(4) (C) or (D) will be considered to be owned on behalf of a governmental unit if a constituted authority empowered to issue obligations on behalf of a governmental unit is the owner of the property for Federal income tax purposes generally. Whether the property is owned by, or on behalf of, a governmental unit will be determined on the basis of the facts and circumstances of each particular case. The fact that the governmental unit's or constituted authority's obligation to pay principal and interest on an obligation is limited to revenues from fees collected from users of the property provided with the proceeds of such obligation will not, in itself, cause such property to be treated as not owned by, or on behalf of, the governmental unit. In order to qualify for the exception described in section

103(n)(7)(C), the property must be owned by, or on behalf of, the governmental unit throughout the term of the issue. See A–10 of this § 1.103(n)–2T with respect to the consequences of a transfer of ownership.

Q–6: Will property described in section 103(b)(4) (C) or (D) that is leased to a non-governmental entity be treated as owned by, or on behalf of, a governmental unit if the lessee is the owner of the property for Federal income tax purposes generally solely by reason of the length of the lease?

A–6: If property, or any portion thereof, is leased to a non-governmental entity and if, for Federal income tax purposes generally, the lessee is the owner of the property solely by reason of the length of the lease, then, for purposes of §§ 1.103(n)–1T through 1.103(n)–6T (but not for other Federal income tax purposes, such as whether payments under the lease constitute deductible rental payments), the governmental unit will be treated as the owner of the property if the lessee elects not to claim depreciation or an investment credit with respect to such property. See A–7 of this § 1.103(n)–2T for the rules describing the method of making this election. For purposes of §§ 1.103(n)–1T through 1.103(n)–6T, the term ''non-governmental entity'' means a person other than a governmental unit or a constituted authority empowered to issue obligations on behalf of a governmental unit. The fact that a non-governmental entity lessee elects not to claim depreciation or an investment credit with respect to property does not, however, ensure that the property will be treated as owned by, or on behalf of a governmental unit for purposes of §§ 1.103(n)–1T through 1.103(n)–6T. Thus, for example, if the lessee is the owner of the property for Federal income tax purposes generally other than solely because of the length of the lease, the obligations issued as part of the issue are private activity bonds notwithstanding that the lessee elected not to claim depreciation or an investment credit with respect to the property.

Similarly, even if a governmental unit is the owner of property for Federal income tax purposes generally, the property will not be treated as owned by, or on behalf of, a governmental unit for purposes of §§ 1.103(n)–1T through 1.103(n)–6T if the lease under which such property is leased to a non-governmental entity provides for significant front end loading of rental accruals or payments. See A–12 of this § 1.103(n)–2T with respect to significant front end loading of rental accruals or payments.

Q–7: What must a lessee do in order to elect not to take depreciation or an investment credit with respect to property described in section 103(b)(4) (C) or (D)?

A–7: The lessee must make the election at the time the lease is executed. The election must include a description of the property with respect to which the election is being made; the name, address, and TIN of the issuing authority; the name, address, and TIN of the lessee; and the date and face amount of the issue the proceeds of which are to be used to provide the property. The election must be signed by the lessee, if a natural person, or by a duly authorized official of the lessee. The issuing authority must be provided with a copy of the election. The issuing authority and the lessee must retain copies of the election in their respective records for the entire term of the lease. In addition, the lease, and any publicly recorded document recorded in lieu of such lease, must state that neither the lessee nor any successor in interest under the lease may claim depreciation or an investment credit with respect to such property. This election may be made with respect to property whether or not such property otherwise would be eligible for depreciation or an investment tax credit. See section 7701(a)(41) for the definition of the term ''TIN''.

Q–8: Is the election not to claim depreciation or an investment credit revocable?

A–8: No, the election is irrevocable. In addition, the election is binding on all successors in interest under the lease regardless of whether the obligations remain outstanding. If a successor in interest claims depreciation or an investment credit with respect to property for which such an election has been made, such property will be considered transferred to a non-governmental entity. See A–10 of this §1.103(n)–2T with respect to the consequences of such a transfer.

Q–9: Where obligations are issued to provide all or any portion of a facility described in section 103(b)(4) (C) or (D), must all of the property described in section 103(b)(4) (C) or (D) that is part of such facility be owned by, or on behalf of, a governmental unit in order for such obligations to qualify for the exception to the definition of the term ''private activity bond'' provided in section 103(n)(7)(C)?

A–9: Generally, yes. If obligations are issued to provide all or any portion of a facility described in section 103(b)(4) (C) or (D), the obligations comprising such issue will not qualify for the exception to the definition of the term ''private activity bond'' provided in section 103(n)(7)(C) unless all of the property described in section 103(b)(4) (C) or (D) that is part of (or functionally related and subordinate to) the facility being financed is owned by, or on behalf of, a governmental unit throughout the term of the issue. For this purpose, the facility being financed will be construed to include the entire airport, dock, etc., under consideration and not merely the part of the facility being provided with the proceeds of the issue. For example, the term facility, when used in reference to an airport, will be considered to include all property that is part of, or included in, that airport under §1.103–8(e)(2)(ii)(*a*), including all property functionally related and subordinate thereto under §1.103–8 (a)(3) and (e)(2)(ii)(*b*). Thus, if the proceeds of an issue are used to provide a hangar at an airport described in section 103(b)(4)(D), that airport is considered as being financed with such issue, and if any portion of that airport, including property functionally related and subordinate thereto, is treated as owned by a non-governmental entity, that issue does not qualify for the exception of the definition of the term ''private activity bond'' provided in section 103(n)(7)(C).

There are three exceptions to this rule, however. First, if any property otherwise would be considered part of the facility financed and such property was not provided with proceeds of any obligation described in section 103(a), such property will not be considered part of the facility being financed.

Second, if any property otherwise would be considered part of the facility being financed and such property was part of such facility on or before October 5, 1984, such property will not be considered part of the facility being financed. For this purpose, property will be considered part of the facility on or before October 5, 1984, if any person was under a binding contract to acquire or construct such property to be a part of such facility on October 5, 1984.

Third, property will not be considered part of the facility being financed if such property (i) is land, a building, a structural component of a building, or other structure (other than tangible personal property (other than an air conditioning or heating unit)) and such property is not physically supported by, does not physically support, and is not physically connected to any property provided with the proceeds of obligations that qualify for the exception to the definition of the term ''private activity bond'' provided in section 103(n)(7)(C), or (ii) is tangible personal property (other than an air conditioning or heating unit). For this purpose, contiguous parcels of land will not be considered to support, to be supported by, or to be physically connected to each other, and insignificant physical connections (such as a connection by a sidewalk) will be disregarded. For purposes of this A–9, the term ''tangible personal property'' shall have the meaning given to it under section 48(a)(1)(A) and §1.48–1(c). Examples. The following examples illustrate the provisions of A–9 of this §1.103(n)–2T:

Example 1. On January 1, 1986, Governmental Unit M issues industrial development bonds to provide an airport, as described in section 103(b)(4)(D), which will consist of land, runways, a terminal and a functionally related and subordinate hotel. The hotel will be leased to N, a non-governmental entity. The lease does not call for significant front end loading of rental accruals or payments. For Federal income tax purposes generally, M will own the entire airport except that N will be the owner of the hotel solely by reason of the length of the lease. N properly elects not to claim depreciation of an investment credit with respect to the hotel. The industrial development bonds are not private activity bonds.

Example 2. The facts are the same as in Example (1) except that N does not make the election and claims depreciation with respect to the hotel. The entire issue of industrial development bonds is treated as an issue of private activity bonds.

Example 3. The facts are the same as in Example (2) except that the hotel is provided other than with the proceeds of an obligation described in section 103(a). The issue for the remainder of the airport qualifies for the exception to the definition of the term ''private activity bond'' provided in section 103(n)(7)(C).

Example 4. The facts are the same as in Example (2) except that the hotel, including the hotel parking lot, the hotel grounds, and the parcel of land on which they rest, are provided with a separate issue of industrial development bonds. There are no significant connections between the hotel and the airport. The issue for the hotel is an issue of private activity bonds. The issue for the remainder of the airport qualifies for the exception to the definition of the term ''private activity bonds'' provided in section 103(n)(7)(C).

Example 5. The facts are the same as Example (4) except that the hotel is constructed upon land provided with the proceeds of the issue used to provide the remainder of the airport. Both issues are treated as issues of private activity bonds.

Example 6. On June 30, 1983, construction began on the City NN airport, which consists of land, runways, a terminal, and hangars. Corporation XX (a non-governmental entity) owns for Federal income tax purposes generally several of the hangars, which it financed with obligations described in section 103(a) issued on June 30, 1983. On March 1, 1985, at a time when XX still owns the hangars, City NN issues an issue of obligations described in section 103(b)(4)(D) to enlarge the terminal at the City NN airport. City NN will own the addition to the terminal for Federal income tax purposes generally. The obligations comprising the March 1, 1985, issue will not be private activity bonds.

Q–10: What are the consequences if a governmental unit ceases to be treated as owning property described in section 103(b)(4) (C) or (D) where the property was provided by obligations that were not private activity bonds on the date of issue due to the exception provided in section 103(n)(7)(C)?

A–10: The obligations outstanding on the date such ownership ceases are private activity bonds and are treated as if they are the last private activity bonds issued by the issuer in the calendar year in which the transfer of ownership occurs. Thus, if the aggregate amount of bonds issued pursuant to such issue, when added to the aggregate amount of the other private activity bonds actually issued or treated as issued under this A–10 by the issuer during such year and the amount of any carryforward elections made during the year, exceeds the issuer's private activity bond limit for such year, the obligations are not described in section 103(a) as of the date on which transfer of ownership occurs; if such obligations do not comply with the requirements of section 103(n), the obligations will be treated as not described in section 103(a) as of the date such ownership ceases. However, if on the date of issue the issuer intended to transfer ownership of such property to a non-governmental entity during the term of the issue, then the obligations are treated as the last private activity bonds actually issued or treated as issued under this A–10 by the issuer during the year in which such obligations were actually issued; if such obligations do not comply with the requirements of section 103(n), the obligations will be treated as not described in section 103(a) as of the date of issue. The exception to the definition of the term ''private activity bond'' for facilities described in section 103(b)(4) (C) and (D) only applies if the property is owned by, or on behalf of, a governmental unit while all or any part of the issue or any refunding issue remains outstanding.

If all or a portion of the property is sold to a non-governmental entity for its fair market value and all of the proceeds from the sale (except for a de minimis amount less than $5,000) are used within six months to redeem outstanding obligations, the obligations will not be treated as private entity bonds.

Q–11: What are the consequences if private activity bonds are issued to provide additions to a facility that was provided with obligations that were not private activity bonds when issued by virtue of the exception provided in section 103(n)(7)(C) and such additions are not treated as owned by a governmental unit?

A–11: In order to qualify for the exception to the definition of the term ''private activity bond'' for obligations described in section 103(b)(4) (C) or (D), all of the property described in section 103(b)(4) (C) or (D) that is part of the facility provided with the proceeds generally must be owned by, or on behalf of, a governmental unit. See A–9 of this § 1.103 (n)–2T. However, if the proceeds of an issue of private activity bonds are used to make additions to a facility (other than additions that are not considered to be part of the facility under A–9 of this § 1.103(n)–2T) that was provided with another issue of industrial development bonds that were not private activity bonds when issued by virtue of the exception provided in section 103(n)(7)(C), then the prior issue will not cease to qualify for that exception. Nevertheless, for purposes of determining the aggregate amount of private activity bonds issued during the year that the issue to provide the addition to the previously financed facility is issued, the portion of the prior issue outstanding on the date of issue of the issue to provide the addition will be treated as part of the issue to provide the addition.

Example. The following example illustrates the provisions of A–11 of this § 1.103 (n)–2T:

Example. On March 1, 1986, City P issues a $100 million issue of industrial development bonds to provide an airport, as described in section 103(b)(4)(D). City P uses substantially all of the proceeds to acquire land and to construct runways and a terminal on that land. No other property is constructed on the land. City P is the owner of the land and the terminal for Federal income tax purposes generally. Thus, the obligations comprising the March 1, 1986, issue are not private activity bonds when issued. On September 1, 1988, City P leases a portion of the land adjacent to the terminal to Corporation V (a non-governmental entity) under a true lease for Federal income tax purposes. City P's private activity bond limit for 1988 is $100 million, and as of September 30, 1988, City P has not issued any private activity bond during 1988. On September 30, 1988, City P issues a $20 million issue of industrial development bonds, the proceeds of which are to be used to construct a hotel that is functionally related and subordinate to the airport. The hotel is to be constructed on the land that P leased to Corporation V. The hotel will be owned by Corporation V for Federal income tax purposes generally. On September 30, 1988, the outstanding face amount of the March 1, 1986, issue is $100 million. Although the obligations comprising the March 1, 1986, issue will not become private activity bonds as a result of the subsequent issue, on September 30, 1988, City P is treated as issuing a $120 million issue of private activity bonds. Since that amount exceeds City P's private activity bond limit, the $20 million issue of private activity bonds issued on September 30, 1988, does not meet the requirements of section 103(n). In addition, any subsequent issuance of private activity bonds by City P during 1988 will fail to meet the requirements of section 103(n). The March 1, 1986, issue continues to be described in section 103(a).

Q–12: Section 103(n)(7)(C)(iv) provides that the exception for certain facilities described in section 103(b)(4) (C) or (D) shall not apply in any case where the facility is leased under a lease that has significant front end loading of rental accruals or payments. What does ''significant front end loading of rental accruals or payments'' mean?

A–12: Where a lease requires rental payments that are significantly higher in the early years of the lease than in later years, the lease calls for significant front end loading of rental accruals or payments. A lease that provides for flat rental payments during the entire lease term does not violate the prohibition against significant front end loading of rent. In addition, a lease may provide for adjustments in rent for inflation or deflation, provided that such adjustments are to be made on the basis of a generally recognized price index. In addition, a lease may provide that rental payments are to be determined, in whole or part, based on a percentage of income, production, etc., provided that the percentage rate is kept constant (or increases) over the term of the lease and that the threshold, if any, above which the percentage applies is kept constant (or decreases) over the term of the lease. Thus, for example, a lease that requires rental payments throughout the term of the lease of $100,000 per year plus 5 percent of the gross income from the facility in excess of $500,000 does not violate the prohibition against significant front end loading of rent.

Examples. The following examples illustrate the provisions of A–4 through A–12 of this § 1.103(n)–2T:

Example 1. On February 1, 1985, County Z issues obligations with a term of 30 years. Substantially all of the proceeds of the obligations are to be used to provide a trade show facility as described in section 103(b)(4)(C). Z leases the entire facility to Corporation S. For Federal income tax purposes generally, S is treated as the owner of the facility solely by reason of the length of the lease. The lease provides that the lessee will elect not to claim depreciation or an investment credit with respect to the facility and that S will provide Z with a copy of the election. S makes the election, retains it in its records, and provides County Z with a copy. The lease provides that neither the lessee nor any successor in interest will claim a deduction for depreciation or an investment credit with respect to such facility. The obligations are not private activity bonds on the date of issue, provided that the lease does not call for significant front end loading of rental accruals or payments.

Example 2. The facts are the same as in Example (1) except that on February 1, 1986, S assigns the lease to Corporation T. For its taxable year ending March 31, 1986, Corporation T claims depreciation with respect to the trade show facility. The obligations outstanding on the date Corporation T claims depreciation on its Federal income tax return are treated as the last private activity bonds actually issued or treated as issued by County Z during 1986, and such obligations must comply with the requirements of section 103(n). In addition, Corporation T is not entitled to claim depreciation or an investment credit with respect to the trade show facility during the balance of the term of the lease and will be subject to the applicable penalties for so claiming depreciation.

Example 3. The facts are the same as in Example (1) except that the obligations are redeemed on January 31, 1998; on January 31, 1999, S assigns the lease to Corporation X; and on its Federal income tax return for calendar year 1999, Corporation X claims depreciation with respect to the facility. The obligations are not private activity bonds provided that the lease does not call for significant front end loading of rental accruals or payments. However, X is not entitled to claim depreciation or an investment credit with respect to the trade show facility during the balance of the term of the lease and will be subject to the applicable penalties for so claiming those items.

Q–13: To which obligations does the refunding obligation exception apply?

A–13: The term ''private activity bond'' does not include any refunding obligation to the extent specified in this A–13. The term ''refunding obligation'' means an obligation that is part of an issue of obligations the proceeds of which are used to pay any principal or interest on any other issue of obligations described in section 103(a) (referred to as the prior issue). The term ''refunding obligation'' does not include any obligations issued more than 180 days before the prior issue is discharged (''advance refundings''). The exception for refunding obligations only applies to the extent that the aggregate amount of the refunding issue does not exceed the outstanding face amount of the prior issue, or portion thereof, being refunded. Thus, for example, in the case of an obligation part of the proceeds of which are to be used to refund a prior issue of private activity bonds and part of the proceeds of which are to be used to provide a pollution control facility under section 103(b)(4)(F), those proceeds to be used to refund all or any part of the principal amount of the prior issue are not the proceeds of a private activity bond; the balance of the proceeds are the proceeds of a private activity bond. The refunding obligation exception does not apply to obligations to the extent that amounts are used to pay the costs of issuing refunding obligations. If an issue of obligations consists of both obligations that qualify for the refunding obligation exception and private activity bonds that do not meet the requirements of section 103(n), the entire issue is treated as consisting of obligations not described in section 103(a).

Q–14: Does the refunding obligation exception apply to obligations issued to refund a prior issue of student loan bonds?

A–14: In the case of any student loan bond, the refunding obligation exception applies only if, in addition to the requirements stated in A–13 of this § 1.103(n)–2T, the maturity date of the funding obligation is not later than the later of (i) the maturity date of the obligation to be refunded, or (ii) the date 17 years after the date on which the refunded obligation was issued (or, in the case of a series of refundings, the date on which the original obligation was issued).

Q–15: What is the ''maturity date'' of an obligation?

A–15: For purposes of section 103(n), the ''maturity date'' of an obligation is the date on which interest ceases to accrue and the obligation may either be paid or redeemed without penalty. The date is determined without regard to optional redemption dates (including those at the option of holders). If the issuer is required by the obligations or the indenture to redeem portions of obligations or to make payments of principal with respect to obligations in specified amounts and at specified times, such mandatory redemptions or payments shall be treated as separate obligations.

Q–16: Where private activity bonds are refunded with other obligations described in section 103(a), does the refunding obligation exception apply to the extent that the aggregate amount of the refunding obligations exceeds the outstanding principal amount of the prior issue due to the use of a portion of the proceeds of the refunding issue to fund a reasonably required reserve or replacement fund?

A–16: Whether the prior issue was issued prior to January 1, 1984, or thereafter, the refunding obligation exception to the definition of the term ''private activity bond'' only applies to the extent that the aggregate amount of the refunding obligation does not exceed the outstanding principal amount of the prior issue. Thus, the additional obligations issued to provide for a reasonably required reserve or replacement fund are private activity bonds.

Q–17: What is a ''student loan bond''?

A–17: The term ''student loan bond'' means an obligation that is issued as part of an issue all or a major portion of the proceeds of which are to be used directly or indirectly to finance loans to individuals for educational expenses. For purposes of this A–17, the use of more than 25 percent of the proceeds of an issue of obligations to finance loans to individuals for educational expenses will constitute the use of a major portion of such proceeds in such manner.

(Secs. 103(n) and 7805 of the Internal Revenue Code of 1954 (98 Stat. 916, 26 U.S.C.103(n); 68A Stat. 917, 26 U.S.C. 7805))

[T.D. 7981, 49 FR 39316, Oct. 5, 1984]

§ 1.103(n)–3T Private activity bond limit (temporary).

Q–1: What is the ''State ceiling''?

A–1: In general, the State ceiling applicable to each State and the District of Columbia for any calendar year prior to 1987 shall be the greater of $200 million or an amount equal to $150 multiplied by the State's (or the District of Columbia's) population. In the case of any territory or possession of the United States, the State ceiling for any calendar year prior to 1987 shall be an amount equal to $150 multiplied by the population of such territory or possession. In the case of calendar years after 1986, the two preceding sentences shall be applied by substituting ''$100'' for ''$150.'' In the case of any State that had an excess bond amount for 1983, the State ceiling for calendar year 1984 shall be the sum of the State ceiling determined under the general rule plus 50 percent of the excess bond amount for 1983. The excess bond amount for 1983 is the excess (if any) of (i) the aggregate amount of private activity bonds issued by issuing authorities in such State during the first 9 months of calendar year 1983 multiplied by 4⁄3, over (ii) the State ceiling determined under the general rule for 1984. For purposes of determining the State ceiling amount applicable to any any State for calendar year 1984, an issuer may rely upon the State ceiling amount published by the Treasury Department for such calendar year. However, an issuer may compute a different excess bond amount for 1983 where the issuer or the State in which the issuer is located has made a more accurate determination of the amount of private activity bonds issued by issuing authorities in the issuer's State during 1983. See A–7 of this § 1.103(n)–3T for rules regarding a State containing constitutional home rule cities.

Q–2: What is the private activity bond limit for a State agency?

A–2: Under section 103(n)(2) the private activity bond limit for any agency of the State authorized to issue private activity bonds for any calendar year shall be 50 percent of the State ceiling for such year unless the State provides for a different allocation. For this purpose, the State is considered an agency. See, however, A–17 of this § 1.103(n)–

3T with respect to the penalty for failure to comply with the requirements of section 631(a)(3) of the Tax Reform Act of 1984.

Q–3: How is private activity bond limit determined where a State has more than one agency?

A–3: If any State has more than one agency (including the State) authorized to issue private activity bonds, all such agencies shall be treated as a single agency for purposes of determining the aggregate private activity bond limit available for all such agencies. Each of the State agencies is treated as having jurisdiction over the entire State. Therefore, under A–8 of this §1.103(n)–3T the aggregate private activity bond limit for all the State agencies is allocated to the State since it possesses the broadest sovereign powers of any of the State agencies. Each other State agency's private activity bond limit is zero until it is assigned part of the private activity bond limit of another governmental unit pursuant to these regulations.

Q–4: What is a State agency?

A–4: A State agency is an agency authorized by a State to issue private activity bonds on behalf of the State. In addition, a special purpose governmental unit that derives its sovereign powers from the State and may exercise its sovereign powers throughout the State is a State agency. See A–5 of this §1.103(n)–3T for the definition of the term ''special purpose governmental unit.'' The term ''State agency'' does not include issuing authorities empowered by a State at the request of another governmental unit within the State to issue private activity bonds to provide facilities within the jurisdiction of such other governmental unit. For example, if County O requests the legislature of State P to create an issuing authority empowered to issue obligations to provide pollution control facilities in County O, the authority is not a State agency.

Examples. The following examples illustrate the provisions of A–3 and A–4 of this §1.103(n)–3T:

Example 1. For 1987 State Q has a State ceiling of $200 million. Neither the Governor nor the legislature of State Q has provided a formula for allocating the State ceiling different from that provided by section 103(n)(2) and (3). State Q has authorized the following State agencies to issue private activity bonds on its behalf: Authority M, Authority N, and Authority O. The aggregate private activity bond limit available for State agencies of State Q is $100 million. As of January 1, 1987, none of this aggregate private activity bond limit has been assigned to any of Authorities M, N, or O. On January 1, 1987, Authority M issues $25 million of private activity bonds. During 1987, the duly authorized official designated by State Q to allocate the aggregate private activity bond limit among the three authorities does not allocate any of the State's private activity bond limit to Authority M. The January 1, 1987, issue does not meet the requirements of section 103(n) since Authority M has no private activity bond limit for 1987.

Example 2. Under the laws of State U, only the State legislature can create constituted authorities empowered to issue private activity bonds on behalf of governmental units within State U. Authority R was created by the State U legislature at the request of County X. Authority R is a constituted authority empowered to issue private activity bonds on behalf of County X to provide facilities located in County X. Authority S was created by the legislature to issue private activity bonds to provide pollution control facilities throughout the State. Authority S is a State agency as defined in A–4 of this §1.103(n)–3T. Authority R it is not a State agency.

Q–5: What is a governmental unit?

A–5: The term ''governmental unit'' has the meaning given such term by §1.103–1. For purposes of §§1.103(n)–1T through 1.103(n)–6T, a governmental unit is either a general purpose governmental unit or a special purpose governmental unit. The term ''general purpose governmental unit'' means a State, territory, possession of the United States, the District of Columbia, or any general purpose political subdivision thereof. The term ''general purpose political subdivision'' denotes any division of government that possesses the right to exercise police powers, the power to tax, and the power of eminent domain and that is governed, at least in part, by popularly elected officials (e.g., county, city, town, township, parish, village). The term ''special purpose governmental unit'' means any governmental unit as defined in §1.103–1 other than a general purpose governmental unit. For example, a sewer authority with the power of eminent domain but without police powers is a special purpose governmental unit.

A constituted authority empowered to issue private activity bonds on behalf of a governmental unit is not a governmental unit.

Q–6: What is the private activity bond limit for a general purpose governmental unit other than a State, the District of Columbia, a territory, or a possession?

A–6: The private activity bond limit for any such general purpose governmental unit for any calendar year is an amount equal to the general purpose governmental unit's proportionate share of 50 percent of the State ceiling amount for such calendar year. See A–10 of this §1.103(n)–3T with respect to the rules for providing a different allocation. The proportionate share of a general purpose governmental unit is an amount that bears the same ratio to 50 percent of the State ceiling for such year as the population of the jurisdiction of such general purpose governmental unit bears to the population of the entire State, District of Columbia, territory, or possession in which its jurisdiction falls. See, however, A–17 of this §1.103(n)–3T with respect to the penalty for failure to comply with the requirements of section 631(a)(3) of the Tax Reform Act of 1984. See A–9 of this §1.103(n)–3T with respect to the private activity bond limit of issuing authorities other than general purpose governmental units.

Q–7: What is the private activity bond limit for a general purpose governmental unit in a State with one or more constitutional homes rule cities?

A–7: The private activity bond limit for a constitutional home rule city for any calendar year is an amount equal to the constitutional home rule city's proportionate share of 100 percent of the State ceiling amount for the calendar year. The proportionate share of a constitutional home rule city is an amount that bears the same ratio to the State ceiling for such year as the population of the jurisdiction of such constitutional home rule city bears to the population of the entire State. The private activity bond limit for issuers other than constitutional home rule cities is computed in the manner described in A–2 through A–6 of this §1.103(n)–3T, except that in computing the private activity bond limit for issuers other than such constitutional home rule cities, the State ceiling amount for any calendar year shall be reduced by the aggregate private activity bond limit for all constitutional home rule cities in the State. The term ''constitutional home rule city'' means, with respect to any calendar year, any political subdivision of a State that, under a State constitution that was adopted in 1970 and effective on July 1, 1971, had home rule powers on the first day of the calendar year. See, however, A–17 of this §1.103(n)–3T with respect to the penalty for failure to comply with the requirements of section 631(a)(3) of the Tax Reform Act of 1984.

Q–8: How is the private activity bond limit of an issuing authority determined under section 103(n)(3) when there are overlapping jurisdictions?

A–8: If an area is within the jurisdiction of two or more governmental units, that area will be treated as only within the jurisdiction of the governmental unit having jurisdiction over the smallest geographical area. However, the governmental unit with jurisdiction over the smallest geographical area may enter into a written agreement to allocate all or a designated portion of such overlapping area to the governmental unit having jurisdiction over the next smallest geographical area. Where two or more issuing authorities, whether governmental units or constituted authorities, have authority to issue private activity bonds and both issuing authorities have jurisdiction over the identical geographical area, that area will be treated as only within the jurisdiction of the one having the broadest sovereign powers. However, the issuing authority having the broadest sovereign powers may enter into a written agreement to allocate all or a designated portion of such area to the one with the narrower sovereign powers. All written agreements entered into pursuant to this A–8 must be retained by the assignee in its records for the term of all private activity bonds it issues in each calendar year to which such agreement applies. See A–9 of this §1.103(n)–3T with respect to the private activity bond limit of issuing authorities other than general purpose governmental units.

Q–9: What is the private activity bond limit of an issuing authority (other than a State agency) that is not a general purpose governmental unit?

A–9: A constituted authority empowered to issue private activity bonds on behalf of a governmental unit is treated as having jurisdiction over the same geographical area as the governmental unit on behalf of which it is empowered to issue private activity bonds. Since a governmental unit has broader sovereign powers than a constituted authority empowered to issue private activity bonds on its behalf, a constituted authority has a private activity bond limit under section 103(n) (2) and (3) of zero. Similarly, a special purpose governmental unit is treated for purposes of section 103(n) as having jurisdiction over the same geographical area as that of the general purpose governmental unit or units from which the special purpose governmental unit derives its sovereign powers. Since a general purpose governmental unit has broader sovereign powers than a special purpose governmental unit, a special purpose governmental unit has a private activity bond limit under section 103(n) (2) and (3) of zero. An issuer of qualified scholarship funding bonds, as defined in section 103(e), is treated for purposes of section 103(n) as issuing on behalf of the State or political subdivision or subdivisions that requested its organization or its exercise of power to issue bonds. See A–13 and A–14 of this §103(n)–3T with respect to assignments of private activity bond limit. For purposes of §§1.103(n)–1T through 1.103(n)–6T, a special purpose governmental unit shall be considered to derive its authority from the smallest general purpose governmental unit that—

(i) Enacts a specific law (e.g., a provision of a State constitution, charter, or statute) by or under which the special purpose governmental unit is created, or

(ii) Otherwise empowers, approves, or requests the creation of the special purpose governmental unit, or

(iii) Appoints members to the governing body of the special purpose governmental unit,

and within which general purpose governmental unit falls the entire area in which such special purpose governmental unit may exercise its sovereign powers. If no one general purpose governmental unit meets such criteria (e.g., a regional special purpose governmental unit that exercises its sovereign powers within three counties pursuant to a separate ordinance adopted by each such county), such special purpose governmental unit shall be considered to derive its sovereign powers from each of the general purpose governmental units comprising the combination of smallest general purpose governmental units within which falls the entire area in which such special purpose governmental unit may exercise its sovereign powers and each of which meets (i), (ii), or (iii) above.

Q–10: Does the issue comply with the requirements of section 103 (n) under the following circumstances? Based on the most recent estimate of the resident population of State Y published by the Bureau of the Census before the beginning of 1988, the State ceiling for State Y is $200 million. Based on the same estimate, the population of City Q is one-fourth of the population of State Y. No part of the geographical area within the jurisidiction of City Q is within the jurisdiction of any other governmental unit with jurisdiction over a smaller geographical area. There are no consitutional home rule cities in State Y. Neither the Governor nor the legislature of State Y has provided a different formula for allocating the State ceiling than that provided by section 103(n) (2) and (3); thus, City Q's private activity bond limit for 1988 is $25 million ($.25 \times .50 \times$ $200 million). As of March 1, 1988, City Q has issued $15 million of private activity bonds during calendar year 1988, none of which were issued pursuant to a carryforward election made in a prior year. On March 1, 1988, City Q will issue $5 million of private activity bonds to provide a pollution control facility as described in section 103(b)(4) (F). C, a duly authorized official of City Q responsible for issuing the bonds, provides a statement that will be included in the bond indenture or a related document providing that—

(i) Under section 103(n) (2) and (3) of the Internal Revenue Code, City Q has a private activity bond limit of $25 million for calendar year 1988 (.25 × .50 × $200 million), none of which has been assigned to it by another governmental unit,

(ii) State Y has not provided a different method of allocating the State ceiling,

(iii) City Q has not assigned any portion of its private activity bond limit to a constituted authority empowered to issue private activity bonds on its behalf, or to any other governmental unit,

(iv) City Q has not elected to carry forward any of its private activity bond limit for 1988 to another calendar year, nor has City Q in any prior year made a carryforward election for the pollution control facility,

(v) The aggregate amount of private activity bonds issued by City Q during 1988 is $15 million, and

(vi) The issuance of $5 million of private activity bonds on March 1, 1988, will not violate the requirements of section 103 (n) and the regulations thereunder.

In addition, C provides the certification described in section 103 (n) (12) (A).

A–10: Based on these facts, the issue meets the requirements of section 103(n) and §§1.103(n)–1T through 1.103(n)–6T. See §1.103–13(b)(8) for the definition of the terms "bond indenture" and "related documents."

Q–11: May a State provide a different formula for allocating the state ceiling?

A–11: A State, by law enacted at any time, may provide a different formula for allocating the State ceiling among the governmental units in the State (other than constitutional home rule cities) having authority to issue private activity bonds, subject to the limitation provided in A–12 of this §1.103(n)–3T. The governor of a State may proclaim a different formula for allocating the State ceiling among the governmental units in such State having authority to issue private activity bonds. The authority of the governor to proclaim a different formula shall not apply after the earlier of (i) the first day of the first calendar year beginning after the legislature of the State has met in regular session for more than 60 days after July 18, 1984, and (ii) the effective date of any State legislation dealing with the allocation of the State ceiling. If, on or before either date, the governor of any State exercises the authority to provide a different allocation, such allocation shall be effective until the date specified in (ii) of the immediately preceding sentence. Unless otherwise provided in a State constitutional amendment or by a law changing the home rule provisions adopted in the manner provided by the State constitution, the allocation of that portion of the State ceiling that is allocated to any constitutional home rule city may not be changed by the governor or State legislature unless such city agrees to such different allocation.

Q–12: Where a State provides an allocation formula different from that provided in section 103 (n) (2) and (3), which allocation formula applies to obligations issued prior to the adoption of the different allocation formula?

A–12: Where a State provides a different allocation formula, the determination as to whether a particular bond issue meets the requirements of section 103(n) will be based upon the allocation formula in effect at the time such bonds were issued. The amount that may be reallocated pursuant to the later allocation formula is limited to the State ceiling for such year reduced by the amount of private activity bonds issued under the prior allocation formula in effect for such year.

Q–13: May an issuing authority assign a portion of its private activity bond limit to another issuing authority if the governor or legislature has not provided for an allocation formula different from that provided in section 103(n) (2) and (3)?

A–13: Except as provided in this A–13 or in A–8, A–14, or A–15 of this §1.103(n)–3T, no issuing authority may assign, directly or indirectly, all or any portion of its private activity bond limit to any other issuing authority, and no such attempted assignment will be effective. However, a general purpose governmental unit may assign a portion of its private activity bond limit to (i) a constituted authority empowered to issue private activity bonds on behalf of the assigning governmental unit, and (ii) a special purpose governmental unit deriving sovereign powers from the governmental unit making the assignment. In addition, a State may assign a portion of its private activity bond limit to a constituted authority empowered to issue private activity bonds on behalf of any governmental unit within such State and to any governmental unit within such State. Finally, an issuing authority that is assigned all or a portion of the private activity bond limit of a governmental unit pursuant to the immediately preceding two sentences may assign such amount or any part thereof to the governmental unit from which it received the assignment. None of these permissible types of assignments shall be effective, however, unless made in writing by a duly authorized official of the governmental unit making the assignment and a record of the assignment is maintained by the assignee for the term of all private activity bonds it issues in each calendar year to which such assignment applies. None of these permissible types of assignments shall be effective if made retroactively; provided, however, that retroactive assignments may be made during 1984. In addition, except as provided in A–15 of this §1.103(n)–3T, a purported assignment by a governmental unit of a portion of its private activity bond limit to an issuing authority will be ineffective to the extent that private activity bonds issued by such authority provide facilities not located within the jurisdiction of the governmental unit making the assignment, unless the sole beneficiary of the facility is the governmental unit attempting to make the assignment. Similarly, except as provided in A–15 of this §1.103(n)–3T, a governmental unit may not allocate a portion of its private activity bond limit to an issue of obligations to provide a facility not located within the jurisdiction of that governmental unit unless the sole beneficiary of the facility is the governmental unit attempting to allocate its private activity bond limit to the issue. If an issuing authority issues an issue of obligations a portion of the proceeds of which are to be used to provide a facility not within its jurisdiction other than one described in the immediately preceding sentence, that issue will not meet the requirements of section 103(n) unless an issuing authority within the jurisdiction of which the facility is to be located specifically allocates a portion of its private activity bond limit to such issue equal to the amount of proceeds to be used to provide such facility.

Q–14: May an issuing authority assign a portion of its private activity bond limit to another issuing authority if the governor or legislature has provided for an allocation formula different from that provided in section 103(n) (2) and (3)?

A–14: Yes, under certain conditions. In providing a different formula for allocating the State ceiling, a State may permit an issuing authority to assign all or a portion of its private activity bond limit to other issuing authorities within the State, provided that such assignment is made in writing and a record of that assignment is maintained by the assignee in its records for the term of all private activity bonds it issues in each calendar year to which such assignment applies and a record of that assignment is maintained during such period by the public official responsible for making allocations of the State ceiling to issuing authorities within the State. The preceding sentence will only apply where the different formula expressly permits such assignments. Notwithstanding this A–14, no assignments may be made to regional authorities without compliance with the provisions of A–15 of this §1.103(n)–3T.

Q–15: May a general purpose governmental unit assign a portion of its private activity bond limit to a regional authority empowered to issue private activity bonds on behalf of two or more general purpose governmental units?

A–15: Yes, under certain conditions. In order for an issue of private activity bonds issued by such a regional authority to meet the requirements of section 103(n), each of the governmental units on behalf of which the regional authority issues private activity bonds must assign to the regional authority a portion of its private activity bond limit based on the ratio of its population to the aggregate population of all such governmental units. The governmental unit within the jurisdiction of which the facility to be provided by the private activity bonds will be located, however, may elect to treat the regional authority as if it were a constituted authority empowered to issue such obligations solely on behalf of that governmental unit and, therefore, may assign a portion of its limit to the authority solely to provide the facility within its jurisdiction. Similarly, if a facility will solely benefit one governmental unit, that governmental unit may make the election described in the preceding sentence. In addition, any of the governmental units on behalf of which the regional authority issues private activity bonds, other than the governmental unit within the jurisdiction of which the facility will be located, may elect to be treated as if it had not empowered the authority to issue that issue of private activity bonds on its behalf. In providing a different formula for allocating the State ceiling, a State may permit a governmental unit to assign all or a portion of its private activity bond limit to a constituted authority empowered to issue private activity bonds on behalf of two or more governmental units, all of which are located within the State. The preceding sentence will only apply where the different formula expressly so provides. The principles of this A–15 shall not apply to any regional authority created with a principal purpose of avoiding the restrictions provided in A–13 or A–14 of this §1.103(n)–3T. The principles of this A–15 shall also apply to a special purpose governmental unit providing facilities located within the jurisdiction of two or more general purpose governmental units from which it derives sovereign powers.

Examples. The following examples illustrate the provisions of A–8 through A–15 of this section:

Example 1. Authority ZZ is empowered by City Y to issue obligations on its behalf to provide financing for pollution control facilities located within the jurisdiction of City Y and the geographical area within 10 miles of the limits of City Y. Authority ZZ has no sovereign powers. Although the authority of Authority ZZ to issue obligations enables it to provide facilities located outside of the jurisdiction of City Y, Authority ZZ is treated as having jurisdiction over the same geographical area as City Y. Since City Y has broader sovereign powers than Authority ZZ, under section 103(n)(3) Authority ZZ has a private activity bond limit of zero. On March 31, 1985, Authority ZZ issues $5 million of private activity bonds. City Y has not assigned any portion of its private activity bond limit to Authority ZZ. Thus, the March 31, 1985, issue of private activity bonds is treated as an issue of obligations not described in section 103(a), and the interest on such obligations is subject to Federal income taxation.

Example 2. In 1972, State S, State T, and State V empowered Authority Z to issue industrial development bonds on behalf of the three States and to provide port facilities in a harbor serving residents of all three States. S, T, and V have populations of 1,000,000, 2,000,000, and 7,000,000, respectively. Authority Z will issue $100 million of private activity bonds on September 1, 1985, to finance construction of a dock to be located in State S. The obligations will not meet the requirements of section 103(n) unless S, T, and V assign a portion of their private activity bond limits to Authority Z pursuant to one of three methods. First, S, T, and V may assign $10 million, $20 million, and $70 million, respectively, of their private activity bond limits to Authority Z for this issue. Second, S, T, and V may assign $100 million, $0, and $0, respectively, of their private activity bond limits to Authority Z for this issue. Third, either T or V (but not S) may allocate $0 of its private activity bond limit to Authority Z for purposes of this issue, and the remaining two States may allocate the $100 million based upon their respective populations. For instance, if T were to allocate $0 for purposes of this issue, S and V must allocate $12.5 million and $87.5 million, respectively, of their private activity bond limits to Authority Z.

Q–16: Must an issuing authority allocate any of its private activity bond limit to certain preliminarily approved projects?

A–16: Yes. Section 631(a)(3) of the Tax Reform Act of 1984 provides that, with respect to certain projects preliminarily approved by an issuing authority before October 19, 1983, the issuing authority shall allocate its share of the private activity bond limit for the calendar year during which the obligations are to be issued first to those projects. For purposes of this A–16 and A–17 and A–18 of this §1.103(n)–3T, a general purpose governmental unit will be treated as having preliminarily approved a project if the project was preliminarily approved by it, by a constituted authority empowered to issue private activity bonds on its behalf, or by a special purpose governmental unit treated as having jurisdiction over the same geographical area as the general purpose governmental unit. Thus, if a project was approved by a constituted authority, the governmental unit on behalf of which such issue is to be issued must assign a portion of its private activity bond limit to the authority pursuant to section 631(a)(3) of the Act. If a project was preliminarily approved by a constituted authority empowered to issue private activity bonds on behalf or more than one general purpose governmental unit or a special purpose governmental unit that derives its sovereign powers from more than one general purpose governmental unit, the project will be considered approved by each of such general purpose governmental units in proportion to their relative populations. The projects that receive priority under section 631(a)(3) of the Act and this A–16 are those with respect to which—

(i) There was an inducement resolution (or other comparable preliminary approval) for a project before October 19, 1983, by an issuing authority,

(ii) A substantial user of the project notified such issuing authority—

(A) By August 17, 1984, that it intended to claim its rights under section 631(a)(3) of the Tax Reform Act of 1984, and

(B) By December 31, 1984, as to the calendar year in which it expects the obligations to provide the project to be issued, and

(iii) Construction of such project began before October 19, 1983, or a substantial user was under a binding obligation on that date to incur significant expenditures with respect to the project.

For purposes of the preceding sentence, the term ''significant expenditures'' means expenditures that equal or exceed the lesser of $15 million or 20 percent of the estimated cost of the facilities. An issuing authority may require, as part of the submission required by (ii)(B) of this A–16, that a substantial user specify the aggregate amount of private activity bonds necessary for the project. Section 631(a)(3) does not apply to a project to the extent that the aggregate amount of obligations required for such project exceeds the amount, if any, provided for in the inducement resolution or resolutions in existence with respect to such project before October 19, 1983, or in the statement that may be required by the issuing authority as part of the submission required by (ii)(B) of this A–16. Similarly, section 631(a)(3) does not apply to a project to the extent of any material change in its nature, character, purpose, or capacity. Section 631(a)(3) does not apply to a project if the owner, operator, or manager of such project is not the same (or a related person) as the owner, operator, or manager named in the latest inducement resolution with respect to such project in existence before October 19, 1983. Section 631(a)(3) of the Act does not apply to any project if the obligations to provide the project are not issued in the year specified in the submission required by (ii)(B) of this A–16. In addition, section 631(a)(3) of the Act does not apply to any project to the extent that the amount of obligations to be issued for such project exceeds the share of the State ceiling to which the issuing authority that authorized the project is entitled as determined under section 103(n) (2) and (3) without regard to any alternative formula for allocating the State ceiling. The requirements of section 631(a)(3) will not apply where a State statute specifically so provides.

Q–17: What is the penalty for failure to comply with the requirements of section 631(a)(3) of the Act?

A–17: If any issuing authority fails to comply with the requirements of section 631(a)(3) of the Act, its private activity bond limit for the calendar year following the year in which the failure occurs shall be reduced by the amount of private activity bonds with respect to which the failure occurs. This penalty applies whether the issuing authority's private activity bond limit is determined under the formula provided under section 103(n) (2) and (3) or a different formula provided under section 103(n)(6). The penalty is imposed on the issuing authority that failed to comply with the requirements of section 631(a)(3) or, if in the year in which the penalty is imposed the issuing authority does not have a sufficient private activity bond limit to absorb the entire penalty, on the general purpose governmental unit treated as having jurisdiction over the same geographical area as the issuing authority. For purposes of this A–17, the general purpose governmental unit's private activity bond limit includes the private activity bond limit of each issuing authority treated as having preliminarily approved the project under A–16 of this §1.103(n)–3T. Thus, for example, if a governmental unit failed to comply with the requirements of section 631(a)(3) of the Act with respect to a $5 million issue to be issued in 1985, and that governmental unit is assigned $15 million of the State ceiling for 1986 pursuant to a formula provided under section 103(n)(6), that governmental unit has a private activity bond limit of $10 million for 1986. Similarly, where a project that was preliminarily approved by an issuing authority that is not a governmental unit qualifies for $10 million of priority under section 631(a)(3) of the Act is not allocated a total of $10 million by the governmental unit on behalf of which the issuing authority is empowered to issue private activity bonds, the issuing authority's private activity bond limit, if any, for the year following this failure is reduced by $10 million; if the issuing authority's private activity bond limit for the year following the failure is less than $10 million, the private activity bond limit of the governmental unit on behalf of which the private activity bonds would have been issued had the failure not occurred (including if necessary, on a proportionate basis, the private activity bond limit purported to have been assigned to each of the other constituted authorities empowered to issue private activity bonds on behalf of the governmental unit and each special purpose governmental unit deriving all or part of its sovereign powers from the governmental unit) is reduced by the difference between $10 million and the reduction made in the issuing authority's private activity bond limit with respect to such failure.

Q–18: Will a penalty be assessed for failure to allocate private activity bond limit to all projects that meet the requirements section 631(a)(3) if the amount of obligations required by all such projects preliminarily approved by (or treated as having been preliminarily approved by) an issuing authority exceeds the private activity bond limit of such issuing authority?

A–18: No penalty will be assessed if priority is given to those eligible projects for which substantial expenditures were incurred before October 19, 1983. An issuer may define the term ''substantial expenditures'' in any reasonable manner based on the relevant facts and circumstances and its private activity bond limit.

Examples. The following examples illustrate the provisions of A–16 through A–18:

Example 1. On October 1, 1983, County S approved an inducement resolution for the issuance of up to $30 million of industrial development bonds to provide a pollution control facility described in section 103(b)(4)(F) for Corporation R. On October 5, 1983, R contracted with Corporation Q to begin construction of the pollution control facility immediately, and construction began on October 10, 1983. Not later than August 17, 1984, Corporation R notified County S that it intended to seek priority under section 631(a)(3) of the Tax Reform Act of 1984. In addition, prior to December 31, 1984, Corporation R notified County S that it expected the County to issue $25 million of industrial development bonds for its project during calendar year 1985. Under section 103(n)(3), County S has a private activity bond limit of $50 million for calendar year 1985, and neither the Governor nor the legislature of the State has provided a different allocation formula under section 103(n)(6). There are no other projects approved by County S that have rights under section 631(a)(3). On March 1, 1985, County S issues $25 million of industrial development bonds for the pollution control facility for Corporation R. If County S allocates less than $25 million of its private activity bond limit to that project, its private activity bond limit for 1986 will be reduced by the difference between $25 million and the amount County S actually allocates to the project.

Example 2. The facts are the same as in Example (1) except that during 1984 Corporation R fails to notify County S of the year in which it expects the obligations to be issued. Upon such failure the pollution control facility no longer qualifies for priority under section 631(a)(3), and County S will not be penalized if it does not not allocate any of its private activity bond limit for 1985, or any future year, to that project.

Example 3. The facts are the same as in Example (1) except that under section 103(n)(3) County S has a private activity bond limit of $10 million for 1985. County S will not be penalized if it allocates $10 million of its private activity bond limit to the project.

Example 4. The facts are the same as in Example (3) except that on December 31, 1984, the Governor of the State provides a different allocation from that provided under section 103(n) (2) and (3). (The State has not enacted a statute specifically providing that section 631(a)(3) does not apply.) The different allocation provides that the entire State ceiling is allocated to the State and that the State will allocate the State ceiling to issuing authorities for specific projects on a first-come, first-served basis. Corporation R qualifies for the special rights granted by section 631(a)(3) of the Tax Reform Act to the extent of County S's private activity bond limit as determined under section 103(n)(3), *i.e.*, $10 million. If the State fails to assign to County S $10 million of the State ceiling or if County S, after receiving such assignment, fails to allocate $10 million of private activity bond limit to the project, County S's private activity bond limit (if any) for 1986 will be reduced by the difference between $10 million and the amount of private activity bond limit allocated to the project.

Example 5. The facts are the same as in Example (1) except that Corporation R notifies County S that it only requires $15 million for the pollution control facility, County S only issues $15 million of private activity bonds for the pollution control facility, and County S only allocates $15 million of its private activity bond limit to such obligations. County S will not be penalized for not allocating more than $15 million of its private activity bond limit to Corporation R even though the original inducement resolution provided for up to $25 million.

(Secs. 103(n) and 7805 of the Internal Revenue Code of 1954 (98 Stat. 916, 26 U.S.C.103(n); 68A Stat. 917, 26 U.S.C. 7805))

[T.D. 7981, 49 FR 39320, Oct. 5, 1984]

§ 1.103(n)–4T Elective carryforward of unused private activity bond limit (temporary).

Q–1: May an issuing authority carry forward any of its unused private activity bond limit for a calendar year?

A–1: In any calendar year after 1983 in which an issuing authority's private activity bond limit exceeds the aggregate amount of private activity bonds issued during such calendar year by such issuing authority, such issuing authority may elect to treat all, or any portion, of such excess as a carryforward for any one or more projects described in A–5 of this §1.103(n)–4T (carryforward projects).

Q–2: How is the election to carry forward an issuing authority's unused private activity bond limit made?

A–2: (i) An issuing authority may make the election by means of a statement, signed by an authorized public official responsible for making allocations of such issuing authority's private activity bond limit, that the issuing authority elects to carry forward its unused private activity bond limit. The statement shall be filed with the Internal Revenue Service Center, Philadelphia, Pennsylvania 19255. Except with respect to elections to carry forward any unused private activity bond limit for calendar year 1984, the election must be filed prior to the end of the calendar year with respect to which the issuing authority has the unused private activity bond limit; elections with respect to unused private activity bond limit for calendar year 1984 must be filed prior to February 26, 1985. The statement is to be titled ''Carryforward election under section 103(n)''.

(ii) The statement required by (i) of this A–2 shall contain the following information:

(A) The name, address, and TIN of the issuing authority,

(B) The issuing authority's private activity bond limit for the calendar year,

(C) The aggregate amount of private activity bonds issued by the issuing authority during the calendar year for which the election is being made,

(D) The unused private activity bond limit of the issuing authority, and

(E) For each carryforward project—

(*1*) A description of the project, including its address (by its street address or, if none, by a general description designed to indicate its specific location) and the general type of facility (e.g., an airport described in section 103(b)(4)(D)),

(*2*) The name, address, and TIN of the initial owner, operator, or manager, and

(*3*) The amount to be carried forward for the project.

(iii) For purposes of (ii)(E) of this A–2, in the case of a carryforward project for which the initial owner, operator, or manager is to be selected pursuant to a competitive bidding process, the election may include up to 3 prospective addresses for the project and the name, address, and TIN of more than one prospective initial owner, operator, or manager, if prior to the end of the calendar year for which the election is made—

(A) In the case of elections for calendar years other than 1984, the issuing authority has taken preliminary official action approving the undertaking of the carryforward project,

(B) All persons included as prospective owners, operators, or managers have met all applicable conditions (if any) to submit proposals to provide the project, and

(C) The issuing authority has expended (or has entered into binding contracts to expend) in connection with the planning and construction of the carryforward project the lesser of $500,000 or 2½ percent of the carryforward amount.

(iv) For purposes of (ii) of this A–2, in the case of a carryforward election for the purpose of issuing student loan bonds, the statement need not include the address of a facility or the name, address, and TIN of an initial owner, operator, or manager of a project but shall state that the carryforward election is for the purpose of issuing student loan bonds.

Q–3: Is a carryforward election revocable?

A–3: Any carryforward election, and any specification contained therein, shall be irrevocable after the last day of the calendar year in which the election is made. Thus, for example, obligations issued to finance a carryforward project with a different initial owner, operator, or manager from the owner, operator, or manager specified in the carryforward election shall not be issued purusant to such carryforward election. An insubstantial deviation from a specification contained in a carryforward election shall not prevent obligations from being issued pursuant to such carryforward election. In addition, where a carryforward election is made with respect to more than one carryforward project, a substantial deviation with respect to one carryforward project shall not prevent obligations from being issued pursuant to such carryforward election with respect to the other carryforward projects.

Q–4: How is a carryforward used?

A–4: Any private activity bonds issued during the three calendar years (six calendar years in the case of a project described in section 103(b)(4)(F)) following the calendard year in which the carryforward election was first made with respect to a carryforward project shall not be taken into account in determining whether the issue meets the requirements of section 103(n). If, however, the amount of private activity bonds issued for the carryforward project exceeds the amount of the carryforward elected with respect to the project, then the portion of the issue that exceeds the carryforward shall be taken into account in determining whether the issue meets with the requirements of section 103(n); if that portion of the issue does not meet the requirements of section 103(n) then the entire issue is treated as consisting of obligations not described in section 103(a). Carryforwards elected with respect to any project shall be used in the order of the calendar years in which they arose. Thus, for example, if an issuing authority makes carryforward elections in 1986 and 1988 for a carryforward project and issues private activity bonds for that project in 1989 and 1990, the obligations issued in 1989 will be applied to the 1986 carryforward election to the extent thereof.

Q–5: For what projects may a carryforward election be made?

A–5: A carryforward election may be made for any project described in section 103(b) (4) or (5), and for the purpose of issuing student loan bonds. Thus, for example, an issuing authority may elect to carry forward its unused private activity bond limit in order to provide a sports facility described in section 103(b)(4)(B). In addition, a governmental unit may elect to carry forward its unused private activity bond limit in order to issue qualified scholarship funding bonds. An issuing authority may not, however, elect to carry forward its unused private activity bond limit in order to issue an exempt small issue of industrial development bonds under section 103(b)(6).

(Secs. 103(n) and 7805 of the Internal Revenue Code of 1954 (98 Stat. 916, 26 U.S.C.103(n); 68A Stat. 917, 26 U.S.C. 7805); sec. 644(b) of the Tax Reform Act of 1984 (98 Stat. 940); secs. 103(n) and 7805 of the Internal Revenue Code of 1954 (98 Stat. 915, 26 U.S.C. 103(n); 68A Stat. 917, 26 U.S.C. 7805))

[T.D. 7981, 49 FR 39325, Oct. 5, 1984, as amended by T.D. 8001, 49 FR 50389, Dec. 28, 1984]

§ 1.103(n)–5T Certification of no consideration for allocation (temporary).

Q–1: Who must certify that there was no consideration for an allocation?

A–1: Section 103(n)(12)(A) provides that, with respect to any private activity bond allocated any portion of the State ceiling, the private activity bond will not be described under section 103(a) unless the public official, if any, responsible for such allocation (''responsible public official'') certifies under penalties of perjury that to the best of his knowledge the allocation of the State ceiling to that private activity bond was not made in consideration of any bribe, gift, gratuity, or direct or indirect contribution to any political campaign. With respect to any issue of private activity bonds, the responsible public official is the official or officer of the issuing authority that in fact is responsible for choosing which individual projects will be allocated a portion of the State ceiling. If a body of several individuals is responsible for such choices, any one member of such body qualifies as the responsible public official.

Q–2: What is the penalty for willfully making an allocation in consideration of any bribe, gift, gratuity, or direct or indirect contribution to any political campaign?

A–2: Section 103(n)(12)(B) provides that any person willfully making an allocation of any portion of the State ceiling in consideration of any bribe, gift, gratuity, or direct or indirect contribution to any political campaign will be subject to criminal penalty as though the allocation were a willful attempt to evade tax imposed by the Internal Revenue Code.

(Secs. 103(n) and 7805 of the Internal Revenue Code of 1954 (98 Stat. 916, 26 U.S.C.103(n); 68A Stat. 917, 26 U.S.C. 7805))

[T.D. 7981, 49 FR 39326, Oct. 5, 1984]

§ 1.103(n)–6T Determinations of population (temporary).

Q–1: What is the proper method for determining population?

A–1: All determinations of population must be made with respect to any calendar year on the basis of the most recent census estimate (whether final or provisional) of the resident population of the State or other governmental unit published by the Bureau of the Census in the ''Current Population Reports'' series before the beginning of the calendar year.

However, determinations of the population of a general purpose governmental unit (other than a State, territory, or possession) within a State, territory, or possession may not be based on estimates that do not contain estimates for all of the general purpose governmental units within such State, territory, or possession. Thus, a county may not determine its population on the basis of a census estimate that does not provide an estimate of the population of the other general purpose governmental units within the State (e.g., cities, towns). If no census estimate is available for all such general purpose governmental units, the most recent decennial census of population may be relied on.

Example: The following example illustrates the provisions of A–1 of this § 1.103(n)–6T:

Example. County Q is located within State R. There are no constitutional home rule cities in State R. State R has not adopted a formula for allocating the State ceiling different from the formula provided in section 103(n) (2) and (3). The geographical area within the jurisdiction of County Q is not within the jurisdiction of any other governmental unit having jurisdiction over a smaller geographical area. As of December 31, 1984, the Bureau of the Census has published the following estimates of resident population: ''Current Population Reports; Series P–25: Population Estimates and Projections, Estimates of the Population of States: July 1, 1981–1983'' and ''Current Population Reports; Series P–26: Local Population Estimates:

Population of State R, Counties, Incorporated Places, and Minor Civil Divisions: July 1, 1981–1982.'' The most recent population estimate for State R available prior to 1985 provides population estimates as of July 1, 1983. The most recent population extimates for County Q available prior to 1985 is the estimate for July 1, 1982. Assuming that the State ceiling for State R for 1985 is in excess of $200 million (*i.e.*, $150 multiplied by the estimated population of State R as of July 1, 1983, exceeds $200 million), County Q may determine its private activity bond limit by using the following formula:

$P = \$150 \times .5 \times W \times Y/Z$, where,

P = County Q's private activity bond limit,
W = the July 1, 1983, population estimate for State R,
Y = the July 1, 1982, population estimate for County Q, and
Z = the July 1, 1982, population estimate for State R.

If the State ceiling for State R is not in excess of $200 million, County Q may determine its private activity bond limit by using the following formula:

$P = \$200{,}000{,}000 \times .5 \times Y/Z$, where
P, Y, and Z have the same meaning as above.

(Secs. 103(n) and 7805 of the Internal Revenue Code of 1954 (98 Stat. 916, 26 U.S.C.103(n); 68A Stat. 917, 26 U.S.C. 7805))

[T.D. 7981, 49 FR 39326, Oct. 5, 1984]

§ 1.103(n)–7T Election to allocate State ceiling to certain facilities for local furnishing of electricity (temporary).

(a) *Election*—(1) *In general*. The issuing authorities of the State of New York (''New York'') may elect to use in 1984 up to one-half of the amount that would have been New York's State ceiling (as defined in section 103(n)(4) and A–1 of § 1.103(n)–3T) for calendar years 1985, 1986, and 1987 for the purpose of issuing obligations to provide facilities for the local furnishing of electric energy described in section 644(a) of the Tax Reform Act of 1984 (the ''Act''). For purposes of this paragraph, New York's State ceiling for calendar years 1985, 1986, and 1987 is considered equal to the State ceiling for 1984 (without taking into account any increase in the State ceiling for 1984 as a result of an election under section 644(b) and this section).

(2) *Procedure*. The election shall be made by filing the statement described in this paragraph (a)(2) with the Internal Revenue Service Center, Philadelphia, Pennsylvania, on or before December 31, 1984. The statement shall be titled ''Allocation election under section 644 of the Tax Reform Act of 1984,'' shall be signed by the Governor of New York or his authorized representative, and shall contain the following information:

(i) The name, address, and TIN of the issuing authority (or authorities) that is expected to issue the obligations for the facilities described in section 644(a) of the Act pursuant to the election described in section 644(b) of the Act and this section, and

(ii) The amount of the State ceiling for each of calendar years 1985, 1986, and 1987 with respect to which the election is made.

(b) *Effect of election*—(1) *In 1984*. The amount of the State ceiling for calendar years 1985, 1986, and 1987 with respect to which the election is made will be considered part of New York's State ceiling for calendar year 1984. For purposes of section 644(b) of the Act, such amount will be considered used in 1984 only to the extent that obligations are issued in 1984 to provide facilities for the local furnishing of electric energy described in section 644(a) of the Act, or to the extent that a proper election is made on or before December 31, 1984 (and is not revoked or amended between the time it is made and the end of 1984) pursuant to section 103(n)(10) and § 1.103(n)–4T to carry forward all or part of such amount to provide such facilities during the carryforward period applicable to calendar year 1984 State ceiling.

(2) *In 1985, 1986, and 1987*. An election under section 644(b) of the Act and this section to use in calendar year 1984 an amount of New York's State ceiling for a subsequent calendar year reduces the State ceiling for such subsequent calendar year by the amount with respect to which the election is made, whether or not such amount is considered used in 1984 pursuant to this paragraph (b). Thus, no obligations may be issued pursuant to the election described in section 644(b) of the Act and this section to provide a facility other than the facilities for the furnishing of electric energy described in section 644(a) of the Act.

(3) *Other effects.* An election or the failure to make an election under section 644(b) of the Act and this section shall not affect any otherwise applicable rule that permits an issuing authority, for any calendar year, to—

(i) Allocate a portion of its private activity bond limit,

(ii) Issue obligations within its private activity bond limit, or

(iii) Elect under section 103(n)(10) and §1.103(n)–4T to carry forward any portion of its private activity bond limit,

in order to issue obligations to provide a facility described in section 644(a) of the Act.

(c) *Revocation of election.* An election made under section 644(b) of the Act and this section may not be revoked or amended. An insubstantial deviation from a specification contained in an election under section 644(b) of the Act and this section shall not prevent obligations from being issued pursuant to such election.

(Sec. 644(b) of the Tax Reform Act of 1984 (98 Stat. 940); secs. 103(n) and 7805 of the Internal Revenue Code of 1954 (98 Stat. 915, 26 U.S.C. 103(n); 68A Stat. 917, 26 U.S.C. 7805))

[T.D. 8001, 49 FR 50389, Dec. 28, 1984]

§ 1.103A–2 Qualified mortgage bond.

(a)–(j) [Reserved]

(k) *Information reporting requirement*—(1) *In general.* An issue meets the requirements of this paragraph only if the issuer in good faith attempted to meet the information reporting requirements of this paragraph. Except as otherwise provided in paragraph (k)(5)(iv) of this section, the requirements of this paragraph apply to qualified veterans' mortgage bonds issued after July 18, 1984, and to qualified mortgage bonds issued after December 31, 1984. With respect to bonds issued after December 31, 1986, see the regulations under section 149(e).

(2) *Information required.* (i) The issuer must, based on information and reasonable expectations determined as of the date of issue, submit on Form 8038 the information required therein; the issuer need not however, include the information required by Form 8038 that is relevant only to obligations described in section 103(l)(1) and the regulations thereunder. The information that must be submitted includes—

(A) The name, address, and employer identification number of the issuer,

(B) The date of issue,

(C) The face amount of each obligation which is part of the issue,

(D) The total purchase price of the issue,

(E) The amount allocated to a reasonably required reserve or replacement fund,

(F) The amount of lendable proceeds,

(G) The stated interest rate of each maturity,

(H) The term of each maturity,

(I) In the case of an issue of qualified mortgage bonds, whether the issuer has elected under §6a.103A–2(i)(4)(v) to pay arbitrage to the United States,

(J) In the case of an issue of qualified mortgage bonds, the issuer's market limitation as of the date of issue (as defined in §6a.103A–2(g)), the amount of qualified mortgage bonds that the issuer has elected not to issue under section 25(c)(2) and the regulations thereunder, and the aggregate amount of qualified mortgage bonds issued to date by the issuer during the calendar year, and

(K) In the case of an issue of qualified veterans' mortgage bonds, the issuer's State veterans limit (as defined in section 103A(o)(3)(B) and the regulations thereunder) and the aggregate amount of qualified veterans' mortgage bonds issued to date by the issuer during the calendar year and prior to the date of issue of the issue for which the Form 8038 is being submitted.

(ii) With respect to issues issued after December 31, 1984, the issuer must submit a report containing information on the borrowers of the original proceeds of such issues. The report must be filed for each reporting period in which the original proceeds of any of such issues are used to provide mortgages. The issuer is not responsible for false information provided by a borrower if the issuer did not know or have reason to know that the information was false. The report must be filed on the form prescribed by the Internal Revenue Service. If no form is prescribed, or if the form prescribed is not readily available, the issuer may use its own form provided that such form is in the format set forth in paragraph (k)(3) of this section and contains the information required by this paragraph (k)(2)(ii). The report must be titled ''Qualified Mortgage Bond Information Report'' or ''Qualified Veterans' Mortgage Bond Information Report'', and must include the name, address, and TIN of the issuer, the reporting period for which the information is provided, and the following tables containing information concerning the borrowers of the original proceeds of the issues subject to the requirements of this paragraph (k)(2)(ii) with respect to mortgages provided during the reporting period for which the report is filed:

(A) A table titled ''Number of Mortgage Loans by Income and Acquisition Cost'' showing the number of mortgage loans (other than those issued in connection with qualified home improvement and rehabilitation loans) made during the reporting period according to the annualized gross income of the borrowers (categorized in the following intervals of income:

$0–$9,999
$10,000–$19,999
$20,000–$29,999
$30,000–$39,999
$40,000–$49,999
$50,000–$74,999
$75,000 or more)

and according to the acquisition cost of each residence being financed (categorized in the following intervals of acquisition cost:

$0–$19,999
$20,000–$39,999
$40,000–$59,999
$60,000–$79,999
$80,000–$99,999
$100,000–$119,999
$120,000–$149,999
$150,000–$199,999
$200,000 or more)

For each interval of income and acquisition cost the table must also be categorized according to the number of borrowers that—

(*1*) Did not have a present ownership interest in a principal residence at any time during the 3-year period ending on the date the mortgage is executed (*i.e.*, satisfied the 3-year requirement) and purchased residences in targeted areas,

(*2*) Satisfied the 3-year requirement and purchased residences not located in targeted areas,

(*3*) Did have a present ownership interest in a principal residence at any time during the 3-year period ending on the date the mortgage is executed (*i.e.*, did not satisfy the 3-year requirement) and purchased residences in targeted areas, and

(*4*) Did not satisfy the 3-year requirement and purchased residences not located in targeted areas.

With respect to issues of qualified veterans' mortgage bonds, for each interval of income and acquisition cost the table need only be categorized according to the number of borrowers that satisfied the 3-year requirement and the number of borrowers that failed to satisfy the 3-year requirement.

(B) A table titled ''Volume of Mortgage Loans by Income and Acquisition Cost'' showing the total principal amount of the mortgage loans (other than qualified home improvement and rehabilitation loans) provided during the reporting period according to annualized gross income (categorized in the same intervals of income as the preceding table) and according to the acquisition cost of the residences acquired (categorized in the same acquisition cost intervals as the preceding table). For each interval of income and acquisition cost the table must also be categorized according to the total principal amount of the mortgage loans of borrowers that—

(*1*) Satisfied the 3-year requirement and purchased residences in targeted areas,

(*2*) Satisfied the 3-year requirement and purchased residences not located in targeted areas,

(*3*) Did not satisfy the 3-year requirement and purchased residences in targeted areas, and

(*4*) Did not satisfy the 3-year requirement and purchased residences not located in targeted areas.

With respect to issues of qualified verterans' mortgage bonds, for each interval of income and acquisition cost the table need only be categorized according to the total principal amount of the mortgage loans of borrowers that satisified the 3-year requirement and the total principal amount of the mortgage loans of borrowers that did not satisfy the 3-year requirement.

(C) For issues other than qualified veterans' mortgage bonds, a table titled ''Mortgage Subsidy Bonds for Qualified Home Improvement and Rehabilitation Loans'' showing the number of borrowers obtaining qualified home improvement loans and qualified rehabilitation loans and the total of the principal amounts of such loans; the information contained in the table must also be categorized according to whether the residences with respect to which the loans were provided are located in targeted areas.

(3) *Format*. (i) With respect to the report required by paragraph (k)(2)(ii) of this section, if no form is prescribed by the Internal Revenue Service, or if the prescribed form is not readily available, the issuer must submit the report in the format specified in this paragraph (k)(3).

(ii) With respect to issues of qualified mortgage bonds, the format of the report specified in this paragraph (k)(3) is the following:

QUALIFIED MORTGAGE BOND INFORMATION REPORT

Name of issuer:
Address of issuer:
TIN of issuer:
Reporting period:

NUMBER OF MORTGAGE LOANS BY INCOME AND ACQUISITION COST

3-year requirement: Annualized gross monthly income of borrowers	Satisfied		Not Satisfied		Totals
	Nontargeted area	Targeted area	Nontargeted area	Targeted area	
$0 to $9,999.					
$10,000 to $19,999.					
$20,000 to $29,999.					
$30,000 to $39,999.					
$40,000 to $49,999.					
$50,000 to $74,999.					
$75,000 or more.					
Total.					
Acquisition Cost					
$0 to $19,999.					
$20,000 to $39,999.					
$40,000 to $59,999.					
$60,000 to $79,999.					
$80,000 to $99,999.					
$100,000 to $119,999.					
$120,000 to $149,999.					
$150,000 to $199,999.					
$200,000 or more.					
Total.					

VOLUME OF MORTGAGE LOANS BY INCOME AND ACQUISITION COST

3-year requirement: Annualized gross monthly income of borrowers	Satisfied		Not Satisfied		Totals
	Nontargeted area	Targeted area	Nontargeted area	Targeted area	
$0 to $9,999.					
$10,000 to $19,999.					
$20,000 to $29,999.					
$30,000 to $39,999.					
$40,000 to $49,999.					
$50,000 to $74,999.					
$75,000 or more.					
Total.					
Acquisition Cost					
$0 to $19,999.					
$20,000 to $39,999.					
$40,000 to $59,999.					
$60,000 to $79,999.					
$80,000 to $99,999.					
$100,000 to $119,999.					
$120,000 to $149,999.					
$150,000 to $199,999.					

VOLUME OF MORTGAGE LOANS BY INCOME AND ACQUISITION COST—Continued

3-year requirement: Annualized gross monthly income of borrowers	Satisfied		Not Satisfied		Totals
	Nontargeted area	Targeted area	Nontargeted area	Targeted area	
$200,000 or more.					
Total.					

MORTGAGE SUBSIDY BONDS FOR QUALIFIED HOME IMPROVEMENT AND REHABILITATION LOANS

	Nontargeted area	Targeted area	Totals
Number of qualified home improvement loans.			
Volume of qualified home improvement loans.			
Number of qualified rehabilitation loans.			
Volume of qualified rehabilitation loans.			

(iii) The format of the report specified in this paragraph (k)(3) for qualified veterans' mortgage bonds is the following:

QUALIFIED VETERANS' MORTGAGE BOND INFORMATION REPORT

Name of issuer:
Address of issuer:
TIN of issuer:
Reporting period:

NUMBER OF MORTGAGE LOANS BY INCOME AND ACQUISITION COST

3-year requirement: annualized gross monthly income of borrowers	Satisfied	Not satisfied	Totals
$0 to $9,999.			
$10,000 to $19,999.			
$20,000 to $29,999.			
$30,000 to $39,999.			
$40,000 to $49,999.			
$50,000 to $74,999.			
$75,000 or more.			
Total.			
Acquistion Cost			
$0 to $19,999.			
$20,000 to $39,999.			
$40,000 to $59,999.			
$60,000 to $79,999.			
$80,000 to $99,999.			
$100,000 to $119,999.			
$120,000 to $149,999.			
$150,000 to $199,999.			
$200,000 or more.			
Total.			

NUMBER OF MORTGAGE LOANS BY INCOME AND ACQUISITION COST

3-year requirement: annualized gross monthly income of borrowers	Satisfied	Not satisfied	Totals
$0 to $9,999.			
$10,000 to $19,999.			
$20,000 to $29,999.			
$30,000 to $39,999.			
$40,000 to $49,999.			
$50,000 to $74,999.			
$75,000 or more.			
Total.			
Acquistion Cost			
$0 to $19,999.			
$20,000 to $39,999.			
$40,000 to $59,999.			
$60,000 to $79,999.			
$80,000 to $99,999.			
$100,000 to $119,999.			
$120,000 to $149,999.			
$150,000 to $199,999.			
$200,000 or more.			
Total.			

(4) *Definitions and special rules.* (i) For purposes of this paragraph the term ''annualized gross income'' means the borrower's gross monthly income muliplied by 12. Gross monthly income is the sum of monthly gross pay, any additional income from investments, pensions, Veterans Administration (VA) compensation, part-time employment, bonuses, dividends, interest, current overtime pay, net rental income, etc., and other income (such as alimony and child support, if the borrower has chosen to disclose such income). Information with respect to gross monthly income may be obtained from available loan documents, e.g., the sum of lines 23D and 23E on the Application for VA or FmHA Home Loan Guaranty or for HUD/FHA Insured Mortgage (VA Form 26–1802a, HUD 92900, Jan. 1982), or the total line from the Gross Monthly Income section of FHLMC Residential Loan Application form (FHLMC 65 Rev. 8/78). With respect to obligations issued prior to October 1, 1985, issuers may submit data based on annualized gross income or, instead, based on the adjusted income (as defined in §1.167(k)–3(b)(3)) of the mortgagor's family for the previous calendar year. If data is submitted based on adjusted income, the issuer must note this fact in the report.

(ii) For purposes of this paragraph, the term ''reporting period'' means the following periods:

(A) The period beginning January 1, 1985, and ending on September 30, 1985,

(B) The period beginning on October 1, 1985, and ending on June 30, 1986, and

(C) After June 30, 1986, each 1-year period beginning July 1 and ending June 30.

(iii) See the regulations under section 103(l) for the definitions of the terms ''date of issue'', ''maturity'', and ''term of issue''.

(iv) For purposes of this paragraph, verification of information concernig a borrower's gross monthly income with other available information concerning the borrower's income (e.g., Federal income tax returns) is not required. In determining whether a borrower acquiring a residence in a targeted area satisfies the 3-year requirement, the issuer may rely on a statement signed by the borrower.

(5) *Time for filing.* (i) The report required by paragraph (k)(2)(i) of this section shall be filed not later than the 15th day of the second calendar month after the close of the calendar quarter in which the obligation is issued. The statement may be filed at any time before such date but must be complete based on facts and reasonable expectations as of the date of issue. The statement need not be amended to report information learned subsequent to the date of issue or to reflect changed circumstances with respect to the issuer.

(ii) The report required by paragraph (k)(2)(ii) of this section (relating to use of proceeds) shall be filed not later than the 15th day of the second calendar month after the close of the reporting period, except that the report for the reporting period ending September 30, 1985, is due not later than February 15, 1986. The report may be filed at any time before such date but must be complete based on facts and reasonable expectations as of the date the report is filed. The report need not be amended to reflect information learned subsequent to the date the report is filed or to reflect changed circumstances with respect to any borrower.

(iii) The Commissioner may grant an extension of time for the filing of a report required by paragraph (k)(2) (i) or (ii) of this section if there is reasonable cause for the failure to file such report in a timely fashion.

(iv) An issue of qualified veterans' mortgage bonds issued after July 18, 1984, and prior to January 1, 1985, will be treated as satisfying the information reporting requirement of this paragraph if a Form 8038 with respect to the issue is properly filed not later than February 15, 1985; the report described in paragraph (k)(2)(ii) of this section need not be filed with respect to such issues.

(6) *Place for filing.* The reports required by paragraph (k)(2) (i) and (ii) of this section are to be filed at the Internal Revenue Service Center, Philadelphia, Pennsylvania 19255.

(l) *Policy statement*—(1) *In general.* (i) For obligations issued after December 31, 1984, an issue meets the requirements of this paragraph only if the applicable elected representative of the governmental unit which is the issuer (or on behalf of which the issuing authority is empowered to issue qualified mortgage bonds) has published (after a public hearing following reasonable public notice) the report described in paragraph (l)(3) of this section by the last day of the year preceding the year in which such issue is issued and a copy of such report has been submitted to the Commissioner on or before such last day. The Commissioner may grant an extension of time for publishing and filing the report if there is reasonable cause for the failure to publish or file such report in a timely fashion. The requirements of this paragraph will be treated as met if the issuer in good faith attempted to meet the policy statement requirements of this paragraph.

(ii) With respect to reports required by paragraph (l)(1)(i) of this section to be published and submitted to the Commissioner not later than December 31, 1984, the Commissioner has determined that there is reasonable cause for the failure to publish or file such reports in a timely fashion; such a report will be considered published and filed in a timely fashion if, not later than March 11, 1985, the report is published (after a public hearing following reasonable public notice) and a copy is submitted to the Commissioner. In addition, any report submitted not later than December 31, 1984, with respect to which an issuer in good faith attempted to satisfy the requirements of section 103A(j)(5) shall be treated as substantially satisfying the requirements of this paragraph. For example, with respect to a report submitted not later than December 31, 1984, an issuer shall not be treated as failing to satisfy the requirements of section 103A(j)(5) based on the fact that (A) the notice of public hearing failed to state the manner in which affected residents may obtain copies of the proposed report prior to the hearing, or (B) the proposed report was not available prior to or at the public hearing. With respect to reports required to be published and submitted to the Commissioner not later than December 31, 1986, the Commissioner has determined that there is a reasonable cause for the failure to publish and file such reports in a timely fashion; such reports will be considered published and filed in a timely fashion if, not later than December 31, 1987, the report is published (after having a public hearing following reasonable public notice) and a copy is submitted to the Commissioner.

(2) *Definitions and special rules.* (i) In the case of an issuer that issues qualified mortgage bonds on behalf of one or more governmental units, a single report may be filed provided that such report is signed (A) by the applicable elected representative of each governmental unit on whose behalf obligations have been issued during any preceding calendar year or (B) by the Governor of the State in which the issuer is located.

(ii) See notice 103(k)(2)(E) and the regulations thereunder for the definition of the term ''applicable elected representative''.

(iii) In the case of qualified mortgage bonds issued by, or on behalf of, a governmental unit that did not reasonably expect during the preceding calendar year to issue (or have issued on its behalf by any other issuer) qualified mortgage bonds during the current calendar year, the requirements of this paragraph will be treated as met if the applicable governmental unit which is the issuer (or on behalf of which the issuing authority is empowered to issue qualified mortgage bonds) has published (after a public hearing following reasonable public notice) the report described in paragraph (l)(3) of this section prior to the issuance of any qualified mortgage bonds and a copy of such report has been submitted to the Commissioner prior to such issuance.

(iv) For purposes of this paragraph a report will be considered to be ''published'' when the applicable elected representative of the governmental unit has made copies of the report available for distribution to the public. Reasonable public notice of the manner in which copies of the report may be obtained must be provided; such notice may be included as part of the public notice required by paragraph (l)(4) of this section.

(3) *Report.* (i) A report is described in this paragraph (l)(3) if it contains the issuer's name, TIN, and the title ''Policy Report Under Section 103A'' stated on the cover page of the report and if it includes—

(A) A statement of the policies of the issuer with respect to housing, development, and low-income housing assistance which such issuer is to follow in issuing qualified mortgage bonds and mortgage credit certificates, and

(B) An assessment of the compliance of such issuer during the 1-year period preceding the date of the report with—

(*1*) The statement of policy on qualified mortgage bonds and mortgage credit certificates that was set forth in the previous report, if any, of the issuer, and

(*2*) The intent of Congress that State and local governments are expected to use their authority to issue qualified mortgage bonds and mortgage credit certificates to the greatest extent feasible (taking into account prevailing interest rates and conditions in the housing market) to assist lower income families to afford home ownership before assisting higher income families.

(ii) For example, a report described in this paragraph (l)(3) may (but is not required to) contain—

(A) A specific statement of the policies with respect to housing, development, and low-income housing assistance which the issuer is to follow in issuing qualified mortgage bonds and mortgage credit certificates, including, for example, a statement as to—

(*1*) With respect to housing policies, (*i*) whether the proceeds will be used to provide financing for the acquisition of residences, to provide qualified home improvement loans, or to provide qualified rehabilitation loans; (*ii*) whether all or a portion of the proceeds will be targeted to new, existing, or any other particular class or type of housing; (*iii*) how the existence of a need or absence of a need for such targeting has been determined; (*iv*) the method by which the proceeds will be targeted; (*v*) any other pertinent information relating to the issuer's housing policies; and (*vi*) how the housing policies relate to the issuer's development and low-income housing assistance policies;

(*2*) With respect to development policies, (*i*) whether all or a portion of the proceeds will be targeted to specific areas (including targeted areas as described in §6a.103A–2(b)(3)); (*ii*) a description of the areas to which the proceeds will be targeted; (*iii*) the reasons for selecting such areas; (*iv*) whether proceeds targeted to each area are to be used to finance redevelopment of existing housing or new construction; (*v*) any other pertinent information relating to the issuer's development policies; and (*vi*) how the development policies relate to the issuer's low-income housing assistance policies; and

(*3*) With respect to low-income housing assistance policies, (*i*) whether all or a portion of the proceeds will be targeted to low-income (*i.e.*, 80 percent of median income), moderate-income (*i.e.*, 100 percent of median income), or any other class of borrowers; (*ii*) the method by which the proceeds will be targeted to such borrowers; and (*iii*) any other pertinent information relating to the issuer's low-income housing assistance policies;

(B) An assessment of the compliance of the governmental unit or issuing authority during the twelve-month period ending with the date of the report with the statement of housing, development, and low-income housing assistance policies with respect to qualified mortgage bonds and mortgage credit certificates that were set forth in the report, if any, published in the preceding year with respect to such governmental unit, including, for example, a statement as to whether the governmental unit or issuing authority successfully implemented its policies and, if not, an analysis of the reasons for such failure; and

(C) An assessment of the compliance of the governmental unit or issuing authority during the twelve-month period ending with the date of the report with the intent of Congress that State and local governments are expected to use their authority to issue qualified mortgage bonds and mortgage credit certificates to the greatest extent feasible (taking into account prevailing interest rates and conditions in the housing market) to assist lower income families to afford home ownership before assisting higher income families, including, for example, a description of (*1*) the method used by the governmental unit or issuing authority to distribute proceeds, (*2*) whether and how that method enabled the governmental unit or issuing authority to assist lower income families before higher income families, and (*3*) any income levels that have been defined and used by the governmental unit or issuing authority in connection with distribution of the proceeds (no specific definition of lower income and higher income is imposed on governmental units or issuing authorities).

(iii) For purposes of the assessments of compliance required by paragraph (l)(3)(i)(B) of this section to be included in the report, the "date of the report" means June 30. For purposes of the report required to be filed prior to January 1, 1986, an issuer need not perform these assessments of compliance with respect to any period prior to January 1, 1985.

(iv) An issuer that fails to establish policies with respect to the criteria provided in paragraph (l)(3)(i) of this section will not be treated as failing to satisfy the requirements of this paragraph. Thus, for example, an issuer may state in its report that none of the proceeds of the issue will be targeted to specific areas. Similarly, an issuer that fails to successfully implement its policies will not be treated as failing to satisfy the requirements of this paragraph.

(4) *Public hearing.* The public hearing required by paragraph (l)(1) of this section means a forum providing a reasonable opportunity for interested individuals to express their views, both orally and in writing, on the report that the applicable representative proposes to publish to satisfy the requirements of this paragraph (l). A public hearing held prior to January 1, 1985, will not fail to satisfy the requirements of this paragraph (l)(4) merely because the proposed policy statement was not available prior to the public hearing. In general, a governmental unit may select its own procedure for the hearing, provided that interested individuals have a reasonable opportunity to express their views. Thus, it may impose reasonable requirements on persons who wish to participate in the hearing, such as a requirement that persons desiring to speak at the hearing so request in writing at least 24 hours before the hearing or that they limit their oral remarks to 10 minutes. For purposes of this public hearing requirement, it is not necessary that the applicable elected representative who will publish the report be present at the hearing, that a report on the hearing be submitted to that official, or that State administrative procedural requirements for public hearings in general be observed. However, compliance with such State procedural requirements (except those at variance with a specific requirement set forth in this paragraph) will generally assure that the hearing satisfies the requirements of this paragraph. The hearing may be conducted by any individual appointed or employed to perform such function by the governmental unit, its agencies, or by the issuer. Thus, for example, for a report to be issued by an issuing authority that acts on behalf of a county, the hearing may be conducted by the issuing authority, the county, or an appointee or employee of either.

(5) *Reasonable public notice.* (i) The reasonable public notice required by paragraph (l)(1) of this section means published notice which is reasonably designed to inform residents of the geographical area within the jurisdiction of the governmental unit that will publish the report. The notice must state the time and place for the hearing and contain the information required by paragraph (l)(5)(ii) of this section. Notice is presumed reasonable if published no fewer than 14 days before the hearing. Notice is presumed reasonably designed to inform affected residents only if published in one or more newspapers of general circulation available to residents of that locality or if announced by radio or televison broadcast to those residents.

(ii) The notice of hearing described in this paragraph (l)(5) must state—

(A) The time and place for the hearing,

(B) Any applicable limitations regarding participation in the hearing,

(C) With respect to any notice of hearing published after December 31, 1984, the manner in which affected residents may obtain copies of the proposed report prior to the hearing, and

(D) With respect to any notice of hearing published after December 31, 1984, that the hearing will involve the issuer's policies with respect to housing, development, and low-income housing assistance which the issuer is to follow in issuing qualified mortgage bonds and mortgage credit certificates.

(6) *Procedure for public hearings of multiple jurisdiction issuers.* In the case of an issuer that issues qualified mortgage bonds on behalf of two or more governmental units (''multiple jurisdiction issuer''), each governmental unit on whose behalf the issuer reasonably expects to issue qualified mortgage bonds during the succeeding calendar year must hold a public hearing following reasonable public notice prior to the publication of the report required by this paragraph. A multiple jurisdiction issuer may hold a combined hearing as long as the combined hearing is a joint undertaking that provides all residents of the participating governmental units (*i.e.*, each governmental unit on whose behalf qualified mortgage bonds were issued by the authority and each governmental unit on whose behalf the authority reasonably expects to issue qualified mortgage bonds during the succeeding calendar year) a reasonable opportunity to be heard. The location of any combined hearing is presumed to provide a reasonable opportunity for

all affected residents to be heard if it is no farther than 100 miles from the seat of government of each participating governmental unit beyond whose geographic jurisdiction the hearing is conducted.

(7) *Place for filing.* The report is to be filed with the Internal Revenue Service Center, Philadelphia, Pennsylvania 19255.

(m) *State certification requirements*—(1) *In general.* An issue meets the requirements of this paragraph only if the issuer in good faith attempted to meet the State certification requirements of this paragraph. The requirements of this paragraph apply to obligations issued after December 31, 1984; see section 149(e) and the regulations thereunder with respect to obligations issued after December 31, 1986.

(2) *Certification.* (i) An issue satisfied the requirements of section 103A(j)(4) and this paragraph (m)(2) only if the State official designated by law (or, if there is no State official, the Governor) certifies on or before the later of the date of issue or October 3, 1985, following a request for such certification by the issuer, that, as of the date the certification is executed, the issue meets the requirements of section 103A(g) and the regulations thereunder (relating to volume limitation). In the case of any constitutional home rule city, the certification shall be made by the chief executive officer of the city. To the extent consistent with State and local law, the Governor (or the chief executive officer of any constitutional home rule city) may delegate the responsibility to execute the certification required by this paragraph.

(ii) The certifying official need not perform an independent investigation in order to determine whether the issue meets the requirements of section 103A(g). In determining the aggregate amount of qualified mortgage bonds previously issued by an issuer during a calendar year, the certifying official may rely on copies of the reports submitted, to date, by the issuer pursuant to section 103A(j)(3) for other issues of qualified mortgage bonds issued during that year and copies of any elections previously made pursuant to section 25(c)(2) not to issue qualified mortgage bonds, together with an affidavit executed by an officer of the issuer responsible for issuing the bonds stating that the issuer has not, to date during the calendar year, issued any other qualified mortgage bonds, the amount, if any, of the issuer's market limitation that it has, to date during the calendar year, surrendered to other issuing authorities, and that it has not, to date during the calendar year, made any other elections not to issue qualified mortgage bonds. If, based on such information, the certifying official determines that, as of the date the certification is executed, the issue will not exceed the issuer's market limitation for the year, the official may certify that the issue meets the requirements of section 103A(g).

(3) *Special rule.* If 15 days elapse after the issuer files a proper request for the certification described in paragraph (m)(2) of this section and the issuer has not received from the State official designated by law (or, if there is no State official, the Governor) certification that the issue meets the requirements of section 103A(g) and §6a.103A–2(g) or, in the alternative, a statement that the issue does not meet such requirements, the issuer may, instead, submit an affidavit executed by an officer of the issuer responsible for issuing the bonds stating that—

(i) The issue meets the requirements of section 103(A)(g) and §6a.103A–2(g),

(ii) At least 15 days before the execution of the affidavit the issuer filed a proper request for the certification described in paragraph (m)(2) of this section, and

(iii) The State official designated by law (or, if there is no State official, the Governor) has not provided the certification described in paragraph (m)(2) of this section.

In the case of obligations issued prior to October 4, 1985 the preceding sentence shall be applied by substituting ''30 days'' for ''15 days''. For purposes of this paragraph, a request for certification is proper if the request includes the reports and affidavits described in paragraph (m)(2)(ii) of this section.

(4) *Filing.* The certification (or affidavit) required by this paragraph shall be filed with the Internal Revenue Service Center, Philadelphia, PA 19255. The certification (or affidavit) shall be

submitted with the Form 8038 required to be filed by section 103A(j)(3) and paragraph (k) of this §1.103A–2. The Commissioner may grant an extension of time for filing the certification (or affidavit) if there is a reasonable cause for the failure to file such statement in a timely fashion.

(5) *Effect of certification.* The fact that an issuer obtains the certification (or affidavit) described in this paragraph does not ensure that the requirements of paragraph (g) of §6a.103A–2 are met. Obligations that do not meet the requirements of paragraph (g) of §6a.103A–2 are not described in section 103(a).

[T.D. 8049, 50 FR 35542, Sept. 3, 1985, as amended by T.D. 8129, 52 FR 7410, Mar. 11, 1987]

§ 1.104–1 Compensation for injuries or sickness.

(a) *In general.* Section 104(a) provides an exclusion from gross income with respect to certain amounts described in paragraphs (b), (c), (d) and (e) of this section, which are received for personal injuries or sickness, except to the extent that such amounts are attributable to (but not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year. See section 213 and the regulations thereunder.

(b) *Amounts received under workmen's compensation acts.* Section 104(a)(1) excludes from gross income amounts which are received by an employee under a workmen's compensation act (such as the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C., c. 18), or under a statute in the nature of a workmen's compensation act which provides compensation to employees for personal injuries or sickness incurred in the course of employment. Section 104(a)(1) also applies to compensation which is paid under a workmen's compensation act to the survivor or survivors of a deceased employee. However, section 104(a)(1) does not apply to a retirement pension or annuity to the extent that it is determined by reference to the employee's age or length of service, or the employee's prior contributions, even though the employee's retirement is occasioned by an occupational injury or sickness. Section 104(a)(1) also does not apply to amounts which are received as compensation for a nonoccupational injury or sickness nor to amounts received as compensation for an occupational injury or sickness to the extent that they are in excess of the amount provided in the applicable workmen's compensation act or acts. See, however, §§1.105–1 through 1.105–5 for rules relating to exclusion of such amounts from gross income.

(c) *Damages received on account of personal physical injuries or physical sickness*—(1) *In general.* Section 104(a)(2) excludes from gross income the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness. Emotional distress is not considered a physical injury or physical sickness. However, damages for emotional distress attributable to a physical injury or physical sickness are excluded from income under section 104(a)(2). Section 104(a)(2) also excludes damages not in excess of the amount paid for medical care (described in section 213(d)(1)(A) or (B)) for emotional distress. For purposes of this paragraph (c), the term *damages* means an amount received (other than workers' compensation) through prosecution of a legal suit or action, or through a settlement agreement entered into in lieu of prosecution.

(2) *Cause of action and remedies.* The section 104(a)(2) exclusion may apply to damages recovered for a personal physical injury or physical sickness under a statute, even if that statute does not provide for a broad range of remedies. The injury need not be defined as a tort under state or common law.

(3) *Effective/applicability date.* This paragraph (c) applies to damages paid pursuant to a written binding agreement, court decree, or mediation award entered into or issued after September 13, 1995, and received after January 23, 2012. Taxpayers also may apply these final regulations to damages paid pursuant to a written binding agreement, court decree, or mediation award entered into or issued after September 13, 1995, and received after August 20, 1996. If applying these final regulations to

damages received after August 20, 1996, results in an overpayment of tax, the taxpayer may file a claim for refund before the period of limitations under section 6511 expires. To qualify for a refund of tax on damages paid after August 20, 1996, under a written binding agreement, court decree, or mediation award entered into or issued after September 13, 1995, a taxpayer must meet the requirements of section 1605 of the Small Business Job Protection Act of 1996, Public Law 104–188 (110 Stat. 1838).

(d) *Accident or health insurance.* Section 104(a)(3) excludes from gross income amounts received through accident or health insurance for personal injuries or sickness (other than amounts received by an employee, to the extent that such amounts (1) are attributable to contributions of the employer which were not includible in the gross income of the employee, or (2) are paid by the employer). Similar treatment is also accorded to amounts received under accident or health plans and amounts received from sickness or disability funds. See section 105(e) and §1.105–5. If, therefore, an individual purchases a policy accident or health insurance out of his own funds, amounts received thereunder for personal injuries or sickness are excludable from his gross income under section 104(a)(3). See, however, section 213 and the regulations thereunder as to the inclusion in gross income of amounts attributable to deductions allowed under section 213 for any prior taxable year. Section 104(a)(3) also applies to amounts received by an employee for personal injuries or sickness from a fund which is maintained exclusively by employee contributions. Conversely, if an employer is either the sole contributor to such a fund, or is the sole purchaser of a policy of accident or health insurance for his employees (on either a group or individual basis), the exclusion provided under section 104(a)(3) does not apply to any amounts received by his employees through such fund or insurance. If the employer and his employees contribute to a fund or purchase insurance which pays accident or health benefits to employees, section 104(a)(3) does not apply to amounts received thereunder by employees to the extent that such amounts are attributable to the employer's contributions. See §1.105–1 for rules relating to the determination of the amount attributable to employer contributions. Although amounts paid by or on behalf of an employer to an employee for personal injuries or sickness are not excludable from the employee's gross income under section 104(a)(3), they may be excludable therefrom under section 105. See §§1.105–1 through 1.105–5, inclusive. For treatment of accident or health benefits paid to or on behalf of a self- employed individual by a trust described in section 401(a) which is exempt under section 501(a) or under a plan described in section 403(a), see paragraph (g) of §1.72–15.

(e) *Amounts received as pensions, etc., for certain personal injuries or sickness.* (1) Section 104(a)(4) excludes from gross income amounts which are received as a pension, annuity, or similar allowance for personal injuries or sickness resulting from active service in the armed forces of any country, or in the Coast and Geodetic Survey, or the Public Health Service. For purposes of this section, that part of the retired pay of a member of an armed force, computed under formula No. 1 or 2 of 10 U.S.C. 1401, or under 10 U.S.C. 1402(d), on the basis of years of service, which exceeds the retired pay that he would receive if it were computed on the basis of percentage of disability is not considered as a pension, annuity, or similar allowance for personal injury or sickness, resulting from active service in the armed forces of any country, or in the Coast and Geodetic Survey, or the Public Health Service (see 10 U.S.C. 1403 (formerly 37 U.S.C. 272(h), section 402(h) of the Career Compensation Act of 1949)). See paragraph (a)(3)(i)(*a*) of §1.105–4 for the treatment of retired pay in excess of the part computed on the basis of percentage of disability as amounts received through a wage continuation plan. For the rules relating to certain reduced uniformed services retirement pay, see paragraph (c)(2) of §1.122–1. For rules relating to a waiver by a member or former member of the uniformed services of a portion of disability retired pay in favor of a pension or compensation receivable under the laws administered by the Veterans Administration (38 U.S.C. 3105), see § 1.122–1(c)(3). For rules relating to a reduction of the disability retired pay of a member or former member of the uniformed services under the Dual Compensation Act of 1964 (5 U.S.C. 5531) by reason of Federal employment, see § 1.122–1(c)(4).

(2) Section 104(a)(4) excludes from gross income amounts which are received by a participant in the Foreign Service Retirement and Disability System in a taxable year of such participant ending after September 8, 1960, as a disability annuity payable under the provisions of section 831 of the Foreign Service Act of 1946, as amended (22 U.S.C. 1081; 60 Stat. 1021). However, if any amount is received by a survivor of a disabled or incapacitated participant, such amount is not excluded from gross income by reason of the provisions of section 104(a)(4).

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6722, 29 FR 5070, Apr. 14, 1964; T.D. 7043, 35 FR 8477, June 2, 1970; T.D. 9573, 77 FR 3107, Jan. 23, 2012]

§ 1.105–1 Amounts attributable to employer contributions.

(a) *In general.* Under section 105(a), amounts received by an employee through accident or health insurance for personal injuries or sickness must be included in his gross income to the extent that such amounts (1) are attributable to contributions of the employer which were not includible in the gross income of the employee, or (2) are paid by the employer, unless such amounts are excluded therefrom under section 105(b), (c), or (d). For purposes of this section, the term "amounts received by an employee through an accident or health plan" refers to any amounts received through accident or health insurance, and also to any amounts which, under section 105(e), are treated as being so received. See § 1.105–5. In determining the extent to which amounts received for personal injuries or sickness by an employee through an accident or health plan are subject to the provisions of section 105(a), rather than section 104(a)(3), the provisions of paragraphs (b), (c), (d), and (e) of this section shall apply. A self-employed individual is not an employee for purposes of section 105 and §§ 1.105–1 through 1.105–5. See paragraph (g) of § 1.72–15. Thus, such an individual will not be treated as an employee with respect to benefits described in section 105 received from a plan in which he participates as an employee within the meaning of section 401(c)(1) at the time he, his spouse, or any of his dependents becomes entitled to receive such benefits.

(b) *Noncontributory plans.* All amounts received by employees through an accident or health plan which is financed solely by their employer, either by payment of premiums on an accident or health insurance policy (whether on a group or individual basis), by contributions to a fund which pays accident or health benefits, or by direct payment of the benefits under the plan, are subject to the provisions of section 105(a), except to the extent that they are excludable under section 105(b), (c), or (d). This rule may be illustrated by the following examples:

Example 1. Employer A maintains a plan for his employees which provides that he will continue to pay regular wages to employees who are absent from work due to sickness or personal injuries. Employees make no contributions to the plan and all benefits are paid by the employer. Amounts received by employees under the plan are subject to section 105(a), and must be included in gross income unless excluded therefrom under section 105(b), (c), or (d).

Example 2. Pursuant to a State nonoccupational disability benefits law, employer B maintains an accident and health plan for his employees. Although under the State law B is authorized to withhold from his employees' wages a specified amount for employee contributions to the State fund, in actual practice B does not so withhold and makes all contributions out of his own funds. All amounts received by B's employees from the State fund are subject to section 105(a), and must be included in gross income unless excluded therefrom under section 105 (b), (c), or (d).

(c) *Contributory plans.* (1) In the case of amounts received by an employee through an accident or health plan which is financed partially by his employer and partially by contributions of the employee, section 105(a) applies to the extent that such amounts are attributable to contributions of the employer which were not includible in the employee's gross income. The portion of such amounts which is attributable to such contributions of the employer shall be determined in accordance with paragraph (d) of this section in the case of an insured plan, or paragraph (e) of this section in the case of a noninsured plan. As used in this section, the phrase ''contributions of the employer'' means employer contributions which were not includible in the gross income of the employee. See section 106 for the exclusion from an employee's gross income of employer contributions to accident or health plans.

(2) A separate determination of the portion of the amounts received under the accident or health plan which is attributable to the contributions of the employer shall be made with respect to each class of employees in any case where the plan provides that some classes of covered employees contribute but others do not, or that the employer will make different contributions for different classes of employees, or that different classes of employees will make different contributions, and where in any such case both the contributions of the employer on account of each such class of employees and the contributions of such class of employees can be ascertained. For example, if employees contribute during the first year of employment but not thereafter, there will have to be a separate determination for first year employees, provided that the amount of the contributions of the employer on account of first-year employees and the contributions of such first-year employees can be ascertained for the required periods to apply the rules of paragraph (d) or (e) of this section. If in such a case the contributions of the employer to the plan on account of first-year employees are not distinguishable from his other contributions to the plan, then the determination shall be made for all employees under the plan, and such determination shall be used by all employees under the plan.

(3) Except as provided in paragraph (c)(2) of §1.72–15, if the plan provides accident or health benefits as well as other benefits for the employees, and if the respective contributions made by the employer and the employees to provide the accident or health benefits cannot be ascertained, the determination of the portion of the accident or health benefits received under such plan which is attributable to the contributions of the employer shall be made in accordance with the rules of paragraph (d) or (e) of this section on the basis of the contributions of the employer and of the employees to the entire plan.

(4) A determination of the portion attributable to the contributions of the employer, once made in accordance with the rules of this section, shall as to such portion be used for all purposes. For example, if an employee receives amounts under a wage continuation plan during the month of January and terminates his services during February, the portion of such amounts which is attributable to the contributions of the employer may be determined in order to provide the employee with such information at the time he is provided his Form W-2. The determination made for such purpose will also be used by the employee to report his income for his taxable year in which such amounts are received, without regard to the experience under the plan for the rest of the year.

(d) *Insured plans*—(1) *Individual policies.* If an amount is received from an insurance company by an employee under an individual policy of accident or health insurance purchased by contributions of the employer and the employee, the portion of the amount received which is attributable to the employer's contributions shall be an amount which bears the same ratio to the amount received as the portion of the premiums paid by the employer for the current policy year bears to the total premiums paid by the employer and the employee for that year. This rule may be illustrated by the following example:

Example. Employer A maintains a plan whereby he pays two-thirds of the annual premium cost on individual policies of accident and health insurance for his employees. The remainder of each employee's premium is paid by a payroll deduction from the wages of the employee. The annual premium for employee X is $24, of which $16 is paid by the employer. Thus, 16/24 or two-thirds of all amounts received by X under such insurance policy are attributable to the contributions of the employer and are subject to section

105(a), and the remaining one-third of such amounts is excludable from X's gross income under section 104(a)(3).

(2) *Group policies.* If the accident or health coverage is provided under or is a part of a group insurance policy purchased by contributions of the employer and of the employees, and the net premiums for such coverage for a period of at least three policy years are known at the beginning of the calendar year, the portion of any amount received by an employee which is attributable to the contributions of the employer for such coverage shall be an amount which bears the same ratio to the amount received as the portion of the net premiums contributed by the employer for the last three policy years which are known at the beginning of the calendar year, bears to the total of the net premiums contributed by the employer and all employees for such policy years. If the net premiums for such coverage for a period of at least three policy years are not known at the beginning of the calendar year but are known for at least one policy year, such determination shall be made by using the net premiums for such coverage which are known at the beginning of the calendar year. If the net premiums for such coverage are not known at the beginning of the calendar year for even one policy year, such determination shall be made by using either (i) a reasonable estimate of the net premiums for the first policy year, or (ii) if the net premiums for a policy year are ascertained during the calendar year, by using such net premiums. These rules may be illustrated by the following example:

Example. An employer maintains a plan under which a portion of the cost of a group policy of accident and health insurance for his employees is paid through payroll deductions from wages of the employees. The remainder of the cost is borne by the employer. The policy year begins on November 1 and ends on October 31. The net premium for the policy year ended October 31, 1954, is not known on January 1, 1955, because certain retroactive premium adjustments, such as dividends and credits, are not determinable until after January 1. Therefore, for purposes of this computation the last three policy years are the policy years ended October 31, 1951, 1952, and 1953. The net premium for the policy year ended October 31, 1953, was $8,000, of which the employer contributed $3,000; the net premium for the policy year ended October 31, 1952, was $9,000, of which the employer contributed $3,500; and the net premium for the policy year ended October 31, 1951, was $7,000, of which the employer contributed $1,500. The portion of any amount received under the policy by an employee at any time during 1955 which is attributable to the contributions of the employer is to be determined by using the ratio of $8,000 ($3,000 plus $3,500 plus $1,500) to $24,000 ($8,000 plus $9,000 plus $7,000. Thus, $8,000 ÷ $24,000 or one-third, of the amounts received by an employee at any time during 1955 is attributable to contributions of the employer.

(e) *Noninsured plans.* If the accident or health benefits are a part of a noninsured plan to which the employer and the employees contribute, and such plan has been in effect for at least three years before the beginning of the calendar year, the portion of the amount received which is attributable to the employer's contributions shall be an amount which bears the same ratio to the amount received as the contributions of the employer for the period of three calendar years next preceding the year of receipt bear to the total contributions of the employer and all the employees for such period. If, at the beginning of the calendar year of receipt, such plan has not been in effect for three years but has been in effect for at least one year, such determination shall be based upon the contributions made during the 1-year or 2-year period during which the plan has been in effect. If such plan has not been in effect for one full year at the beginning of the calendar year of receipt, such determination may be based upon the portion of the year of receipt preceding the time when the determination is made, or such determination may be made periodically (such as monthly or quarterly) and used throughout the succeeding period. For example, if an employee terminates his services on April 15, 1955, and 1955 is the first year the plan has been in effect, such determination may be based upon the contributions of the employer and the employees during the period beginning with January 1 and ending with April 15, or during the month of

March, or during the quarter consisting of January, February, and March.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6722, 29 FR 5071, Apr. 14, 1964]

§ 1.105–2 Amounts expended for medical care.

Section 105(b) provides an exclusion from gross income with respect to the amounts referred to in section 105(a) (see § 1.105–1) which are paid, directly or indirectly, to the taxpayer to reimburse him for expenses incurred for the medical care (as defined in section 213(e)) of the taxpayer, his spouse, and his dependents (as defined in section 152). However, the exclusion does not apply to amounts which are attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year. See section 213 and the regulations thereunder. Section 105(b) applies only to amounts which are paid specifically to reimburse the taxpayer for expenses incurred by him for the prescribed medical care. Thus, section 105(b) does not apply to amounts which the taxpayer would be entitled to receive irrespective of whether or not he incurs expenses for medical care. For example, if under a wage continuation plan the taxpayer is entitled to regular wages during a period of absence from work due to sickness or injury, amounts received under such plan are not excludable from his gross income under section 105(b) even though the taxpayer may have incurred medical expenses during the period of illness. Such amounts may, however, be excludable from his gross income under section 105(d). See § 1.105–4. If the amounts are paid to the taxpayer solely to reimburse him for expenses which he incurred for the prescribed medical care, section 105(b) is applicable even though such amounts are paid without proof of the amount of the actual expenses incurred by the taxpayer, but section 105(b) is not applicable to the extent that such amounts exceed the amount of the actual expenses for such medical care. If the taxpayer incurs an obligation for medical care, payment to the obligee in discharge of such obligation shall constitute indirect payment to the taxpayer as reimbursement for medical care. Similarly, payment to or on behalf of the taxpayer's spouse or dependents shall constitute indirect payment to the taxpayer.

§ 1.105–3 Payments unrelated to absence from work.

Section 105(c) provides an exclusion from gross income with respect to the amounts referred to in section 105(a) to the extent that such amounts (a) constitute payments for the permanent loss or permanent loss of use of a member or function of the body, or the permanent disfigurement, of the taxpayer, his spouse, or a dependent (as defined in section 152), and (b) are computed with reference to the nature of the injury without regard to the period the employee is absent from work. Loss of use or disfigurement shall be considered permanent when it may reasonably be expected to continue for the life of the individual. For purposes of section 105(c), loss or loss of use of a member or function of the body includes the loss or loss of use of an appendage of the body, the loss of an eye, the loss of substantially all of the vision of an eye, and the loss of substantially all of the hearing in one or both ears. The term ''disfigurement'' shall be given a reasonable interpretation in the light of all the particular facts and circumstances. Section 105(c) does not apply if the amount of the benefits is determined by reference to the period the employee is absent from work. For example, if an employee is absent from work as a result of the loss of an arm, and under the accident and health plan established by his employer, he is to receive $125 a week so long as he is absent from work for a period not in excess of 52 weeks, section 105(c) is not applicable to such payments. See, however, section 105(d) and § 1.105–4. However, for purposes of section 105(c), it is immaterial whether an amount is paid in a lump sum or in installments. Section 105(c) does not apply to amounts which are treated as workmen's compensation under paragraph (b) of § 1.104–1, or to amounts paid by reason of the death of the employee (see section 101).

§ 1.105–4 Wage continuation plans.

(a) *In general.* (1) Subject to the limitations provided in this section, section 105(d) provides an exclusion from gross income with respect to amounts referred to in section 105(a) which are paid to an employee through a wage continuation plan and which constitute wages or payments in lieu of wages for a period during which the employee is absent from work on account of personal injuries or sickness.

(2)(i) Section 105(d) is applicable only if the wages or payments in lieu of wages are paid pursuant to a wage continuation plan. (See §1.105–6 for special rules for employees retired before January 27, 1975). The term ''wage continuation plan'' means an accident or health plan, as defined in §1.105–5, under which wages, or payments in lieu of wages, are paid to an employee for a period during which he is absent from work on account of a personal injury or sickness. Such term includes plans under which payments are continued as long as the employee is absent from work on account of personal injury or sickness. It includes plans under which there is a limitation on the period for which benefits will be paid, such as 13 or 26 weeks, and also plans under which benefits are continued until the employee is either able to return to work or reaches mandatory retirement age. Such term also includes a plan under which wages or payments in lieu of wages are paid to an employee who is absent from work on account of personal injury or sickness, even though the plan also provides that wages or payments in lieu of wages may be paid to an employee who is absent from work for reasons other than a personal injury or sickness.

(ii) Section 105(d) is applicable if, and only if, the employee is absent from work and such absence is due to a personal injury or sickness. Thus, if an employer has a plan for continuing the wages of employees when they are absent from work, regardless of the cause of the absence from work, section 105(d) is applicable to any payments made under this plan to an employee whose absence from work is in fact due to a personal injury or sickness. On the other hand, although the terms of a plan provide that benefits are to be continued only as long as the employee is absent from work on account of a personal injury or sickness, section 105(d) does not apply to payments made to an employee for a period of absence from work where such absence is not in fact due to a personal injury or sickness.

(3)(i)(A) Section 105(d) applies only to amounts attributable to periods during which the employee would be at work were it not for a personal injury or sickness. Thus, an employee is not absent from work if he is not expected to work because, for example, he has reached mandatory retirement age. If a plan provides that an employee, who is absent from work on account of a personal injury or sickness, will receive a disability pension or annuity as long as he is disabled, section 105(d) is applicable to any payments that he receives under this plan before reaching mandatory retirement age, as defined in paragraph (a)(3)(i)(B) of this section. Thus, section 105(d) would not apply to the payments that an employee receives after reaching mandatory retirement age. The disability retired pay received by a member on the retired list pursuant to section 402 of the Career Compensation Act of 1949 (63 Stat. 802) or chapter 61 of title 10, United States Code (10 U.S.C. 1201 *et seq.*) which is in excess of the amounts excludable under section 104(a)(4) and paragraph (e) of §1.104–1 shall be excluded from gross income subject to the limitations of section 105(d) and this section, if such pay is received before the member reaches mandatory retirement age. See §1.72–15 for additional rules relating to the tax treatment of disability pensions. For the rules relating to certain reduced uniformed services retirement pay, see paragraph (c)(2) of §1.122–1. For rules relating to a waiver by a member or former member of the uniformed services of a portion of disability retired pay in favor of a pension or compensation receivable under the laws administered by the Veterans Administration (38 U.S.C. 3105), see §1.122–1(c)(3).

(B) The term ''mandatory retirement age'' as used in paragraph (a)(3)(i)(A) of this section means the age set by an employer for the mandatory retirement of employees in the class to which the taxpayer last belonged, unless such age has been set at an age higher than that at which it has been the practice of the employer to terminate, due to age, the services of such employees, or for purposes of tax avoidance. Where no age is set for mandatory retirement, such term means age 65, or, if higher, the age at which it has been the practice of the employer to terminate, due to age, the services of the class of employees to which the taxpayer last belonged.

(ii) Similarly, an employee who incurs a personal injury or sickness during his paid vacation is not allowed to exclude under section 105(d) any of the vacation pay which he receives, since he is not absent from work on account of the personal injury or sickness. Likewise, a teacher who becomes sick during the summer or other vacation period when he is not expected to teach, is not entitled to any exclusion under section 105(d) for the summer or vacation period. However, if an employee who would otherwise be at work during a particular period is absent from work and his absence is in fact due to a personal injury or sickness, a payment which he receives for such period under a wage continuation plan is subject to section 105(d).

(4) A period of absence from work shall commence the moment the employee first becomes absent from work and shall end the moment the employee first returns to work. However, the exclusion provided under section 105(d) is applicable only to payments attributable to a period of absence from work which is due to a personal injury or sickness, and to payments attributable to a period when the employee would have been at work but for such personal injury or sickness.

(5) For the purpose of section 105(d), whether an employee is absent from work depends upon all the circumstances. For example, an employee, who is a farm hand and who lives upon the premises of his employer, is absent from work when he is unable to work even though he remains on the premises of his employer. A member of the Armed Forces, who on a particular day has no assigned duties but to stand ready for duty, is absent from work if he is unable to answer any duty call that may be made upon him. An employee is not absent from work when he performs any services for his employer at his usual place or places of employment, whether or not the services are the usual services performed by the employee. Furthermore, the employee is not absent from work when he performs substantial services for his employer, even though they are performed at a place other than his usual place of employment. Thus, if an employee returns to his usual place or places of employment and performs any services for his employer, he has returned to work, but if he merely holds occasional short conferences concerning his work with other employees or clients while hospitalized or at home recuperating, such conferences do not constitute a return to work.

(b) *Determination of amount attributable to period of absence.* The amount which is paid to an employee as wages or payments in lieu of wages for a period of absence from work due to a personal injury or sickness shall be determined by reference to the plan under which the amount is paid, and to the contract, statute, or regulation which provides the terms of the employment. However, unless the plan, contract, statute, or regulation provides otherwise, it will be presumed that no wages or plan benefits are attributable to days (or portions of days) which are not normal working days for the particular employee. Also, section 105(d) does not apply to amounts earned prior to or subsequent to the period of absence from work, even though received during such period. These rules may be illustrated by the following examples:

Example 1. Employee A, who receives regular wages of $70 per week, normally works five days (Monday through Friday) during each week. A is absent from work on a Friday and the succeeding Monday (two working days) on account of a personal injury, but receives his regular wages with respect to such period of absence under his employer's accident and health plan. Unless the plan of A's employer, or the contract, statute, or regulation under which A is employed, provides otherwise, it will be presumed that A is not paid with respect to nonworking days (Saturday and Sunday). Therefore, the amount received by A with respect to his period of absence from work due to injury is $28, which is two days regular wages. If the plan, or the employment contract, statute, or regulation had provided that wages were paid on a 7-day per week basis and that A must be available for call to work on Saturday and Sunday, A's daily wage would have been $10, and the amount attributable to the period of absence would have been $40 ($10 per day for four days).

Example 2. Employee B is a salesman who is paid on a commission basis. The employer purchases for B an accident and health insurance policy which provides that B shall receive $50 per week during any period (after a 7-day waiting period) that he is unable to work due to personal injuries or sickness. B incurs a personal injury and is incapacitated for two weeks. He receives $50 under the insurance policy with respect to the second week of absence. In addition, during the 2-week period of absence he receives a check for $40 from his employer as his commission on a sale which he made before becoming incapacitated. Section 105(d) applies to the $50 received through the insurance policy, but does not apply to the $40 commission which B earned prior to the period of absence from work.

(c) *Limitation in the case of absence from work due to sickness for periods commencing prior to January 1, 1964.* (1) In the case of a period of absence from work on account of sickness commencing prior to January 1, 1964, the exclusion provided by section 105(d) does not apply to amounts attributable to the first seven calendar days of each such period, unless the employee is hospitalized on account of sickness for at least one day during the period of absence from work. This 7-day rule applies to each period of absence from work because of sickness, regardless of the frequency of such absences or the closeness in time to any prior period of absence from work because of sickness. For example, employee A becomes absent from work because of sickness on Friday, October 4, 1963, and returns to work on the morning of Monday, October 14, 1963. He suffers a relapse and again becomes absent from work on the afternoon of Monday, October 14, 1963. A's return to work on the morning of Monday, October 14, 1963, terminates the first period of absence from work because of sickness, and a new period of absence from work because of sickness begins on the afternoon of Monday, October 14, 1963. The 7-day limitation does not apply if the absence from work is due to personal injury. These rules may be illustrated by the following examples:

Example 1. Employee C normally works five days (Monday through Friday) during each week. On Saturday, October 5, 1963 (a nonworking day), C becomes sick and as a result, he does not return to work until Thursday, October 17, 1963. The period of absence from work due to sickness commences on Monday, October 7, 1963, and terminates when C returns to work on Thursday, October 17, 1963. If C is not hospitalized during such period of absence from work, section 105(d) does not apply to amounts which C receives under his employer's wage continuation plan attributable to the 7-day period commencing Monday, October 7, 1963, and ending Sunday, October 13, 1963, inclusive.

Example 2. Employee D incurs a personal injury which causes him to be absent from work two days. His regular wages are continued during this period in accordance with the wage continuation plan of his employer. Since D's absence from work was due to a personal injury, rather than a sickness, the 7-day waiting period does not apply, and, subject to the other requirements of section 105(d), D is entitled to an exclusion with respect to the amounts received under the employer's plan attributable to the 2-day period of absence.

(2) For the purpose of starting the 7-day waiting period, if the period of absence due to sickness commences after the start of a working day, the amount received with respect to the portion of such day that the employee is absent from work shall be considered the amount attributable to the first calendar day of the period of absence from work due to sickness. This rule may be illustrated by the following example:

Example. Employee E normally works from 9 a.m. until 5:30 p.m. on five days (Monday through Friday) during each week. From noon on Friday, September 6, 1963, until noon on Monday, September 16, 1963, E is absent from work on account of sickness but is not hospitalized at any time during this period. Section 105(d) does not apply to amounts received by E under his employer's wage continuation plan which are attributable to the calendar period beginning September 6, 1963, and ending September 12, 1963, inclusive. However, if the other requirements of section 105(d) are met, E may exclude from gross income amounts attributable to the period beginning September 13, 1963, and ending at noon on September 16, 1963, inclusive.

(3) If the absence from work is due to sickness, the amount attributable to the first seven calendar days of such absence includes all amounts paid for such seven calendar days, regardless of the number of work days included in

such seven calendar days. For example, if one of such seven calendar days an employee would have worked two 8-hour shifts, the amount he is paid for the two shifts is considered to be an amount attributable to only one calendar day.

(4) An employee is considered to be hospitalized for one day only if he is admitted to and confined in a hospital as a bed patient for at least one hospital day. Entry into a hospital as an in-and-out patient does not constitute hospitalization for purposes of section 105(d). The same applies to mere entry into the outpatient ward or the emergency ward of a hospital.

(d) *Exclusion not applicable to the extent that amounts exceed a weekly rate of $100 for periods of absence commencing prior to January 1, 1964*—(1) *In general.* Amounts received under a wage continuation plan, attributable to periods of absence commencing before January 1, 1964, which are not excludable from gross income as being attributable to contributions of the employee (see §1.105–1) must be included in gross income under section 105(d) to the extent that the weekly rate of such amounts exceeds $100. Thus, an employee, who receives $50 under his employer's wage continuation plan on account of his being absent from work for two days due to a personal injury, cannot exclude the entire $50 under section 105(d) if the weekly rate of such benefits exceeds $100. If an employee receives payments under a wage continuation plan for less than a full pay period, the excludability of such payments shall be determined under subparagraph (2) of this paragraph. In all other cases, the weekly rate and excludability of such payments under a wage continuation plan shall be determined under subparagraph (3) of this paragraph. If, with respect to any pay period or portion thereof, the employee receives amounts under two or more wage continuation plans (whether such plans are maintained by or for the same employer or by different employers), the weekly rate and excludability of amounts received under each plan shall be determined under subparagraph (3) of this paragraph and the weekly rate for purposes of section 105(d) shall be the sum of all such weekly rates. This rule may be illustrated by the following examples:

Example 1. An employee whose weekly salary is $120 is covered by two wage continuation plans maintained by his employer. Plan A is a contributory insured plan to which the employee contributes 60 percent of the premiums and which provides a weekly payment of $30. Plan B is a salary continuation plan completely financed by the employer. Since 60 percent of the cost of plan A is contributed by the employee, 60 percent of the weekly payment of $30 ($18) is excluded from gross income under section 104(a)(3). The remainder of each weekly payment ($12) is the weekly rate of plan A. Since the employer pays the entire cost of plan B, the weekly rate of this plan is the total amount paid per week. In the case of an employee whose weekly wages of $120 are continued under plan B, the weekly rate for the employee for purposes of section 105(d) is $132 ($120 from plan B, plus $12 from plan A).

Example 2. Assume in Example (1) that plan A provides a waiting period of four calendar days while plan B is effective immediately. For the first four days of absence the weekly rate for purposes of section 105(d) is $120, and for periods after the first four days the weekly rate for purposes of section 105(d) is $132.

(2) *Daily exclusion.* If an employee receives payments under a wage continuation plan for less than a full pay period, the extent to which such benefits are excludable under section 105(d) shall be determined by computing the daily rate of the benefits which can be excluded under section 105(d). Such daily rate is determined by dividing the weekly rate at which wage continuation payments are excludable ($100) by the number of work days in a normal work week. This rule may be illustrated by the following example:

Example. Employee E is covered by a wage continuation plan maintained by his employer providing that E's regular salary of $220 semimonthly will be continued in case he is absent from work on account of a personal injury or sickness. E is absent from work on account of a personal injury for three days and under the plan he received $66 as wage continuation payments. The extent to which the $66 is excludable under section 105(d) shall be determined by dividing $100 by 5, the number of work days in a normal work week for E, resulting in a daily exclusion of $20 and a total exclusion of $60.

(3) *Determination of weekly rate at which amounts are paid under a wage continuation plan.* (i) For purposes of this subparagraph the pay period of a

particular wage continuation plan shall be determined by reference to such plan. If, in the usual operation of the plan, benefits are paid for the same periods as regular wages, then the pay period of such benefits shall be the period for which a payment of wages is ordinarily made to the employee by the employer. If plan benefits are ordinarily paid for different periods than regular wages then the pay period of such benefits shall be the period for which payment of such benefits is ordinarily made.

(ii) The weekly rate shall be determined in accordance with the following rules:

(*a*) *Weekly pay period.* If benefits are paid on the basis of a weekly pay period, the weekly rate at which such benefits are paid shall be the weekly amount of such benefits.

(*b*) *Biweekly pay period.* If benefits are paid on the basis of a biweekly pay period, the weekly rate at which such benefits are paid shall be one-half of the biweekly rate.

(*c*) *Semimonthly pay period.* If benefits are paid on the basis of a semimonthly pay period, the weekly rate at which such benefits are paid shall be the semimonthly rate multiplied by 24 and divided by 52.

(*d*) *Monthly pay period.* If benefits are paid on the basis of a monthly pay period, the weekly rate at which such benefits are paid shall be the monthly rate multiplied by 12 and divided by 52.

(*e*) *Other pay periods.* If benefits are paid on the basis of a period other than a period described in (*a*) through (*d*), of this subdivision the weekly rate at which such benefits are paid shall be determined by ascertaining the annual rate at which such benefits are paid and dividing such annual rate by 52.

(*f*) *Examples.* The operation of the rules of this subdivision may be illustrated by the following examples:

Example 1. A's employer maintains a noncontributory plan which provides for the continuation of regular salary during periods of absence from work due to personal injury or sickness. A, an office employee, receives regular salary of $520 per month, and he is paid on the basis of a monthly pay period. Since benefits under the salary continuation plan are paid for the same periods as regular salary, the pay period of the plan is monthly. For purposes of section 105(d), the weekly rate at which benefits are paid to A under the plan is $120, determined as follows:

$520 (monthly rate)×12	$6,240 (annual rate).
$6,240÷52	$120 (weekly rate).

Example 2. B, a factory employee of the same employer, is paid regular wages on the basis of a 10-day pay period. B's regular wages are $200 per pay period. If B is absent from work for 15 days, the weekly rate of the amount he receives under his employer's plan will be determined as follows:

365×$200÷10	$7,300 (annual rate).
$7,300÷52	$140.38 (weekly rate).

(iii) If the weekly rate for purposes of section 105(d) (as determined in subdivision (ii) of this subparagraph) does not exceed $100, the amount received which is not attributable to the 7-day waiting period described in paragraph (c) of this section is fully excludable from gross income. If the weekly rate for purposes of section 105(d) (as determined in subdivision (ii) of this subparagraph) exceeds $100, the amount received which is not attributable to the 7-day waiting period provided in paragraph (c) of this section is only partially excludable. The excludable portion of such amount shall bear the same ratio to such amount as $100 bears to the weekly rate for purposes of section 105(d). This rule may be illustrated by the following example:

Example. The weekly rate of benefits in the case of employee A in example (1) of subdivision (ii) of this subparagraph was $120. If A does not receive amounts under any other plan, this is the weekly rate for purposes of section 105(d). Assume that A is absent from work on account of a personal injury for one full month and receives full pay of $520 for such period of absence. Since there is no waiting period requirement, the exclusion is $433.33 computed as follows:

$100÷$120×$520 or $433.33.

(e) *Limitation in the case of absence from work on account of personal injury or sickness for periods commencing after December 31, 1963.* (1) In the case of periods of absence from work on account of sickness or personal injury commencing after December 31, 1963, the exclusion provided by section 105(d) does not apply to amounts attributable to the first 30 calendar days of each such period, if such amounts are at a rate which exceeds 75 percent of the employee's ''regular weekly rate of wages'', as determined under subparagraph (5) of this paragraph. If the amounts are at a rate of 75 percent or less of the employee's ''regular weekly rate of wages'', the exclusion provided by section 105(d) does not apply to amounts attributable to the first 7 calendar days of each such period, unless the employee is hospitalized on account of personal injury or sickness for at least one day during the period of absence from work. The 7- or 30-day waiting period (whichever is applicable) applies to each period of absence from work because of personal injury or sickness, regardless of the frequency of such absences or the closeness in time to any prior period of absence from work because of personal injury or sickness. The waiting period is to be counted by beginning with the first work day for which the employee was absent. These rules may be illustrated by the following examples:

Example 1. Employee A is absent from work because of sickness on Tuesday, January 7, 1964, and returns to work on the morning of Thursday, February 13, 1964. He suffers a relapse and again becomes absent from work on the afternoon of Thursday, February 13, 1964. A's return to work on the morning of Thursday, February 13, 1964, terminates the first period of absence from work because of sickness, and a new period of absence from work because of sickness begins on the afternoon of Thursday, February 13, 1964.

Example 2. Employee B normally works five days (Monday through Friday) during each week. On Saturday, January 11, 1964 (a nonworking day), B becomes sick or injured and as a result he does not return to work until Monday, February 17, 1964. The period of absence from work commences on Monday, January 13, 1964, and terminates when B returns to work on Monday, February 17, 1964. Assuming B receives amounts under his employer's wage continuation plan at a rate exceeding 75 percent of his ''regular weekly rate of wages'' (as determined under subparagraph (5) of this paragraph), the exclusion provided by section 105(d) does not apply to amounts B receives under his employer's wage continuation plan which are attributable to the 30-day period commencing Monday, January 13, 1964, and ending Tuesday, February 11, 1964, inclusive. If B receives amounts under his employer's wage continuation plan at a rate which is 75 percent or less of his ''regular weekly rate of wages'' and he is not hospitalized during the period of absence from work, the exclusion provided by section 105(d) does not apply to amounts B receives which are attributable to the 7-day period commencing Monday, January 13, 1964, and ending Sunday, January 19, 1964, inclusive.

Example 3. Employee C is sick or incurs a personal injury which causes him to be absent from work for two weeks. He receives amounts under his employer's wage continuation plan at a rate which is 75 percent or less of his ''regular weekly rate of wages'' (as determined under subparagraph (5) of this paragraph) and is hospitalized from the eighth through the eleventh day of his absence. Since C was hospitalized on account of personal injury or sickness for at least one day during the period of absence, the 7-day waiting period does not apply, and, subject to the other requirements of section 105(d), C is entitled to an exclusion with respect to the amounts received under his employer's plan attributable to the two- week period of absence. If C were receiving amounts under his employer's wage continuation plan at a rate exceeding 75 percent of his ''regular weekly rate of wages'', he would not be entitled to an exclusion under section 105(d).

(2) For the purpose of starting the 7- or 30-day waiting period, whichever is applicable, if the period of absence commences after the start of a working day, the amount received with respect to the portion of such day that the employee is absent from work shall be considered an amount attributable to the first calendar day of the period of absence from work. This rule may be illustrated by the following example:

Example. Employee D normally works from 9 a.m. until 5:30 p.m. on five days (Monday through Friday) during each week. From noon on Wednesday, January 8, 1964, until noon on Monday, February 17, 1964, D is absent from work on account of personal injury or sickness but is not hospitalized at any time during this period. D receives amounts under his employer's wage continuation plan at a rate not exceeding 75 percent of his ''regular weekly rate of wages'' (as determined under subparagraph (5) of this paragraph). Section 105(d) does not apply to amounts received by D under his employer's wage continuation plan which are attributable to the calendar period beginning January 8, 1964, and continuing through January 14, 1964, inclusive. However, if the other requirements of section 105(d) are met, D may exclude from gross income amounts attributable to the remainder of the period of absence, ending at noon on Monday, February 17, 1964.

(3) If the exclusion is subject to a 7- or 30-calendar-day waiting period, any amount attributable to such 7- or 30-calendar-day waiting period includes all amounts paid therefor, regardless of

the number of work days included in such 7 or 30 calendar days. For example, if on one of the days included in the waiting period, an employee would have worked two 8-hour shifts, the amount he is paid for the two shifts is considered to be attributable to only one calendar day.

(4) An employee is considered to be hospitalized for one day only if he is admitted to and confined in a hospital as a bed patient for at least one hospital day. Entry into a hospital as an in-and-out-patient does not constitute hospitalization for purposes of section 105(d). The same applies to mere entry into the out-patient ward or the emergency ward of a hospital.

(5)(i) In general, the ''regular weekly rate of wages'', for purposes of section 105(d), shall be the average weekly wages paid for the last four weekly periods falling within a full pay period or full pay periods immediately preceding the commencement of the period of absence. If the employee was absent from work for three or more normal working days during any such pay period, and the amount of wages paid for such pay period was less than the amount of wages paid for the immediately preceding pay period during which the employee was not absent from work for three or more normal working days, then the amount of wages paid for the weekly period or weekly periods falling wholly or partly within the pay period during which each such absence occurred shall not be used in the determination of ''regular weekly rate of wages''. In such a case, there shall be substituted the amount of wages paid for the last weekly period or weekly periods falling within the pay period or pay periods immediately preceding the pay period or pay periods in which such absence or absences occurred during which the employee was not absent from work for three or more normal working days.

(*a*) In order to compute wages paid for the last four weekly periods falling within a full pay period or full pay periods immediately preceding the commencement of the period of absence, or any substituted weekly periods therefor, it will be necessary to convert the wages paid for any pay period other than a weekly pay period into a weekly rate or weekly rates of payment of such wages in accordance with the rules stated in subdivision (iv) of this subparagraph. Such weekly rate or weekly rates of wage payments are then used in determining the wages for the last four weekly periods falling within a full pay period or full pay periods immediately preceding the commencement of the period of absence, or any substituted weekly periods therefor.

(*b*) If the employee does not have four weekly periods falling within a full pay period or full pay periods preceding his absence during which he was not absent from work for three or more normal working days, then the greatest number of available weekly periods shall be used, consistent with the rules set forth in this subdivision (i), in determining the ''regular weekly rate of wages.''

(*c*) If the employee has been employed for a full pay period or more preceding his absence, and has worked for the number of days in a normal work week, but was absent from work for three or more normal working days during each of the pay periods preceding his absence, then the ''regular weekly rate of wages'' shall be determined by multiplying the employee's actual wages paid for the total number of normal working days in the pay period immediately preceding the employee's absence by the number of days that the employee is expected to work in a normal work week, and by dividing the product by the number of normal work days in such pay period for which wages were paid.

(*d*) If the employee has not been employed for a full pay period preceding his absence, and has worked for the number of days in a normal work week, the ''regular weekly rate of wages'' shall be determined by multiplying the employee's actual wages paid for the total number of normal working days preceding the employee's absence by the number of days that the employee is expected to work in a normal work week, and by dividing the product by the number of normal work days for which wages were paid.

(*e*) If the employee has not worked the number of days in a normal work week, then there is no ''regular weekly rate of wages,'' and the employee will not be permitted an exclusion under section 105(d) for amounts attributable to the first 30 calendar days in the period of absence.

(*f*) Wages paid by a former employer shall not be used in the determination of ''regular weekly rate of wages'' as described in this subparagraph.

(ii) In the case of a wage continuation plan of an employer under which the benefits are computed as a specified percentage of average wages, the formula for computing the employee's average wages included in the plan may be used (in lieu of the formula provided in subdivision (i) of this subparagraph) for determining the ''regular weekly rate of wages'' for purposes of section 105(d), if under the plan—

(*a*) The definition of wages does not include any items which are not considered ''wages'' as defined in subdivision (iii) of this subparagraph,

(*b*) The period for computing average wages is not less than twenty-eight successive calendar days, does not end earlier than five months preceding the date on which the period of absence commences, and is one in which the employee was at work at least 35 percent of the normal working time, and

(*c*) The period and formula for computing average wages are applied uniformly with respect to all employees eligible to receive benefits under the plan. A plan will not fail to meet the conditions of this subdivision merely because different portions of the employee's wages are averaged over different periods for purposes of computing his average wages, so long as each such period meets the requirements in (*b*) and (*c*) of this subdivision.

(iii) For the purpose of determining ''regular weekly rate of wages'' under subdivision (i) or (ii) of this subparagraph, whichever is applicable, an employee's wages shall comprise basic salary, fees, commissions, tips, gratuities, overtime, and any other type of taxable compensation which is normally paid for services. However, wages shall not include any type of compensation which is not normally paid, such as bonuses and incentive payments. An employee's compensation, for the purpose of determining his ''regular weekly rate of wages'', will not include any compensation which is not currently includible in gross income. For example, an employee's wages for the purpose of this subdivision shall not include deferred compensation paid by the employer which is not includible in gross income until received by the employee, such as employer contributions to a qualified annuity under section 403(a), or employer contributions to an accident or health plan excluded under section 106.

(iv) The following rules shall be used to convert wages for pay periods other than weekly pay periods into weekly rates of wage payments to be used in determining ''regular weekly rate of wages'' as described in subdivision (i) of this subparagraph.

(*a*) If wages are paid biweekly, the weekly rate of wage payments shall be one-half of the biweekly wages paid.

(*b*) If the employee is paid semimonthly, the weekly rate of wage payments shall be the semimonthly wages paid multiplied by 24 and divided by 52.

(*c*) If wages are paid monthly, the weekly rate of wage payments shall be the monthly wages paid multiplied by 12 and divided by 52.

(*d*) If wages are paid on the basis of a pay period other than a period described in (*a*) through (*c*) of this subdivision, the weekly rate of wage payments shall be determined by ascertaining the annual rate of wage payments and dividing by 52.

(*e*) For the purpose of this subparagraph, if separate portions of an employee's wages are paid on the basis of different pay periods, the weekly rate or weekly rates of wage payments of each portion of wages paid with respect to each pay period shall first be determined under the rules set forth in (*a*) through (*d*) of this subdivision and the average weekly rate of each portion of wages, determined in accordance with the rules set forth in subdivision (*i*) of this subparagraph, shall be aggregated to determine the employee's ''regular weekly rate of wages'' for purposes of section 105(d).

(v) The provisions of subdivisions (i), (iii) and (iv) of this subparagraph may be illustrated by the following examples:

Example 1. Employee A is a salesman who is paid a basic salary of $60 per week and, in addition, is paid commissions on a weekly basis. A became ill and did not report for work beginning Monday, February 17, 1964. For the four-week period preceding the commencement of the period of absence, A was paid the following:

Week of—	Basic salary	Commissions	Total weekly wages
Jan. 20, 1964	$60	$10	$70
Jan. 27, 1964	60	50	110
Feb. 3, 1964	60	30	90
Feb. 10, 1964	60	40	100
Total 4-week wages			370

A's wages, under the rules set forth in subdivision (iii) of this subparagraph, consist of basic salary plus commissions. Since the amount of A's average weekly wages paid for the last four weekly periods falling within the four pay periods immediately preceding the commencement of his period of absence from work is $92.50 ($370÷4), such amount is considered as the ''regular weekly rate of wages'' (as computed under subdivision (i) of this subparagraph) for purposes of section 105(d).

Example 2. Assume, in example (1), that A normally works five days during each week (Monday through Friday) and that he was also absent from work for any reason from Monday, February 3, 1964, through Wednesday, February 5, 1964. Since A was absent from work for three normal working days during the pay period of February 3, 1964, and was paid a lesser amount of wages for such pay period than in the immediately preceding pay period during which he was not absent from work (week of January 27), the weekly pay period beginning January 27, 1964 is substituted for the weekly pay period beginning February 3, 1964 in the determination of ''regular weekly rate of wages'' (as computed under subdivision (i) of this subparagraph) for purposes of section 105(d). The ''regular weekly rate of wages'' is calculated to be $97.50, as follows:

Week of		Total wages
February 10	$100	
January 27 (substitute for week of Feb. 3)	110	
January 27	110	
January 20	70	
390÷4 = $97.50		

Example 3. Employee B is a salesman who is paid a basic salary of $75 and, in addition, is paid commissions for semi-monthly periods ending on the 15th day and the last day of each month. He was absent from work on account of a personal injury beginning Monday, February 17, 1964. He was paid the following amounts:

Pay period	Salary	Commissions	Total wages
Feb. 1–15, 1964	$75	$60	$135
Jan. 16–31, 1964	75	50	125

The four weekly periods falling within full pay periods preceding the commencement of the period of absence are the weeks beginning February 9, February 2, January 26, and January 19. B's wages are converted to weekly rates of wage payments per pay period in accordance with the rule set forth in subdivision (iv)(*b*) of this subparagraph as follows:

From February 1, 1964—February 15, 1964, inclusive:

$$\$135 \times 24 = \$3240.00 \text{ (annual rate)}$$

$$\frac{\$3240.00}{52} = \$62.31 \text{ (weekly rate)}$$

From January 16–31, inclusive:

$$\$125 \times 24 = \$3000.00 \text{ (annual rate)}$$

$$\frac{\$3000.00}{52} = \$57.69 \text{ (weekly rate)}$$

$125×24 = $3000.00 (annual rate)

$3000.00

=$57.69 (weekly rate)

52E

The weekly rates are then used in determining the wages for four weekly periods falling within the pay periods immediately preceding the commencement of B's absence. B's ''regular weekly rate of wages'' (as computed under subdivision (i) of this subparagraph) is calculated to be $60.17, as follows:

Feb. 9–15, inclusive	$62.31
February 2–8, inclusive	62.31
January 26–February 1, inclusive ($\frac{6}{7}$×$57.69+$\frac{1}{7}$×$62.31)	58.35
January 19–25, inclusive	57.69

240.66÷4 = $60.17

Example 4. Employee C is paid semi-monthly on the 5th and 20th of each month and he began working for his present employer at the beginning of the semi-monthly pay period commencing Tuesday, January 21, 1964. C received total wages of $200 for the pay period of January 21, 1964 through February 5, 1964, inclusive. He was not absent during that pay period. C became sick and was absent from work beginning February 7, 1964. Since employee C does not have four weekly periods falling within a full pay period or full pay periods preceding his absence, the average wages for the last two weekly periods falling within such full pay period will be

C's ''regular weekly rate of wages'' (as computed under subdivision (i) of this subparagraph) for purposes of section 105(d), determined to be $92.31, as follows:

$200×24 = $4800 (annual rate)
$4800÷52 = $92.31 (weekly rate)

Example 5. Employee D, an office worker, is paid weekly and is expected to work five days during each week. He has been employed by his present employer for three weeks, but has been absent from work for three normal work days in each of the weeks preceding his illness. He became ill and was absent from work on Monday, February 17, 1964. During the weekly pay period immediately preceding his absence (week of February 10) D was paid $48 salary. He was paid for two working days during such weekly pay period. D's ''regular weekly rate of wages'' (as computed under subdivision (i) of this subparagraph), is calculated to be $120.00, determined as follows:

$$\frac{\$48\text{ (total wages)}\times 5\text{ (normal work days in week)}}{2\text{ (number of work days for which wages were paid)}} = \$120.00$$

Example 6. Employee E is an hourly worker who is paid a salary of $1.25 per hour. E is paid basic salary on a biweekly basis for the periods beginning every other Thursday and ending every other Wednesday. E is also paid monthly for his overtime work and is compensated for such work at one and one-half times the hourly rate. E worked 16 hours of overtime for his employer during the month of January. E was injured and could not report for work on Friday, February 21, 1964. E returned to work on Monday, March 16, 1964. E was paid as follows for the pay periods indicated:

Pay period	Hours		Salary per hour		Total salary
	Regular	Overtime	Regular	Overtime	
Month of January 1964		16		$1.875	$30
Jan. 23–Feb. 5, 1964, inclusive	80		$1.25		100
Feb. 6–19, 1964, inclusive	80		1.25		100

Under the rule set forth in subdivision (iv)(*e*) of this subparagraph, the weekly rates of payment of salary and overtime must be determined separately. Since basic salary is paid biweekly, the weekly rate of payment is determined to be one-half of $100.00, or $50.00. The full pay period immediately preceding the commencement of E's absence for overtime compensation ended on January 31, 1964. E's overtime earnings are converted to a weekly rate for such period, as follows:

$30.00 (overtime pay)×12 = $360.00
(annual rate)
$360.00÷52 = $6.93 (weekly rate)

The average wages for the last four weekly periods falling within pay periods immediately preceding the commencement of E's absence with respect to basic salary (weeks of February 13, 6, January 30, and 23) is $50.00. The average wages for the last four weekly periods falling within the pay period immediately preceding the commencement of E's absence with respect to overtime compensation (weeks of January 25, 18, 11, and 4) is $6.93. Accordingly, E's ''regular weekly rate of wages'' (as computed under subdivision (i) of this subparagraph) for the purpose of section 105(d) is $56.93.

(6)(i) Amounts paid under a wage continuation plan must be converted to a weekly rate in order to determine the percentage of benefits paid in relation to the employee's ''regular weekly rate of wages'', since such percentage is used in determining the waiting period, if any, after which an exclusion is allowable under section 105(d). In order to calculate the weekly rate at which benefits are being paid, reference is made to the particular wage continuation plan. If, in the usual operation of the plan, benefits are paid for the same periods as regular wages, then the pay period of such benefits shall be the period for which a payment of wages is ordinarily made to the employee by the employer. If plan benefits are ordinarily paid for different periods than regular wages, then the pay period of such benefits shall be the period for which payment of such benefits is ordinarily made.

(ii) The weekly rate at which the benefits are paid under a wage continuation plan shall be determined in accordance with the following rules:

(*a*) If benefits are paid on the basis of a weekly pay period, the weekly rate at which such benefits are paid shall be the weekly amount of such benefits.

(*b*) If benefits are paid on the basis of a biweekly pay period, the weekly rate at which such benefits are paid shall be one-half of the biweekly rate.

(*c*) If benefits are paid on the basis of a semimonthly pay period, the weekly rate at which such benefits are paid shall be the semimonthly rate multiplied by 24 and divided by 52.

(*d*) If benefits are paid on the basis of a monthly pay period, the weekly rate at which such benefits are paid shall be the monthly rate multiplied by 12 and divided by 52.

(*e*) If benefits are paid on the basis of a period other than a period described in (*a*) through (*d*) of this subdivision the weekly rate at which such benefits are paid shall be determined by ascertaining the annual rate at which such benefits are paid and dividing such annual rate by 52.

(iii) The principles of subdivisions (i) and (ii) of this subparagraph may be illustrated by the following example:

Example. A's employer maintains a noncontributory plan which provides for a monthly benefit of $400 during periods of absence from work due to personal injury or sickness. A, a salesman, receives regular salary of $520 per calendar month plus commissions, depending upon the amount of sales made by A during the month. During the month of January 1964, A was paid commissions of $180. A received a total benefit of $200 for an absence of two weeks because of illness occurring in February 1964. He was not hospitalized. Since benefits under the salary continuation plan are paid for the same period as regular wages, the pay period of the plan is monthly. A's ''regular weekly rate of wages'', determined in accordance with the rules set forth in subparagraph (5)(i) of this paragraph is $161.54. ($700×12)÷52.

For purposes of determining the percentage of benefits paid in relation to A's ''regular weekly rate of wages'', the weekly rate of the benefits are calculated to be $92.31, as follows:

$400 (monthly rate)×12 = $4,800 (annual rate)
$4,800÷52 = $92.31 (weekly rate)

Since $92.31 does not exceed 75 percent of A's ''regular weekly rate of wages'', A is entitled to an exclusion under section 105(d) for the second week of absence, subject to the other limitations provided in this section.

(iv) For the purpose of determining whether or not the rate of benefits paid under a wage continuation plan for a period of absence exceeds 75 percent of the employee's ''regular weekly rate of wages'' (as determined under subparagraph (5) of this paragraph), it is necessary to ascertain the average percentage of benefits paid in relation to the employee's ''regular weekly rate of wages'' for the first 30 calendar days in the period of absence. Such percentage is derived from a fraction, the numerator of which is the sum of benefits paid (attributable to employer contributions) for the period of absence occurring within the first 30 calendar days, and the denominator of which is the collective sum of the employee's ''regular weekly rate of wages'' during such period. This rule may be illustrated by the following examples:

Example 1. Employee A is paid a semimonthly basic salary of $150 plus commissions. He normally works five days during each week (Monday through Friday). During the month of January 1964, A received wages of $150 plus commissions of $66.67 for each of the semimonthly pay periods. A became ill on Monday, February 3, 1964, and as a result was absent from work until Monday, February 17, 1964, but was not hospitalized. Under the noncontributory wage continuation plan of A's employer, A received no benefits for the first three working days' absence (Monday through Wednesday) and was paid benefits at the rate of $100 a week thereafter. A's ''regular weekly rate of wages,'' determined under the rules set forth in subparagraph (5) of this paragraph, is $100. A is considered to have received average benefits at a rate of 70 percent of his ''regular weekly rate of wages'', computed as follows:

(1)	(2)	(3)
Week of absence	Benefits paid	Regular weekly rate of wages
1–Feb. 3	$40	$100
2–Feb. 10	100	100
Total	140	200

Average percentage of benefits paid—140/200 = 70%. Accordingly, A may exclude amounts attributable to the second week of absence, subject to the other limitations of section 105(d).

Example 2. Assume, in example (1), that A did not return to work until Thursday, February 20, 1964. A is considered to have received average benefits at the rate of 76.92 percent of his ''regular weekly rate of wages'', computed as follows:

(1) Week of absence	(2) Benefits paid	(3) Regular weekly rate of wages
1–Feb. 3	$40	$100
2–Feb. 10	100	100
2⅗—Feb. 17	[1] 60	[1] 60
Total	200	260

[1] Three-fifths of 100.

Average percentage of benefits paid—200/260 = 76.92%. Accordingly, A would not be permitted any exclusion under section 105(d).

(v) If with respect to any pay period or portion thereof the employee receives amounts under two or more wage continuation plans (whether such plans are maintained by or for the same employers or by different employers), the weekly rate for purposes of section 105(d) shall be the sum of the weekly rates received under all plans. This rule may be illustrated by the following example:

Example. An employee who is absent because of personal injuries or sickness receives $100 biweekly under wage continuation plan A maintained by his employer. He contributes one-half of the premiums for maintenance of the plan. Under wage continuation plan B maintained by his employer the employee receives $400 monthly. Plan B is noncontributory. The weekly rate at which benefits are paid for the purpose of section 105(d) is computed as follows:

Plan A—	$\frac{\$100}{2}$	= $50.00	(weekly rate)
		25.00	(less amount attributable to employee con- tributions (½))
		25.00	(weekly rate of Plan A)
Plan B—	$\frac{\$400\times12}{52}$	= 92.31	(weekly rate of Plan B)
		$117.31	(combined weekly rate at which benefits are paid)

The $25 attributable to contributions made by the employee under Plan A would be subject to section 104(a)(3).

(f) *Amount of exclusion for periods of absence commencing after December 31, 1963*—(1) *In general.* Amounts received under a wage continuation plan attributable to periods of absence commencing after December 31, 1963, and which are not excludable from gross income as being attributable to contributions of the employee (see §1.105–1) are excludable from gross income of the employee to the extent that such amounts do not exceed—

(i) A weekly rate of $75, during the first 30 calendar days in the period of absence; and

(ii) A weekly rate of $100, after the first 30 calendar days in the period of absence.

For example, an employee who normally works five days during each week is absent from work for two days, is hospitalized during his absence, and receives $75 under his employer's wage continuation plan, which amount is at a rate of 75 percent of his ''regular weekly rate of wages''. The employee cannot exclude the entire $75 under section 105(d), if the weekly rate of such benefits exceeds $75.

(2) *Daily exclusion.* An employee receiving payments under a wage continuation plan must, in order to determine the amount of the exclusion under section 105(d), compute the daily rate of the benefits. Such daily rate is determined, for amounts attributable to the first 30 calendar days in the period of absence, by dividing the weekly rate at which benefits are paid (as determined under paragraph (e)(6)(ii) of this section), or the maximum weekly rate at which wage continuation payments are excludable ($75), whichever is lower, by the number of work days in a normal work week. In the case of amounts attributable to days in a period of absence after the first 30 calendar days, the daily rate for such period is determined by dividing the weekly rate at which benefits are paid (as determined under paragraph

(e)(6)(ii) of this section), or the maximum weekly rate at which wage continuation payments are excludable ($100), whichever is lower, by the number of work days in a normal work week. The daily rate or daily rates of exclusion are then multiplied by the number of normal work days in the period of absence for which an exclusion is allowable in order to determine the total allowable exclusion. These rules may be illustrated by the following examples:

Example 1. Employee A is a salesman receiving salary and commissions on a weekly basis. His employer maintains a noncontributory wage continuation plan which provides for the continuation of A's basic salary of $80 per week during periods of absence. A was absent from work on account of sickness from Monday, February 3, 1964, through Sunday, March 15, 1964, but was not hospitalized. His normal work week is from Monday through Friday. The weekly amount of benefits paid to A ($80) does not exceed 75 percent of his ''regular weekly rate of wages'' as defined in paragraph (e)(5) of this section. Under section 105(d), the daily rate of exclusion for amounts attributable to the first 30 calendar days in the period of absence, excluding the first 7 days thereof (Monday, February 10, 1964, through Tuesday, March 3, 1964, inclusive) is limited to $15 ($75, maximum weekly rate of exclusion divided by 5 (number of normal work days in week)). The daily rate of exclusion for amounts attributable to the period of absence in excess of 30 calendar days (Wednesday, March 4, 1964, through Sunday, March 15, 1964, inclusive) is limited to $16 ($80, weekly rate of benefits divided by 5). Thus, the total exclusion permitted to employee A by section 105(d) is $383.00 ($15 × 17 work days ($255) + $16 × 8 work days ($128)).

Example 2. Assume the facts in example (1) except that A is paid benefits at the rate of $500 a month during periods of absence. The weekly rate of the benefits computed under the rules stated in paragraph (e)(6)(ii) of this section is $115.38, which amount does not exceed 75 percent of his ''regular weekly rate of wages'' as defined in paragraph (e)(5) of this section. Under section 105(d), the daily rate of exclusion for amounts attributable to the first 30 calendar days in the period of absence, excluding the first 7 days thereof (Monday, February 10, 1964, through Tuesday, March 3, 1964, inclusive) is limited to $15 ($75, maximum weekly rate of exclusion divided by 5). The daily rate of exclusion for amounts attributable to the period of absence in excess of 30 calendar days (Wednesday, March 4, 1964, through Sunday, March 15, 1964, inclusive) is limited to $20 ($100, maximum weekly rate of exclusion divided by 5). Thus, the total exclusion permitted to employee A by section 105(d) is $415.00 ($15 × 17 work days ($255) + $20 × 8 work days ($160)).

Example 3. Employee B, an office worker works five days during each week (Monday through Friday) and receives a salary of $85 per week. His employer maintains a noncontributory wage continuation plan which provides for no benefits during the first three days of absence, the continuation of full salary for one week thereafter and benefits at the rate of $65 per week thereafter. B was absent from work on account of sickness from Monday, March 16, 1964, through Tuesday, March 31, 1964, and was hospitalized from Wednesday, March 18, through Tuesday, March 24. B received total benefits of $137 for the period of absence, which does not exceed 75 percent of his ''regular weekly rate of wages'' as determined under paragraph (e)(5) of this section. B is permitted an exclusion under section 105(d) of $127 calculated as follows:

Period of absence	Weekly rate of benefits	Maximum weekly rate of exclusion	Daily rate of exclusion	Days of absence in period	Maximum exclusion
Mar. 16–18	0	$75	0	3	0
Mar. 19–25	$85	75	$15	5	$75
Mar. 26–31	65	75	13	4	52
Total exclusion					$127

(g) *Definitions.* The term ''personal injury'' as used in this section, means an externally caused sudden hurt or damage to the body brought about by an identifiable event. The term ''sickness'' as used in this section, means mental illnesses and all bodily infirmities and disorders other than ''personal injuries''. Diseases, whether resulting from the occupation or otherwise, are not considered personal injuries, but they are treated as a sickness.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6770, 29 FR 15366, Nov. 17, 1964; T.D. 7352, 40 FR 16666, Apr. 14, 1975]

§ 1.105–5 Accident and health plans.

(a) *In general.* Sections 104(a)(3) and 105 (b), (c), and (d) exclude from gross income certain amounts received through accident or health insurance. Section 105(e) provides that for purposes of sections 104 and 105 amounts received through an accident or health plan for employees, and amounts received from a sickness and disability fund for employees maintained under the law of a State, a Territory, or the District of Columbia, shall be treated as amounts received through accident or health insurance. In general, an accident or health plan is an arrangement for the payment of amounts to employees in the event of personal injuries or sickness. A plan may cover one or more employees, and there may be different plans for different employees or classes of employees. An accident or health plan may be either insured or noninsured, and it is not necessary that the plan be in writing or that the employee's rights to benefits under the plan be enforceable. However, if the employee's rights are not enforceable, an amount will be deemed to be received under a plan only if, on the date the employee became sick or injured, the employee was covered by a plan (or a program, policy, or custom having the effect of a plan) providing for the payment of amounts to the employee in the event of personal injuries or sickness, and notice or knowledge of such plan was reasonably available to the employee. It is immaterial who makes payment of the benefits provided by the plan. For example, payment may be made by the employer, a welfare fund, a State sickness or disability benefits fund, an association of employers or employees, or by an insurance company.

(b) *Self-employed individuals.* Under section 105(g), a self-employed individual is not treated as an employee for purposes of section 105. Therefore, for example, benefits paid under an accident or health plan as referred to in section 105(e) to or on behalf of an individual who is self-employed in the business with respect to which the plan is established will not be treated as received through accident and health insurance for purposes of sections 104(a)(3) and 105.

[T.D. 6722, 29 FR 5071, Apr. 14, 1964]

§ 1.105–6 Special rules for employees retired before January 27, 1975.

(a) *Application of section 105(d) to amounts received as retirement annuities.* An employee who retired from work before January 27, 1975, receiving payments under his employer-established plan (to which § 1.72–15(a) applies) which payments were not treated as amounts received under a wage continuation plan for purposes of section 105(d), may, as of the date the employee retired, treat such plan as such a wage continuation plan to the extent such payments are received prior to mandatory retirement age (as described in § 1.105–4(a)(3)(i)(B)), if—

(1) His employer had in operation at the time of his retirement a program providing accident and health benefits under a wage continuation plan to which section 105(d) would apply;

(2) The employer certifies, under procedures approved in advance under paragraph (c) of this section, that the employee would have been eligible for wage continuation benefits, under the terms and conditions of his employer's plan, because of personal injuries or sickness;

(3) At the time of the employee's retirement there was no substantive difference between the benefits being actually received and the benefits he would have received had he retired under his employer's wage continuation plan; and

(4) The employee agrees to the adjustments and conditions required by the Commissioner with respect to amounts excluded under section 72 (b) or (d) in taxable years ending before January 27, 1975.

(b) *Filing requirements.* (1) The certification required in paragraph (a)(2) and the agreement required in paragraph (a)(4) of this section shall be filed on or before April 15, 1977, with the return, or timely amended return or claim, made for the taxable year in which the employee reached retirement age as described in § 1.79–2(b)(3), or, for the first taxable year for which the taxpayer files an income tax return claiming an exclusion under section 105(d), as provided in paragraph (a) of this section.

(2) The Commissioner may prescribe a form and instructions with respect to the agreement provided for in paragraph (a)(4) of this section.

(c) *Employer certification*—(1) *Advance approval of procedures.* Any reasonable and consistently applied procedures, approved in advance by the Internal Revenue Service, which require the employee to provide the employer or the insurer with medical documentation sufficient to show that an illness or disability existed as of the date of the employee's retirement, which would have entitled him to retire on account of personal injuries or sickness alone, are sufficient for purposes of this paragraph.

(2) *Place of submission.* Request for advance approval of procedures for certification shall be submitted to the district director.

(d) *Cross reference.* For special rules pertaining to taxpayers retired on disability before January 27, 1975, see §1.72–15(i).

[T.D. 7352, 40 FR 16666, Apr. 14, 1975]

§ 1.105–11 Self-insured medical reimbursement plan.

(a) *In general.* Under section 105(a), amounts received by an employee through a self-insured medical reimbursement plan which are attributable to contributions of the employer, or are paid by the employer, are included in the employee's gross income unless such amounts are excludable under section 105(b). For amounts reimbursed to a highly compensated individual to be fully excludable from such individual's gross income under section 105(b), the plan must satisfy the requirements of section 105(h) and this section. Section 105(h) is not satisfied if the plan discriminates in favor of highly compensated individuals as to eligibility to participate or benefits. All or a portion of the reimbursements or payments on behalf of such individuals under a discriminatory plan are not excludable from gross income under section 105(b). However, benefits paid to participants who are not highly compensated individuals may be excluded from gross income if the requirements of section 105(b) are satisfied, even if the plan is discriminatory.

(b) *Self-insured medical reimbursement plan*—(1) *General rule*—(i) *Definition.* A self-insured medical reimbursement plan is a separate written plan for the benefit of employees which provides for reimbursement of employee medical expenses referred to in section 105(b). A plan or arrangement is self-insured unless reimbursement is provided under an individual or group policy of accident or health insurance issued by a licensed insurance company or under an arrangement in the nature of a prepaid health care plan that is regulated under federal or state law in a manner similar to the regulation of insurance companies. Thus, for example, a plan of a health maintenance organization, established under the Health Maintenance Organization Act of 1973, would qualify as a prepaid health care plan. In addition, this section applies to a self-insured medical reimbursement plan, determined in accordance with the rules of this section, maintained by an employee organization described in section 501(c)(9).

(ii) *Shifting of risk.* A plan underwritten by a policy of insurance or a prepaid health care plan that does not involve the shifting of risk to an unrelated third party is considered self-insured for purposes of this section. Accordingly, a cost-plus policy or a policy which in effect merely provides administrative or bookkeeping services is considered self-insured for purposes of this section. However, a plan is not considered self-insured merely because one factor the insurer uses in determining the premium is the employer's prior claims experience.

(iii) *Captive insurance company.* A plan underwritten by a policy of insurance issued by a captive insurance company is not considered self-insured for purposes of this section if for the plan year the premiums paid by companies unrelated to the captive insurance company equal or exceed 50 percent of the total premiums received and the policy of insurance is similar to policies sold to such unrelated companies.

(2) *Other rules.* The rules of this section apply to a self-insured portion of

an employer's medical plan or arrangement even if the plan is in part underwritten by insurance. For example, if an employer's medical plan reimburses employees for benefits not covered under the insured portion of an overall plan, or for deductible amounts under the insured portions, such reimbursement is subject to the rules of this section. However, a plan which reimburses employees for premiums paid under an insured plan is not subject to this section. In addition, medical expense reimbursements not described in the plan are not paid pursuant to a plan for the benefit of employees, and therefore are not excludable from gross income under section 105(b). Such reimbursements will not affect the determination of whether or not a plan is discriminatory.

(c) *Prohibited discrimination*—(1) *In general.* A self-insured medical reimbursement plan does not satisfy the requirements of section 105(h) and this paragraph for a plan year unless the plan satisfies subparagraphs (2) and (3) of this paragraph. However, a plan does not fail to satisfy the requirements of this paragraph merely because benefits under the plan are offset by benefits paid under a self-insured or insured plan of the employer or another employer, or by benefits paid under Medicare or other Federal or State law or similar foreign law. A self-insured plan may take into account the benefits provided under another plan only to the extent that the type of benefit subject to reimbursement is the same under both plans. For example, an amount reimbursed to an employee for a hospital expense under a medical plan maintained by the employer of the employee's spouse may be offset against the self-insured benefit where the self-insured plan covering the employee provides the same type of hospital benefit.

(2) *Eligibility to participate*—(i) *Percentage test.* A plan satisfies the requirements of this subparagraph if it benefits—

(A) Seventy percent or more of all employees, or

(B) Eighty percent or more of all the employees who are eligible to benefit under the plan if 70 percent or more of all employees are eligible to benefit under the plan.

(ii) *Classification test.* A plan satisfies the requirements of this subparagraph if it benefits such employees as qualify under a classification of employees set up by the employer which is found by the Internal Revenue Service not to be discriminatory in favor of highly compensated individuals. In general, this determination will be made based upon the facts and circumstances of each case, applying the same standards as are applied under section 410(b)(1)(B) (relating to qualified pension, profit-sharing and stock bonus plans), without regard to the special rules in section 401(a)(5) concerning eligibility to participate.

(iii) *Exclusion of certain employees.* Under section 105(h)(3), for purposes of this subparagraph (2), there may be excluded from consideration:

(A) Employees who have not completed 3 years of service prior to the beginning of the plan year. For purposes of this section years of service may be determined by any method that is reasonable and consistent. A determination made in the same manner as (and not requiring service in excess of how) a year of service is determined under section 410(a)(3) shall be deemed to be reasonable. For purposes of the 3-year rule, all of an employee's years of service with the employer prior to a separation from service are not taken into account. For purposes of the 3-year rule, an employee's years of service prior to age 25, as a part-time or seasonal employee, as a member of a collective bargaining unit, or as a nonresident alien, as each is described in this subdivision, are not excluded by reason of being so described from counting towards satisfaction of the rule. In addition, if the employer is a predecessor employer (determined in a manner consistent with section 414(a)), service for such predecessor is treated as service for the employer.

(B) Employees who have not attained age 25 prior to the beginning of the plan year.

(C) Part-time employees whose customary weekly employment is less than 35 hours, if other employees in similar work with the same employer (or, if no employees of the employer are in similar work, in similar work in the same industry and location) have substantially more hours, and seasonal employees whose customary annual employment is less than 9 months, if other employees in similar work with the same employer (or, if no employees of the employer are in similar work, in similar work in the same industry and location) have substantially more months. Notwithstanding the preceding sentence, any employee whose customary weekly employment is less than 25 hours or any employee whose customary annual employment is less than 7 months may be considered as a part-time or seasonal employee.

(D) Employees who are included in a unit of employees covered by an agreement between employee representatives and one or more employers which the Commissioner finds to be a collective bargaining agreement, if accident and health benefits were the subject of good faith bargaining between such employee representatives and such employer or employers. For purposes of determining whether such bargaining occurred, it is not material that such employees are not covered by another medical plan or that the plan was not considered in such bargaining.

(E) Employees who are nonresident aliens and who receive no earned income (within the meaning of section 911(b) and the regulations thereunder) from the employer which constitutes income from sources within the United States (within the meaning of section 861(a)(3) and the regulations thereunder).

(3) *Nondiscriminatory benefits*—(i) *In general*. In general, benefits subject to reimbursement under a plan must not discriminate in favor of highly compensated individuals. Plan benefits will not satisfy the requirements of this subparagraph unless all the benefits provided for participants who are highly compensated individuals are provided for all other participants. In addition, all the benefits available for the dependents of employees who are highly compensated individuals must also be available on the same basis for the dependents of all other employees who are participants. A plan that provides optional benefits to participants will be treated as providing a single benefit with respect to the benefits covered by the option provided that (A) all eligible participants may elect any of the benefits covered by the option and (B) there are either no required employee contributions or the required employee contributions are the same amount. This test is applied to the benefits subject to reimbursement under the plan rather than the actual benefit payments or claims under the plan. The presence or absence of such discrimination will be determined by considering the type of benefit subject to reimbursement provided highly compensated individuals, as well as the amount of the benefit subject to reimbursement. A plan may establish a maximum limit for the amount of reimbursement which may be paid a participant for any single benefit, or combination of benefits. However, any maximum limit attributable to employer contributions must be uniform for all participants and for all dependents of employees who are participants and may not be modified by reason of a participant's age or years of service. In addition, if a plan covers employees who are highly compensated individuals, and the type or the amount of benefits subject to reimbursement under the plan are in proportion to employee compensation, the plan discriminates as to benefits.

(ii) *Discriminatory operation*. Not only must a plan not discriminate on its face in providing benefits in favor of highly compensated individuals, the plan also must not discriminate in favor of such employees in actual operation. The determination of whether plan benefits discriminate in operation in favor of highly compensated individuals is made on the basis of the facts and circumstances of each case. A plan is not considered discriminatory merely because highly compensated individuals participating in the plan utilize a broad range of plan benefits to a greater extent than do other employees participating in the plan. In addition, if a plan (or a particular benefit provided by a plan) is terminated, the termination would cause the plan benefits to be discriminatory if the duration of the plan (or benefit) has the effect of discriminating in favor of highly compensated individuals. Accordingly, the prohibited discrimination may occur where the duration of a particular benefit coincides with the period during which a highly compensated individual utilizes the benefit.

(iii) *Retired employees.* To the extent that an employer provides benefits under a self-insured medical reimbursement plan to a retired employee that would otherwise be excludible from gross income under section 105(b), determined without regard to section 105(h), such benefits shall not be considered a discriminatory benefit under this paragraph (c). The preceding sentence shall not apply to a retired employee who was a highly compensated individual unless the type, and the dollar limitations, of benefits provided retired employees who were highly compensated individuals are the same for all other retired participants. If this subdivision applies to a retired participant, that individual is not considered an employee for purposes of determining the highest paid 25 percent of all employees under paragraph (d) of this section solely by reason of receiving such plan benefits.

(4) *Multiple plans, etc.*—(i) *General rule.* An employer may designate two or more plans as constituting a single plan that is intended to satisfy the requirements of section 105(h)(2) and paragraph (c) of this section, in which case all plans so designated shall be considered as a single plan in determining whether the requirements of such section are satisfied by each of the separate plans. A determination that the combination of plans so designated does not satisfy such requirements does not preclude a determination that one or more of such plans, considered separately, satisfies such requirements. A single plan document may be utilized by an employer for two or more separate plans provided that the employer designates the plans that are to be considered separately and the applicable provisions of each separate plan.

(ii) *Other rules.* If the designated combined plan discriminates as to eligibility to participate or benefits, the amount of excess reimbursement will be determined under the rules of section 105(h)(7) and paragraph (e) of this section by taking into account all reimbursements made under the combined plan.

(iii) *H.M.O. participants.* For purposes of section 105(h)(2)(A) and paragraph (c)(2) of this section, a self-insured plan will be deemed to benefit an employee who has enrolled in a health maintenance organization (HMO) that is offered on an optional basis by the employer in lieu of coverage under the self-insured plan if, with respect to that employee, the employer's contributions to the HMO plan equal or exceed those that would be made to the self-insured plan, and if the HMO plan is designated in accordance with subdivision (i) with the self-insured plan as a single plan. For purposes of section 105(h) and this section, except as provided in the preceding sentence, employees covered by, and benefits under, the HMO plan are not treated as part of the self-insured plan.

(d) *Highly compensated individuals defined.* For purposes of section 105(h) and this section, the term ''highly compensated individual'' means an individual who is—

(1) One of the 5 highest paid officers,

(2) A shareholder who owns (with the application of section 318) more than 10 percent in value of the stock of the employer, or

(3) Among the highest paid 25 percent of all employees (including the 5 highest paid officers, but not including employees excludable under paragraph (c)(2)(iii) of this section who are not participants in any self-insured medical reimbursement plan of the employer, whether or not designated as a single plan under paragraph (c)(4) of this section, or in a health maintenance organization plan).

The status of an employee as an officer or stockholder is determined with respect to a particular benefit on the basis of the employee's officer status or stock ownership at the time during the plan year at which the benefit is provided. In calculating the highest paid 25 percent of all employees, the number of employees included will be rounded to the next highest number. For example, if there are 5 employees, the top two are in the highest paid 25 percent. The level of an employee's compensation is determined on the basis of the employee's compensation for the plan year. For purposes of the preceding sentence, fiscal year plans may determine employee compensation on the basis of the calendar year ending within the plan year.

(e) *Excess reimbursement of highly compensated individual*—(1) *In general.* For purposes of section 105(h) and this section, a reimbursement paid to a highly compensated individual is an excess reimbursement if it is paid pursuant to a plan that fails to satisfy the requirements of paragraph (c)(2) or (c)(3) for the plan year. The amount reimbursed to a highly compensated individual which constitutes an excess reimbursement is not excludable from such individual's gross income under section 105(b).

(2) *Discriminatory benefit.* In the case of a benefit available to highly compensated individuals but not to all other participants (or which otherwise discriminates in favor of highly compensated individuals as opposed to other participants), the amount of excess reimbursement equals the total amount reimbursed to the highly compensated individual with respect to the benefit.

(3) *Discriminatory coverage.* In the case of benefits (other than discriminatory benefits described in subparagraph (2)) paid to a highly compensated individual under a plan which fails to satisfy the requirements of paragraph (c)(2) relating to nondiscrimination in eligibility to participate, the amount of excess reimbursement is determined by multiplying the total amount reimbursed to the individual by a fraction. The numerator of the fraction is the total amount reimbursed during that plan year to all highly compensated individuals. The denominator of the fraction is the total amount reimbursed during that plan year to all participants. In computing the fraction and the total amount reimbursed to the individual, discriminatory benefits described in subparagraph (2) are not taken into account. Accordingly, any amount which is included in income by reason of the benefit's not being available to all other participants will not be taken into account.

(4) *Examples.* The provisions of this paragraph are illustrated by the following examples:

Example 1. Corporation M maintains a self-insured medical reimbursement plan which covers all employees. The plan provides the following maximum limits on the amount of benefits subject to reimbursement: $5,000 for officers and $1,000 for all other participants. During a plan year Employee A, one of the 5 highest paid officers, received reimbursements in the amount of $4,000. Because the amount of benefits provided for highly compensated individuals is not provided for all other participants, the plan benefits are discriminatory. Accordingly, Employee A received an excess reimbursement of $3,000 ($4,000−$1,000) which constitutes a benefit available to highly compensated individuals, but not to all other participants.

Example 2. Corporation N maintains a self-insured medical reimbursement plan which covers all employees. The plan provides a broad range of medical benefits subject to reimbursement for all participants. However, only the 5 highest paid officers are entitled to dental benefits. During the plan year Employee B, one of the 5 highest paid officers, received dental payments under the plan in the amount of $300. Because dental benefits are provided for highly compensated individuals, and not for all other participants, the plan discriminates as to benefits. Accordingly, Employee B received an excess reimbursement in the amount of $300.

Example 3. Corporation O maintains a self-insured medical reimbursement plan which discriminates as to eligibility by covering only the highest paid 40% of all employees. Benefits subject to reimbursement under the plan are the same for all participants. During a plan year Employee C, a highly compensated individual, received benefits in the amount of $1,000. The amount of excess reimbursement paid Employee C during the plan year will be calculated by multiplying the $1,000 by a fraction determined under subparagraph (3).

Example 4. Corporation P maintains a self-insured medical reimbursement plan for its employees. Benefits subject to reimbursement under the plan are the same for all plan participants. However, the plan fails the eligibility tests of section 105(h)(3)(A) and thereby discriminates as to eligibility. During the 1980 plan year Employee D, a highly compensated individual, was hospitalized for surgery and incurred medical expenses of $4,500 which were reimbursed to D under the plan. During that plan year the Corporation P medical plan paid $50,000 in benefits under the plan, $30,000 of which constituted benefits paid to highly compensated individuals. The amount of excess reimbursement not excludable by D under section 105(b) is $2,700:

$$\$4500 \times \frac{\$30,000}{\$50,000}$$

Example 5. Corporation Q maintains a self-insured medical reimbursement plan for its employees. The plan provides a broad range of medical benefits subject to reimbursement for participants. However, only the five highest paid officers are entitled to dental benefits. In addition, the plan fails the eligibility test of section 105(h)(3)(A) and thereby discriminates as to eligibility. During the calendar 1981 plan year, Employee E, a highly compensated individual, received dental benefits under the plan in the amount of $300, and no other employee received dental benefits. In addition, Employee E was hospitalized for surgery and incurred medical expenses, reimbursement for which was available to all participants, of $4,500 which were reimbursed to E under the plan. Because dental benefits are only provided for highly compensated individuals, Employee E received an excess reimbursement under paragraph (e)(2) above in the amount of $300. For the 1981 plan year, the Corporation Q medical plan paid $50,300 in total benefits under the plan, $30,300 of which constituted benefits paid to highly compensated individuals. In computing the fraction under paragraph (e)(3), discriminatory benefits described in paragraph (e)(2) are not taken into account. Therefore, the amount of excess reimbursement not excludable to Employee E with respect to the $4,500 of medical expenses incurred is $2,700:

$$\$4500 \times \frac{\$30{,}000}{\$50{,}000}$$

and the total amount of excess reimbursements includable in E's income for 1981 is $3,000.

Example 6. (i) Corporation R maintains a calendar year self-insured medical reimbursement plan which covers all employees. The type of benefits subject to reimbursement under the plan include all medical care expenses as defined in section 213(e). The amount of reimbursement available to any employee for any calendar year is limited to 5 percent of the compensation paid to each employee during the calendar year. The amount of compensation and reimbursement paid to Employees A-F for the calendar year is as follows:

Employee	Compensation	Reimbursable amount paid
A	$100,000	$5,000
B	25,000	1,250
C	15,000	750
D	10,000	500
E	10,000	500
F	8,000	400
		8,400

(ii) Because the amount of benefits subject to reimbursement under the plan is in proportion to employee compensation the plan discriminates as to benefits. In addition, Employees A and B are highly compensated individuals. The amount of excess reimbursement paid Employees A and B during the plan year will be determined under paragraph (e)(2). Because benefits in excess of $400 (Employee F's maximum benefit) are provided for highly compensated individuals and not for all other participants, Employees A and B received, respectively, an excess reimbursement of $4,600 and $850.

(f) *Certain controlled groups.* For purposes of applying the provisions of section 105(h) and this section, all employees who are treated as employed by a single employer under section 414 (b) and (c), and the regulations thereunder (relating to special rules for qualified pension, profit-sharing and stock bonus plans), shall be treated as employed by a single employer.

(g) *Exception for medical diagnostic procedures*—(1) *In general.* For purposes of applying section 105(h) and this section, reimbursements paid under a plan for medical diagnostic procedures for an employee, but not a dependent, are not considered to be a part of a plan described in this section. The medical diagnostic procedures include routine medical examinations, blood tests, and X-rays. Such procedures do not include expenses incurred for the treatment, cure or testing of a known illness or disability, or treatment or testing for a physical injury, complaint or specific symptom of a bodily malfunction. For example, a routine dental examination with X-rays is a medical diagnostic procedure, but X-rays and treatment for a specific complaint are not. In addition, such procedures do not include any activity undertaken for exercise, fitness, nutrition, recreation, or the general improvement of health unless they are for medical care as defined in section 213(e). The diagnostic procedures must be performed at a facility which provides no services (directly or indirectly) other than medical, and ancillary, services. For purposes of the preceding sentence, physical proximity between a medical facility and non-medical facilities will not for that reason alone cause the medical facility not to qualify. For example, an employee's annual physical examination conducted at the employee's personal physician's office is not considered a part of the medical reimbursement plan and therefore is not subject to the nondiscrimination requirements. Accordingly, the amount reimbursed may be excludable from the employee's income if the requirements of section 105(b) are satisfied.

(2) *Transportation, etc. expenses.* Transportation expenses primarily for an allowable diagnostic procedure are included within the exception described in this paragraph, but only to the extent they are ordinary and necessary. Transportation undertaken merely for the general improvement of health, or in connection with a vacation, is not within the scope of this exception, nor are any incidental expenses for food or lodging; therefore, amounts reimbursed for such expenses may be excess reimbursements under paragraph (e).

(h) *Time of inclusion.* Excess reimbursments (determined under paragraph (e)) paid to a highly compensated individual for a plan year will be considered as received in the taxable year of the individual in which (or with which) the plan year ends. The particular plan year to which reimbursements relate shall be determined under the plan provisions. In the absence of plan provisions reimbursements shall be attributed to the plan year in which payment is made. For example, under a calendar year plan an excess reimbursement paid to A in 1981 on account of an expense incurred and subject to reimbursement for the 1980 plan year under the terms of the plan will be considered as received in 1980 by A.

(i) *Self-insured contributory plan.* A medical plan subject to this section may provide for employer and employee contributions. See §1.105–1(c). The tax treatment of reimbursements attributable to employee contributions is determined under section 104(a)(3). The tax treatment of reimbursements attributable to employer contributions is determined under section 105. The amount of reimbursements which are attributable to contributions of the employer shall be determined in accordance with §1.105–1(e).

(j) *Effective date.* Section 105(h) and this section are effective for taxable years beginning after December 31, 1979 and for amounts reimbursed after December 31, 1979. In determining plan discrimination and the taxability of excess reimbursements made for a plan year beginning in 1979 and ending in 1980, a plan's eligibility and benefit requirements as well as actual reimbursements made in the plan year during 1979, will not be taken into account. In addition, this section does not apply to expenses which are incurred in 1979 and paid in 1980.

(k) *Special rules*—(1) *Relation to cafeteria plans.* If a self-insured medical reimbursement plan is included in a cafeteria plan as described in section 125, the rules of this section will determine the status of a benefit as a taxable or nontaxable benefit, and the rules of section 125 will determine whether an employee is taxed as though he elected all available taxable benefits (including taxable benefits under a discriminatory medical reimbursement plan). This rule is illustrated by the following example:

Example. Corporation M maintains a cafeteria plan described in section 125. Under the plan an officer of the corporation may elect to receive medical benefits provided by a self-insured medical reimbursement plan which is subject to the rules of this section. However, the self-insured medical reimbursement plan fails the nondiscrimination rules under paragraph (c) of this section. Accordingly, the amount of excess reimbursement is taxable to the officer participating in the medical reimbursement plan pursuant to section 105(h) and this section. Therefore, the self-insured medical reimbursement plan will be considered a taxable benefit under section 125 and the regulations thereunder.

(2) *Benefit subject to reimbursement.* For purposes of this section, a benefit subject to reimbursement is a benefit described in the plan under which a claim for reimbursement or for a payment directly to the health service provider may be filed by a plan participant. It does not refer to actual claims or benefit reimbursements paid under a plan.

[T.D. 7754, 46 FR 3505, Jan. 15, 1981]

§ 1.106–1 Contributions by employer to accident and health plans.

The gross income of an employee does not include contributions which his employer makes to an accident or health plan for compensation (through insurance or otherwise) to the employee for personal injuries or sickness incurred by him, his spouse, or his dependents, as defined in section 152. The employer may contribute to an accident or health plan either by paying the premium (or a portion of the premium) on a policy of accident or health insurance covering one or more of his employees, or by contributing to a separate trust or fund (including a fund referred to in section 105(e)) which provides accident or health benefits directly or through insurance to one or more of his employees. However, if such insurance policy, trust, or fund provides other benefits in addition to accident or health benefits, section 106 applies only to the portion of the employer's contribution which is allocable to accident or health benefits. See paragraph (d) of §1.104–1 and §§1.105–1 through 1.105–5, inclusive, for regulations relating to exclusion from an employee's gross income of amounts received through accident or health insurance and through accident or health plans.

§1.107–1 Rental value of parsonages.

(a) In the case of a minister of the gospel, gross income does not include (1) the rental value of a home, including utilities, furnished to him as a part of his compensation, or (2) the rental allowance paid to him as part of his compensation to the extent such allowance is used by him to rent or otherwise provide a home. In order to qualify for the exclusion, the home or rental allowance must be provided as remuneration for services which are ordinarily the duties of a minister of the gospel. In general, the rules provided in §1.1402(c)–5 will be applicable to such determination. Examples of specific services the performance of which will be considered duties of a minister for purposes of section 107 include the performance of sacerdotal functions, the conduct of religious worship, the administration and maintenance of religious organizations and their integral agencies, and the performance of teaching and administrative duties at theological seminaries. Also, the service performed by a qualified minister as an employee of the United States (other than as a chaplain in the Armed Forces, whose service is considered to be that of a commissioned officer in his capacity as such, and not as a minister in the exercise of his ministry), or a State, Territory, or possession of the United States, or a political subdivision of any of the foregoing, or the District of Columbia, is in the exercise of his ministry provided the service performed includes such services as are ordinarily the duties of a minister.

(b) For purposes of section 107, the term ''home'' means a dwelling place (including furnishings) and the appurtenances thereto, such as a garage. The term ''rental allowance'' means an amount paid to a minister to rent or otherwise provide a home if such amount is designated as rental allowance pursuant to official action taken prior to January 1, 1958, by the employing church or other qualified organization, or if such amount is designated as rental allowance pursuant to official action taken in advance of such payment by the employing church or other qualified organization when paid after December 31, 1957. The designation of an amount as rental allowance may be evidenced in an employment contract, in minutes of or in a resolution by a church or other qualified organization or in its budget, or in any other appropriate instrument evidencing such official action. The designation referred to in this paragraph is a sufficient designation if it permits a payment or a part thereof to be identified as a payment of rental allowance as distinguished from salary or other remuneration.

(c) A rental allowance must be included in the minister's gross income in the taxable year in which it is received, to the extent that such allowance is not used by him during such taxable year to rent or otherwise provide a home. Circumstances under which a rental allowance will be deemed to have been used to rent or provide a home will include cases in which the allowance is expended (1) for rent of a home, (2) for purchase of a home, and (3) for expenses directly related to providing a home. Expenses for food and servants are not considered for this purpose to be directly related to providing a home. Where the minister rents, purchases, or owns a farm or other business property in addition to a home, the portion of the rental allowance expended in connection with the farm or business property shall not be excluded from his gross income.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6691, 28 FR 12817, Dec. 3, 1963]

§ 1.108–1 [Reserved]

§ 1.108–2 Acquisition of indebtedness by a person related to the debtor.

(a) *General rules.* The acquisition of outstanding indebtedness by a person related to the debtor from a person who is not related to the debtor results in the realization by the debtor of income from discharge of indebtedness (to the extent required by section 61(a)(12) and section 108) in an amount determined under paragraph (f) of this section. Income realized pursuant to the preceding sentence is excludible from gross income to the extent provided in section 108(a). The rules of this paragraph apply if indebtedness is acquired directly by a person related to the debtor in a direct acquisition (as defined in paragraph (b) of this section) or if a holder of indebtedness becomes related to the debtor in an indirect acquisition (as defined in paragraph (c) of this section).

(b) *Direct acquisition.* An acquisition of outstanding indebtedness is a direct acquisition under this section if a person related to the debtor (or a person who becomes related to the debtor on the date the indebtedness is acquired) acquires the indebtedness from a person who is not related to the debtor. Notwithstanding the foregoing, the Commissioner may provide by Revenue Procedure or other published guidance that certain acquisitions of indebtedness described in the preceding sentence are not direct acquisitions for purposes of this section.

(c) *Indirect acquisition*—(1) *In general.* An indirect acquisition is a transaction in which a holder of outstanding indebtedness becomes related to the debtor, if the holder acquired the indebtedness in anticipation of becoming related to the debtor.

(2) *Proof of anticipation of relationship.* In determining whether indebtedness was acquired by a holder in anticipation of becoming related to the debtor, all relevant facts and circumstances will be considered. Such facts and circumstances include, but are not limited to, the intent of the parties at the time of the acquisition, the nature of any contacts between the parties (or their respective affiliates) before the acquisition, the period of time for which the holder held the indebtedness, and the significance of the indebtedness in proportion to the total assets of the holder group (as defined in paragraph (c)(5) of this section). For example, if a holder acquired the indebtedness in the ordinary course of its portfolio investment activities and the holder's acquisition of the indebtedness preceded any discussions concerning the acquisition of the holder by the debtor (or by a person related to the debtor) or the acquisition of the debtor by the holder (or by a person related to the holder), as the case may be, these facts, taken together, would ordinarily establish that the holder did not acquire the indebtedness in anticipation of becoming related to the debtor. The absence of discussions between the debtor and the holder (or their respective affiliates), however, does not by itself establish that the holder did not acquire the indebtedness in anticipation of becoming related to the debtor (if, for example, the facts and circumstances show that the holder was considering a potential acquisition of or by the debtor, or the relationship is created within a relatively short period of time of the acquisition, or the indebtedness constitutes a disproportionate portion of the holder group's assets).

(3) *Indebtedness acquired within 6 months of becoming related.* Notwithstanding any other provision of this paragraph (c), a holder of indebtedness is treated as having acquired the indebtedness in anticipation of becoming related to the debtor if the holder acquired the indebtedness less than 6 months before the date the holder becomes related to the debtor.

(4) *Disclosure of potential indirect acquisition*—(i) *In general.* If a holder of outstanding indebtedness becomes related to the debtor under the circumstances described in paragraph (c)(4)(ii) or (iii) of this section, the

debtor is required to attach the statement described in paragraph (c)(4)(iv) of this section to its tax return (or to a qualified amended return within the meaning of §1.6664–2(c)(3)) for the taxable year in which the debtor becomes related to the holder, unless the debtor reports its income on the basis that the holder acquired the indebtedness in anticipation of becoming related to the debtor. Disclosure under this paragraph (c)(4) is in addition to, and is not in substitution for, any disclosure required to be made under section 6662, 6664 or 6694.

(ii) *Indebtedness represents more than 25 percent of holder group's assets*—(A) *In general.* Disclosure under this paragraph (c)(4) is required if, on the date the holder becomes related to the debtor, indebtedness of the debtor represents more than 25 percent of the fair market value of the total gross assets of the holder group (as defined in paragraph (c)(5) of this section).

(B) *Determination of total gross assets.* In determining the total gross assets of the holder group, total gross assets do not include any cash, cash item, marketable stock or security, short-term indebtedness, option, futures contract, notional principal contract, or similar item (other than indebtedness of the debtor), nor do total gross assets include any asset in which the holder has substantially reduced its risk of loss. In addition, total gross assets do not include any ownership interest in or indebtedness of a member of the holder group.

(iii) *Indebtedness acquired within 6 to 24 months of becoming related.* Disclosure under this paragraph (c)(4) is required if the holder acquired the indebtedness 6 months or more before the date the holder becomes related to the debtor, but less than 24 months before that date.

(iv) *Contents of statement.* A statement under this paragraph (c)(4) must include the following—

(A) A caption identifying the statement as disclosure under §1.108–2(c);

(B) An identification of the indebtedness with respect to which disclosure is made;

(C) The amount of such indebtedness and the amount of income from discharge of indebtedness is section 108(e)(4) were to apply;

(D) Whether paragraph (c)(4)(ii) or (iii) of this section applies to the transaction; and

(E) A statement describing the facts and circumstances supporting the debtor's position that the holder did not acquire the indebtedness in anticipation of becoming related to the debtor.

(v) *Failure to disclose.* In addition to any other penalties that may apply, if a debtor fails to provide a statement required by this paragraph (c)(4), the holder is presumed to have acquired the indebtedness in anticipation of becoming related to the debtor unless the facts and circumstances clearly established that the holder did not acquire the indebtedness in anticipation of becoming related to the debtor.

(5) *Holder group.* For purposes of this paragraph (c), the holder group consists of the holder of the indebtedness and all persons who are both—

(i) Related to the holder before the holder becomes related to the debtor; and

(ii) Related to the debtor after the holder becomes related to the debtor.

(6) *Holding period*—(i) *Suspensions.* The running of the holding periods set forth in paragraphs (c)(3) and (c)(4)(iii) of this section is suspended during any period in which the holder or any person related to the holder is protected (directly or indirectly) against risk of loss by an option, a short sale, or any other device or transaction.

(ii) *Tacking.* For purposes of paragraphs (c)(3) and (c)(4)(iii) of this section, the period for which a holder held the debtor's indebtedness includes—

(A) The period for which the indebtedness was held by a corporation to whose attributes the holder succeeded pursuant to section 381; and

(B) The period (ending on the date on which the holder becomes related to the debtor) for which the indebtedness was held continuously by members of the holder group (as defined in paragraph (c)(5) of this section).

(d) *Definitions*—(1) *Acquisition date.* For purposes of this section, the acquisition date is the date on which a direct acquisition of indebtedness or an indirect acquisition of indebtedness occurs.

(2) *Relationship.* For purposes of this section, persons are considered related if they are related within the meaning of sections 267(b) or 707(b)(1). However—

(i) Sections 267(b) and 707(b)(1) are applied as if section 267(c)(4) provided that the family of an individual consists of the individual's spouse, the individual's children, grandchildren, and parents, and any spouse of the individual's children or grandchildren; and

(ii) Two entities that are treated as a single employer under subsection (b) or (c) of section 414 are treated as having a relationship to each other that is described in section 267(b).

(e) *Exceptions*—(1) *Indebtedness retired within one year.* This section does not apply to a direct or indirect acquisition of indebtedness with a stated maturity date on or before the date that is one year after the acquisition date, if the indebtedness is, in fact, retired on or before its stated maturity date.

(2) *Acquisitions by securities dealers.* (i) This section does not apply to a direct acquisition or an indirect acquisition of indebtedness by a dealer that acquires and disposes of such indebtedness in the ordinary course of its business of dealing in securities if—

(A) The dealer accounts for the indebtedness as a security held primarily for sale to customers in the ordinary course of business;

(B) The dealer disposes of the indebtedness (or it matures while held by the dealer) within a period consistent with the holding of the indebtedness for sale to customers in the ordinary course of business, taking into account the terms of the indebtedness and the conditions and practices prevailing in the markets for similar indebtedness during the period in which it is held; and

(C) The dealer does not sell or otherwise transfer the indebtedness to a person related to the debtor (other than in a sale to a dealer that in turn meets the requirements of this paragraph (e)(2)).

(ii) A dealer will continue to satisfy the conditions of this paragraph (e)(2) with respect to indebtedness that is exchanged for successor indebtedness in a transaction in which unrelated holders also exchange indebtedness of the same issue, provided that the conditions of this paragraph (e)(2) are met with respect to the successor indebtedness.

(iii) For purposes of this paragraph (e)(2), if the period consistent with the holding of indebtedness for sale to customers in the ordinary course of business is 30 days or less, the dealer is considered to dispose of indebtedness within that period if the aggregate principal amount of indebtedness of that issue sold by the dealer to customers in the ordinary course of business (or that mature and are paid while held by the dealer) in the calendar month following the month in which the indebtedness is acquired equals or exceeds the aggregate principal amount of indebtedness of that issue held in the dealer's inventory at the close of the month in which the indebtedness is acquired. If the period consistent with the holding of indebtedness for sale to customers in the ordinary course of business is greater than 30 days, the dealer is considered to dispose of the indebtedness within that period if the aggregate principal amount of indebtedness of that issue sold by the dealer to customers in the ordinary course of business (or that mature and are paid while held by the dealer) within that period equals or exceeds the aggregate principal amount of indebtedness of that issue held in inventory at the close of the day on which the indebtedness was acquired.

(f) *Amount of discharge of indebtedness income realized*—(1) *Holder acquired the indebtedness by purchase on or less than six months before the acquisition date.* Except as otherwise provided in this paragraph (f), the amount of discharge of indebtedness income realized under paragraph (a) of this section is measured by reference to the adjusted basis of the related holder (or of the holder that becomes related to the debtor) in the indebtedness on the acquisition date if the holder acquired the indebtedness by purchase on or less than six months before the acquisition date. For purposes of this paragraph (f), indebtedness is acquired ''by purchase'' if the indebtedness in the hands of the holder is not substituted basis property within the meaning of section 7701(a)(42). However, indebtedness is also considered acquired by purchase within six months before the acquisition date if the holder acquired the indebtedness as transferred basis property (within the meaning of section 7701(a)(43)) from a person who acquired the indebtedness by purchase on or less than six months before the acquisition date.

(2) *Holder did not acquire the indebtedness by purchase on or less than six months before the acquisition date.* Except as otherwise provided in this paragraph (f), the amount of discharge of indebtedness income realized under paragraph (a) of this section is measured by reference to the fair market value of the indebtedness on the acquisition date if the holder (or the transferor to the holder in a transferred basis transaction) did not acquire the indebtedness by purchase on or less than six months before the acquisition date.

(3) *Acquisitions of indebtedness in nonrecognition transactions.* [Reserved]

(4) *Avoidance transactions.* The amount of discharge of indebtedness income realized by the debtor under paragraph (a) of this section is measured by reference to the fair market value of the indebtedness on the acquisition date if the indebtedness is acquired in a direct or an indirect acquisition in which a principal purpose for the acquisition is the avoidance of federal income tax.

(g) *Correlative adjustments*—(1) *Deemed issuance.* For income tax purposes, if a debtor realizes income from discharge of its indebtedness in a direct or an indirect acquisition under this section (whether or not the income is excludible under section 108(a)), the debtor's indebtedness is treated as new indebtedness issued by the debtor to the related holder on the acquisition date (the deemed issuance). The new indebtedness is deemed issued with an issue price equal to the amount used under paragraph (f) of this section to compute the amount realized by the debtor under paragraph (a) of this section (*i.e.*, either the holder's adjusted basis or the fair market value of the indebtedness, as the case may be). Under section 1273(a)(1), the excess of the stated redemption price at maturity (as defined in section 1273(a)(2)) of the indebtedness over its issue price is original issue discount (OID) which, to the extent provided in sections 163 and 1272, is deductible by the debtor and includible in the gross income of the related holder. Notwithstanding the foregoing, the Commissioner may provide by Revenue Procedure or other published guidance that the indebtedness is not treated as newly issued indebtedness for purposes of designated provisions of the income tax laws.

(2) *Treatment of related holder.* The related holder does not recognize any gain or loss on the deemed issuance described in paragraph (g)(1) of this section. The related holder's adjusted basis in the indebtedness remains the same as it was immediately before the deemed issuance. The deemed issuance is treated as a purchase of the indebtedness by the related holder for purposes of section 1272(a)(7) (pertaining to reduction of original issue discount where a subsequent holder pays acquisition premium) and section 1276 (pertaining to acquisitions of debt at a market discount).

(3) *Loss deferral on disposition of indebtedness acquired in certain exchanges.* (i) Any loss otherwise allowable to a related holder on the disposition at any time of indebtedness acquired in a direct or indirect acquisition (whether or not any discharge of indebtedness income was realized under paragraph (a) of this section) is deferred until the date the debtor retires the indebtedness if—

(A) The related holder acquired the debtor's indebtedness in exchange for its own indebtedness; and

(B) The issue price of the related holder's indebtedness was not determined by reference to its fair market value (e.g., the issue price was determined under section 1273(b)(4) or 1274(a) or any other provision of applicable law).

(ii) Any comparable tax benefit that would otherwise be available to the holder, debtor, or any person related to either, in any other transaction that directly or indirectly results in the disposition of the indebtedness is also deferred until the date the debtor retires the indebtedness.

(4) *Examples*. The following examples illustrate the application of this paragraph (g). In each example, all taxpayers are calendar-year taxpayers, no taxpayer is insolvent or under the jurisdiction of a court in a title 11 case and no indebtedness is qualified farm indebtedness described in section 108(g).

Example 1. (i) P, a domestic corporation, owns 70 percent of the single class of stock of S, a domestic corporation. S has outstanding indebtedness that has an issue price of $10,000,000 and provides for monthly interest payments of $80,000 payable at the end of each month and a payment at maturity of $10,000,000. The indebtedness has a stated maturity date of December 31, 1994. On January 1, 1992, P purchases S's indebtedness from I, an individual not related to S within the meaning of paragraph (d)(2) of this section, for cash in the amount of $9,000,000. S repays the indebtedness in full at maturity.

(ii) Under section 61(a)(12), section 108(e)(4), and paragraphs (a) and (f) of this section, S realizes $1,000,000 of income from discharge of indebtedness on January 1, 1992.

(iii) Under paragraph (g)(1) of this section, the indebtedness is treated as issued to P on January 1, 1992, with an issue price of $9,000,000. Under section 1273(a), the $1,000,000 excess of the stated redemption price at maturity of the indebtedness ($10,000,000) over its issue price ($9,000,000) is original issue discount, which is includible in gross income by P and deductible by S over the remaining term of the indebtedness under sections 163(e) and 1272(a).

(iv) Accordingly, S deducts and P includes in income original issue discount, in addition to stated interest, as follows: in 1992, $289,144.88; in 1993, $331,286.06; and in 1994, $379,569.06.

Example 2. The facts are the same as in *Example 1*, except that on January 1, 1992, P sells S's indebtedness to J, who is not related to S within the meaning of paragraph (d)(2) of this section, for $9,400,000 in cash. J holds S's indebtedness to maturity. On January 1, 1993, P's adjusted basis in S's indebtedness is $9,289,144.88. Accordingly, P realizes gain in the amount of $110,855.12 upon the disposition. S and J continue to deduct and include the original issue discount on the indebtedness in accordance with *Example 1*. The amount of original issue discount includible by J is reduced by the $110,855.12 acquisition premium as provided in section 1272(a)(7).

Example 3. The facts are the same as in *Example 1*, except that on February 1, 1992 (one month after P purchased S's indebtedness), S retires the indebtedness for an amount of cash equal to the fair market value of the indebtedness. Assume that the fair market value of the indebtedness is $9,022,621.41, which in this case equals the issue price of indebtedness determined under paragraph (g)(1) of this section ($9,000,000) plus the accrued original issue discount through February 1 ($22,621.41). Section 1.61–12(c)(3) provides that if indebtedness is repurchased for a price that is exceeded by the issue price of the indebtedness plus the amount of discount already deducted, the excess is income from discharge of indebtedness. Therefore, S does not realize income from discharge of indebtedness. The result would be the same if P had contributed the indebtedness to the capital of S. Under section 108(e)(6), S would be treated as having satisfied the indebtedness with an amount of money equal to P's adjusted basis and, under section 1272(d)(2), P's adjusted basis is equal to $9,022,621.41.

Example 4. (i) P, a domestic corporation, owns 70 percent of the single class of stock of S, a domestic corporation. On January 1, 1986, P issued indebtedness that has an issue price of $5,000,000 and provides for no stated interest payments and a payment at maturity of $10,000,000. The indebtedness has a stated maturity date of December 31, 1995. On January 1, 1992, S purchases P's indebtedness from K, a partnership not related to P within the meaning of paragraph (d)(2) of this section, for cash in the amount of $6,000,000. The sum of the debt's issue price and previously deducted original issue discount is $7,578,582.83. P repays the indebtedness in full at maturity.

(ii) Under section 61(a)(12), section 108(e)(4), and paragraphs (a) and (f) of this section, P realizes $1,578,582.83 in income from discharge of indebtedness ($7,578,582.83 minus $6,000,000) on January 1, 1992.

(iii) Under paragraph (g)(1) of this section, the indebtedness is treated as issued to S on January 1, 1992, with an issue price of $6,000,000. Under section 1273(a), the $4,000,000 excess of the stated redemption price at maturity of the indebtedness ($10,000,000) over its issue price ($6,000,000) is orignial issue discount, which is includible in gross income by S and deductible by P over the remaining term of the indebtedness under sections 163(e) and 1272(a).

(iv) Accordingly, P deducts and S includes in income original issue discount as follows: in 1992, $817,316.20; in 1993, $928,650.49; in 1994, $1,055,150.67; and in 1995, $1,198,882.64.

(h) *Effective date*. This section applies to any transaction described in paragraph (a) and in either paragraph (b) or (c) of this section with an acquisition date on or after March 21, 1991. Although this section does not apply to direct or indirect acquisitions occurring before March 21, 1991, section 108(e)(4) is effective for any transaction after December 31, 1980, subject to the rules of section 7 of the Bankruptcy

Tax Act of 1980 (Pub. L. 96–589, 94 Stat. 3389, 3411). Taxpayers may use any reasonable method of determining the amount of discharge of indebtedness income realized and the treatment of correlative adjustments under section 108(e)(4) for acquisitions of indebtedness before March 21, 1991, if such method is applied consistently by both the debtor and related holder.

[T.D. 8460, 57 FR 61808, Dec. 29, 1992]

§ 1.108–3 Intercompany losses and deductions.

(a) *General rule.* This section applies to certain losses and deductions from the sale, exchange, or other transfer of property between corporations that are members of a consolidated group or a controlled group (an intercompany transaction). See section 267(f) (controlled groups) and § 1.1502–13 (consolidated groups) for applicable definitions. For purposes of determining the attributes to which section 108(b) applies, a loss or deduction not yet taken into account under section 267(f) or § 1.1502–13 (an intercompany loss or deduction) is treated as basis described in section 108(b) that the transferor retains in property. To the extent a loss not yet taken into account is reduced under this section, it cannot subsequently be taken into account under section 267(f) or § 1.1502–13. For example, if S and B are corporations filing a consolidated return, and S sells land with a $100 basis to B for $90 and the $10 loss is deferred under section 267(f) and § 1.1502–13, the deferred loss is treated for purposes of section 108(b) as $10 of basis that S has in land (even though S has no remaining interest in the land sold to B) and is subject to reduction under section 108(b)(2)(E). Similar principles apply, with appropriate adjustments, if S and B are members of a controlled group and S's loss is deferred only under section 267(f).

(b) *Effective date.* This section applies with respect to discharges of indebtedness occurring on or after September 11, 1995.

[T.D. 8597, 60 FR 36680, July 18, 1995]

§ 1.108–4 Election to reduce basis of depreciable property under section 108(b)(5) of the Internal Revenue Code .

(a) *Description.* An election under section 108(b)(5) is available whenever a taxpayer excludes discharge of indebtedness income (COD income) from gross income under sections 108(a)(1)(A), (B), or (C) (concerning title 11 cases, insolvency, and qualified farm indebtedness, respectively). See sections 108(d)(2) and (3) for the definitions of *title 11 case* and *insolvent.* See section 108(g)(2) for the definition of *qualified farm indebtedness.*

(b) *Time and manner.* To make an election under section 108(b)(5), a taxpayer must enter the appropriate information on Form 982, *Reduction of Tax Attributes Due to Discharge of Indebtedness (and Section 1082 Basis Adjustment),* and attach the form to the timely filed (including extensions) Federal income tax return for the taxable year in which the taxpayer has COD income that is excluded from gross income under section 108(a). An election under this section may be revoked only with the consent of the Commissioner.

(c) *Effective date.* This section applies to elections concerning discharges of indebtedness occurring on or after October 22, 1998.

[T.D. 8787, 63 FR 56562, Oct. 22, 1998]

§ 1.108–5 Time and manner for making election under the Omnibus Budget Reconciliation Act of 1993.

(a) *Description.* Section 108(c)(3)(C), as added by section 13150 of the Omnibus Budget Reconciliation Act of 1993 (Pub. L. 103–66, 107 Stat. 446), allows certain noncorporate taxpayers to elect to treat certain indebtedness described in section 108(c)(3) that is discharged after December 31, 1992, as qualified real property business indebtedness. This discharged indebtedness is excluded from gross income to the extent allowed by section 108.

(b) *Time and manner for making election.* The election described in this section must be made on the timely-filed (including extensions) Federal income tax return for the taxable year in which the taxpayer has discharge of indebtedness income that is excludible from gross income under section 108(a).

The election is to be made on a completed Form 982, in accordance with that Form and its instructions.

(c) *Revocability of election.* The election described in this section is revocable with the consent of the Commissioner.

(d) *Effective date.* The rules set forth in this section are effective December 27, 1993.

[T.D. 8688, 61 FR 65322, Dec. 12, 1996. Redesignated by T.D. 8787, 63 FR 56563, Oct. 22, 1998]

§ 1.108–6 Limitations on the exclusion of income from the discharge of qualified real property business indebtedness.

(a) *Indebtedness in excess of value.* With respect to any qualified real property business indebtedness that is discharged, the amount excluded from gross income under section 108(a)(1)(D) (concerning discharges of qualified real property business indebtedness) shall not exceed the excess, if any, of the outstanding principal amount of that indebtedness immediately before the discharge over the net fair market value of the qualifying real property, as defined in §1.1017–1(c)(1), immediately before the discharge. For purposes of this section, *net fair market value* means the fair market value of the qualifying real property (notwithstanding section 7701(g)), reduced by the outstanding principal amount of any qualified real property business indebtedness (other than the discharged indebtedness) that is secured by such property immediately before and after the discharge. Also, for purposes of section 108(c)(2)(A) and this section, outstanding principal amount means the principal amount of indebtedness together with all additional amounts owed that, immediately before the discharge, are equivalent to principal, in that interest on such amounts would accrue and compound in the future, except that outstanding principal amount shall not include amounts that are subject to section 108(e)(2) and shall be adjusted to account for unamortized premium and discount consistent with section 108(e)(3).

(b) *Overall limitation.* The amount excluded from gross income under section 108(a)(1)(D) shall not exceed the aggregate adjusted bases of all depreciable real property held by the taxpayer immediately before the discharge (other than depreciable real property acquired in contemplation of the discharge) reduced by the sum of any—

(1) Depreciation claimed for the taxable year the taxpayer excluded discharge of indebtedness from gross income under section 108(a)(1)(D); and

(2) Reductions to the adjusted bases of depreciable real property required under section 108(b) or section 108(g) for the same taxable year.

(c) *Effective date.* This section applies to discharges of qualified real property business indebtedness occurring on or after October 22, 1998.

[T.D. 8787, 63 FR 56563, Oct. 22, 1998]

§ 1.108–7 Reduction of attributes.

(a) *In general.* (1) If a taxpayer excludes discharge of indebtedness income (COD income) from gross income under section 108(a)(1)(A), (B), or (C), then the amount excluded shall be applied to reduce the following tax attributes of the taxpayer in the following order:

(i) Net operating losses.

(ii) General business credits.

(iii) Minimum tax credits.

(iv) Capital loss carryovers.

(v) Basis of property.

(vi) Passive activity loss and credit carryovers.

(vii) Foreign tax credit carryovers.

(2) The taxpayer may elect under section 108(b)(5), however, to apply any portion of the excluded COD income to reduce first the basis of depreciable property. To the extent the excluded COD income is not so applied, the taxpayer must then reduce any remaining tax attributes in the order specified in section 108(b)(2). If the excluded COD income exceeds the sum of the taxpayer's tax attributes, the excess is permanently excluded from the taxpayer's gross income. For rules relating to basis reductions required by sections 108(b)(2)(E) and 108(b)(5), *see* sections 1017 and 1.1017–1. For rules relating to the time and manner for making an election under section 108(b)(5), *see* §1.108–4.

(b) *Carryovers and carrybacks.* The tax attributes subject to reduction under section 108(b)(2) and paragraph (a)(1) of this section that are carryovers to the taxable year of the discharge, or that may be carried back to taxable years preceding the year of the discharge, are taken into account by the taxpayer for the taxable year of the discharge or the preceding years, as the case may be, before such attributes are reduced pursuant to section 108(b)(2) and paragraph (a)(1) of this section.

(c) *Transactions to which section 381 applies.* If a taxpayer realizes COD income that is excluded from gross income under section 108(a) either during or after a taxable year in which the taxpayer is the distributor or transferor of assets in a transaction described in section 381(a), any tax attributes to which the acquiring corporation succeeds, including the basis of property acquired by the acquiring corporation in the transaction, must reflect the reductions required by section 108(b). For this purpose, all attributes listed in section 108(b)(2) immediately prior to the transaction described in section 381(a), but after the determination of tax for the year of the distribution or transfer of assets, including basis of property, will be available for reduction under section 108(b)(2). However, the basis of stock or securities of the acquiring corporation, if any, received by the taxpayer in exchange for the transferred assets shall not be available for reduction under section 108(b)(2).

(d) *Special rules for S corporations*—(1) *In general.* If an S corporation excludes COD income from gross income under section 108(a)(1)(A), (B), or (C), the amount excluded shall be applied to reduce the S corporation's tax attributes under paragraph (a)(1) of this section. For purposes of paragraph (a)(1)(i) of this section, the aggregate amount of the shareholders' losses or deductions that are disallowed for the taxable year of the discharge under section 1366(d)(1), including disallowed losses or deductions of a shareholder that transfers all of the shareholder's stock in the S corporation during the taxable year of the discharge, is treated as the net operating loss tax attribute (deemed NOL) of the S corporation for the taxable year of the discharge.

(2) *Allocation of excess losses or deductions*—(i) *In general.* If the amount of an S corporation's deemed NOL exceeds the amount of the S corporation's COD income that is excluded from gross income under section 108(a)(1)(A), (B), or (C), the excess deemed NOL shall be allocated to the shareholder or shareholders of the S corporation as a loss or deduction that is disallowed under section 1366(d) for the taxable year of the discharge.

(ii) *Multiple shareholders*—(A) *In general.* If an S corporation has multiple shareholders, to determine the amount of the S corporation's excess deemed NOL to be allocated to each shareholder under paragraph (d)(2)(i) of this section, calculate with respect to each shareholder the shareholder's excess amount. The shareholder's excess amount is the amount (if any) by which the shareholder's losses or deductions disallowed under section 1366(d)(1) (before any reduction under paragraph (a)(1) of this section) exceed the amount of COD income that would have been taken into account by that shareholder under section 1366(a) had the COD income not been excluded under section 108(a).

(B) *Shareholders with a shareholder's excess amount.* Each shareholder that has a shareholder's excess amount, as determined under paragraph (d)(2)(ii)(A) of this section, is allocated an amount equal to the S corporation's excess deemed NOL multiplied by a fraction, the numerator of which is the shareholder's excess amount and the denominator of which is the sum of all shareholders' excess amounts.

(C) *Shareholders with no shareholder's excess amount.* If a shareholder does not have a shareholder's excess amount as determined in paragraph (d)(2)(ii)(A) of this section, none of the S corporation's excess deemed NOL shall be allocated to that shareholder.

(iii) *Terminating shareholder.* Any amount of the S corporation's excess deemed NOL allocated under paragraph (d)(2) of this section to a shareholder that had transferred all of the shareholder's stock in the corporation during the taxable year of the discharge is permanently disallowed under §1.1366–2(a)(5), unless the transfer of stock is described in section 1041(a). If the transfer of stock is described in section 1041(a), the amount of the S corporation's excess deemed NOL allocated to the transferor under paragraph (d)(2) of this section shall be treated as a loss or deduction incurred by the corporation in the succeeding taxable year with respect to the transferee. *See* section 1366(d)(2)(B).

(3) *Character of excess losses or deductions allocated to a shareholder.* The character of an S corporation's excess deemed NOL that is allocated to a shareholder under paragraph (d)(2) of this section consists of a proportionate amount of each item of the shareholder's loss or deduction that is disallowed for the taxable year of the discharge under section 1366(d)(1).

(4) *Information requirements.* If an S corporation excludes COD income from gross income under section 108(a) for a taxable year, each shareholder of the S corporation during the taxable year of the discharge must report to the S corporation the amount of the shareholder's losses and deductions that are disallowed for the taxable year of the discharge under section 1366(d)(1), even if that amount is zero. If a shareholder fails to report the amount of the shareholder's losses and deductions that are disallowed for the taxable year of the discharge under section 1366(d)(1) to the S corporation, or if the S corporation knows that the amount reported by the shareholder is inaccurate, or if the information, as reported, appears to be incomplete or incorrect, the S corporation may rely on its own books and records, as well as other information available to the S corporation, to determine the amount of the shareholder's losses and deductions that are disallowed for the taxable year of the discharge under section 1366(d)(1), provided that the S corporation knows or reasonably believes that its information presents an accurate reflection of the shareholder's disallowed losses and deductions under section 1366(d)(1). The S corporation must report to each shareholder the amount of the S corporation's excess deemed NOL that is allocated to that shareholder under paragraph (d)(2) of this section, even if that amount is zero, in accordance with applicable forms and instructions.

(e) *Examples.* The following examples illustrate the application of this section:

Example 1. (i) *Facts.* In Year 4, X, a corporation in a title 11 case, is entitled under section 108(a)(1)(A) to exclude from gross income $100,000 of COD income. For Year 4, X has gross income in the amount of $50,000. In each of Years 1 and 2, X had no taxable income or loss. In Year 3, X had a net operating loss of $100,000, the use of which when carried over to Year 4 is not subject to any restrictions other than those of section 172.

(ii) *Analysis.* Pursuant to paragraph (b) of this section, X takes into account the net operating loss carryover from Year 3 in computing its taxable income for Year 4 before any portion of the COD income excluded under section 108(a)(1)(A) is applied to reduce tax attributes. Thus, the amount of the net operating loss carryover that is reduced under section 108(b)(2) and paragraph (a) of this section is $50,000.

Example 2. (i) *Facts.* The facts are the same as in *Example 1,* except that in Year 4 X sustains a net operating loss in the amount of $100,000. In addition, in each of Years 2 and 3, X reported taxable income in the amount of $25,000.

(ii) *Analysis.* Pursuant to paragraph (b) of this section and section 172, the net operating loss sustained in Year 4 is carried back to Years 2 and 3 before any portion of the COD income excluded under section 108(a)(1)(A) is applied to reduce tax attributes. Thus, the amount of the net operating loss that is reduced under section 108(b)(2) and paragraph (a) of this section is $50,000.

Example 3. (i) *Facts.* In Year 2, X, a corporation in a title 11 case, has outstanding debts of $200,000 and a depreciable asset that has an adjusted basis of $75,000 and a fair market value of $100,000. X has no other assets or liabilities. X has a net operating loss of $80,000 that is carried over to Year 2 but has no general business credit, minimum tax credit, or capital loss carryovers. Under a plan of reorganization, X transfers its asset to Corporation Y in exchange for Y stock with a value of $100,000. X distributes the Y stock to its creditors in exchange for release of their claims against X. X's shareholders receive nothing in the transaction. The transaction qualifies as a reorganization under section 368(a)(1)(G) that satisfies the requirements of section 354(b)(1)(A) and (B). For Year 2, X has gross income of $10,000 (without regard to any income from the discharge of indebtedness) and is allowed a depreciation deduction of $10,000 in respect of the asset. In addition, it generates no general business credits.

(ii) *Analysis.* On the distribution of Y stock to X's creditors, under section 108(a)(1)(A), X is entitled to exclude from gross income the debt discharge amount of $100,000. (Under section 108(e)(8), X is treated as satisfying $100,000 of the debt owed the creditors for $100,000, the fair market value of the Y stock transferred to those creditors.) In Year 2, X has no taxable income or loss because its gross income is exactly offset by the depreciation deduction. As a result of the depreciation deduction, X's basis in the asset is reduced by $10,000 to $65,000. Pursuant to paragraph (c) of this section, the amount of X's net operating loss to which Y succeeds pursuant to section 381 and the basis of X's property transferred to Y must take into account the reductions required by section 108(b). Pursuant to paragraph (a) of this section, X's net operating loss carryover in the amount of $80,000 is reduced by $80,000 of the COD income excluded under section 108(a)(1). In addition, X's basis in the asset is reduced by $20,000, the extent to which the COD income excluded under section 108(a)(1) did not reduce the net operating loss. Accordingly, as a result of the reorganization, there is no net operating loss to which Y succeeds under section 381. Pursuant to section 361, X recognizes no gain or loss on the transfer of its property to Y. Pursuant to section 362(b), Y's basis in the asset acquired from X is $45,000.

Example 4. (i) *Facts.* The facts are the same as in *Example 3,* except that X elects under section 108(b)(5) to reduce first the basis of its depreciable asset.

(ii) *Analysis.* As in *Example 3,* on the distribution of Y stock to X's creditors, under section 108(a)(1)(A), X is entitled to exclude from gross income the debt discharge amount of $100,000. In addition, in Year 2, X has no taxable income or loss because its gross income is exactly offset by the depreciation deduction. As a result of the depreciation deduction, X's basis in the asset is reduced by $10,000 to $65,000. Pursuant to paragraph (c) of this section, the amount of X's net operating loss to which Y succeeds pursuant to section 381 and the basis of X's property transferred to Y must take into account the reductions required by section 108(b). As a result of the election under section 108(b)(5), X's basis in the asset is reduced by $65,000 to $0. In addition, X's net operating loss is reduced by $35,000, the extent to which the amount excluded from income under section 108(a)(1)(A) does not reduce X's asset basis. Accordingly, as a result of the reorganization, Y succeeds to X's net operating loss in the amount of $45,000 under section 381. Pursuant to section 361, X recognizes no gain or loss on the transfer of its property to Y. Pursuant to section 362(b), Y's basis in the asset acquired from X is $0.

Example 5. (i) *Facts.* During the entire calendar year 2009, A, B, and C each own equal shares of stock in X, a calendar year S corporation. As of December 31, 2009, A, B, and C each have a zero stock basis and X does not have any indebtedness to A, B, or C. For the 2009 taxable year, X excludes from gross income $45,000 of COD income under section 108(a)(1)(A). The COD income (had it not been excluded) would have been allocated $15,000 to A, $15,000 to B, and $15,000 to C under section 1366(a). For the 2009 taxable year, X has $30,000 of losses and deductions that X passes through pro rata to A, B, and C in the amount of $10,000 each. The losses and deductions that pass through to A, B, and C are disallowed under section 1366(d)(1). In addition, B has $10,000 of section 1366(d) losses from prior years and C has $20,000 of section 1366(d) losses from prior years. A's ($10,000), B's ($20,000) and C's ($30,000) combined $60,000 of disallowed losses and deductions for the taxable year of the discharge are treated as a current year net operating loss tax attribute of X under section 108(d)(7)(B) (deemed NOL) for purposes of the section 108(b) reduction of tax attributes.

(ii) *Allocation.* Under section 108(b)(2)(A), X's $45,000 of excluded COD income reduces the $60,000 deemed NOL to $15,000. Therefore, X has a $15,000 excess net operating loss (excess deemed NOL) to allocate to its shareholders. Under paragraph (d)(2)(ii)(C) of this section, none of the $15,000 excess deemed NOL is allocated to A because A's section 1366(d) losses and deductions immediately prior to the section 108(b)(2)(A) reduction ($10,000) do not exceed A's share of the excluded COD income for 2008 ($15,000). Thus, A has no shareholder's excess amount. Each of B's and C's respective section 1366(d) losses and deductions immediately prior to the section 108(b)(2)(A) reduction exceed each of B's and C's respective shares of the excluded COD income for 2008. B's excess amount is $5,000 ($20,000 − $15,000) and C's excess amount is $15,000 ($30,000 − $15,000). Therefore, the total of all shareholders' excess amounts is $20,000. Under paragraph (d)(2) of this section, X will allocate $3,750 of the $15,000 excess deemed NOL to B ($15,000 × $5,000/$20,000) and $11,250 of the $15,000 excess deemed NOL to C ($15,000 × $15,000/$20,000). These amounts are treated as losses and deductions disallowed under section 1366(d)(1) for the taxable year of the discharge. Accordingly, at the beginning of 2010, A has no section 1366(d)(2) carryovers, B has $3,750 of carryovers, and C has $11,250 of carryovers.

(iii) *Character.* Immediately prior to the section 108(b)(2)(A) reduction, B's $20,000 of section 1366(d) losses and deductions consisted of $8,000 of long-term capital losses, $7,000 of section 1231 losses, and $5,000 of ordinary losses. After the section 108(b)(2)(A) tax attribute reduction, X will allocate $3,750 of the excess deemed NOL to B. Under paragraph (d)(3) of this section, the $3,750 excess deemed NOL allocated to B consists of $1,500 of long-term capital losses (($8,000/$20,000) × $3,750), $1,312.50 of section 1231 losses (($7,000/$20,000) × $3,750), and $937.50 of ordinary losses (($5,000/$20,000) × $3,750). As a result, at the beginning of 2010, B's $3,750 of section 1366(d)(2) carryovers consist of $1,500 of long-term capital losses, $1,312.50 of section 1231 losses, and $937.50 of ordinary losses.

Example 6. (i) A and B each own 50 percent of the shares of stock in X, a calendar year S corporation. On March 1, 2009, X realizes $12,000 of COD income and excludes this amount from gross income under section 108(a)(1)(A) for X's 2009 taxable year. On June 30, 2009, A sells all of her shares of stock in X to C in a transfer not described in section 1041(a). X does not make a terminating election under section 1377(a)(2). The COD income (had it not been excluded) would have been allocated $3,000 to A, $6,000 to B, and $3,000 to C under section 1366(a). Prior to the section 108(b)(2)(A) reduction, for the taxable year of the discharge the shareholders have disallowed losses and deductions under section 1366(d) (including disallowed losses carried over to the current year under section 1366(d)(2)) in the following amounts: A—$5,000, B—$13,000, and C—$2,000. The combined $20,000 of disallowed losses and deductions for the taxable year of the discharge are treated as a current year net operating loss tax attribute of X under section 108(d)(7)(B) (deemed NOL).

(ii) Under section 108(b)(2)(A), X's $12,000 of excluded COD income reduces the $20,000 deemed NOL to $8,000. Therefore, X has an $8,000 excess net operating loss (excess deemed NOL) to allocate to its shareholders. Under paragraph (d)(2)(ii)(C) of this section, none of the $8,000 excess deemed NOL is allocated to C because C's section 1366(d) losses and deductions immediately prior to the section 108(b)(2)(A) reduction ($2,000) do not exceed C's share of the excluded COD income for 2008 ($3,000). However, each of A's and B's respective section 1366(d) losses and deductions immediately prior to the section 108(b)(2)(A) reduction exceed each of A's and B's respective shares of the excluded COD income for 2009. A's excess amount is $2,000 ($5,000 − $3,000) and B's excess amount is $7,000 ($13,000 − $6,000). Therefore, the total of all shareholders' excess amounts is $9,000. Under paragraph (d)(2) of this section, X will allocate $1,777.78 of the $8,000 excess deemed NOL to A ($8,000 × $2,000/$9,000) and $6,222.22 of the $8,000 excess deemed NOL to B ($8,000 × $7,000/$9,000). However, because A transferred all of her shares of stock in X in a transaction not described in section 1041(a), A's $1,777.78 of section 1366(d) losses and deductions are permanently disallowed under paragraph (d)(2)(iii) of this section. Accordingly, at the beginning of 2010, B has $6,222.22 of section 1366(d)(2) carryovers and C has no section 1366(d)(2) carryovers.

Example 7. The facts are the same as in *Example 6,* except that X, with the consent of A and C, makes a terminating election under section 1377(a)(2) upon A's sale of her stock in X to C. Therefore, the COD income (had it not been excluded) would have been allocated $6,000 to A, $6,000 to B, and $0 to C. Under paragraph (d)(2)(ii)(C) of this section, none of the $8,000 excess deemed NOL is allocated to A because A's section 1366(d) losses and deductions immediately prior to the section 108(b)(2)(A) reduction ($5,000) do not exceed A's share of the excluded COD income for 2009 ($6,000). However, each of B's and C's respective section 1366(d) losses and deductions immediately prior to the section 108(b)(2)(A) reduction exceed each of B's and C's respective shares of the excluded COD income for 2009. B's excess amount is $7,000 ($13,000 − $6,000), C's excess amount is $2,000 ($2,000 − $0). Therefore, the total of all shareholders' excess amounts is $9,000. Under paragraph (d)(2) of this section, X will allocate $6,222.22 of the $8,000 excess deemed NOL to B ($8,000 × $7,000/$9,000) and $1,777.78 of the $8,000 excess deemed NOL to C. Accordingly, at the beginning of 2010, B has $6,222.22 of section 1366(d)(2) carryovers and C has $1,777.78 of section 1366(d)(2) carryovers.

(f) *Effective/applicability date*—(1) Paragraphs (a), (b), (c), and *Examples 1, 2, 3,* and *4* of paragraph (e) of this section apply to discharges of indebtedness occurring on or after May 10, 2004.

(2) Paragraph (d) and *Examples 5, 6,* and *7* of paragraph (e) of this section apply to discharges of indebtedness occurring on or after October 30, 2009.

[T.D. 9080, 68 FR 42592, July 18, 2003; 68 FR 56556, Oct. 1, 2003. Redesignated and amended by T.D. 9127, 69 FR 26039, May 11, 2004; T.D. 9469, 74 FR 56111, Oct. 30, 2009]

§ 1.108–8 Indebtedness satisfied by partnership interest.

(a) *In general.* For purposes of determining income of a debtor from discharge of indebtedness (COD income), if a debtor partnership transfers a capital or profits interest in the partnership to a creditor in satisfaction of its recourse or nonrecourse indebtedness (a debt-for-equity exchange), the partnership is treated as having satisfied the indebtedness with an amount of money equal to the fair market value of the partnership interest.

(b) *Determination of fair market value*—(1) *In general.* All the facts and circumstances are considered in determining the fair market value of a partnership interest transferred by a debtor partnership to a creditor in satisfaction of the debtor partnership's indebtedness (debt-for-equity interest) for purposes of paragraph (a) of this section. If the fair market value of the debt-for-equity interest does not equal the fair market value of the indebtedness exchanged, then general tax law principles shall apply to account for the difference.

(2) *Safe harbor*—(i) *General rule.* For purposes of paragraph (a) of this section, the fair market value of a debt-for-equity interest is deemed to be equal to the liquidation value of the debt-for-equity interest, as defined in paragraph (b)(2)(iii) of this section, if the following requirements are satisfied—

(A) The creditor, debtor partnership, and its partners treat the fair market value of the indebtedness as being equal to the liquidation value of the debt-for-equity interest for purposes of determining the tax consequences of the debt-for-equity exchange;

(B) If, as part of the same overall transaction, the debtor partnership transfers more than one debt-for-equity interest to one or more creditors, then each creditor, debtor partnership, and its partners treat the fair market value of each debt-for-equity interest transferred by the debtor partnership to such creditors as equal to its liquidation value;

(C) The debt-for-equity exchange is a transaction that has terms that are comparable to terms that would be agreed to by unrelated parties negotiating with adverse interests; and

(D) Subsequent to the debt-for-equity exchange, the debtor partnership does not redeem the debt-for-equity interest, and no person bearing a relationship to the debtor partnership or its partners that is specified in section 267(b) or section 707(b) purchases the debt-for-equity interest, as part of a plan at the time of the debt-for-equity exchange that has as a principal purpose the avoidance of COD income by the debtor partnership.

(ii) *Tiered-partnership rule.* For purposes of this paragraph (b)(2), the liquidation value of a debt-for-equity interest in a partnership (upper-tier partnership) that directly or indirectly owns an interest in one or more partnerships (lower-tier partnership(s)) is determined by taking into account the liquidation value of such lower-tier partnership interests.

(iii) *Definition of liquidation value.* For purposes of this paragraph (b)(2), the liquidation value of a debt-for-equity interest equals the amount of cash that the creditor would receive with respect to the debt-for-equity interest if, immediately after the debt-for-equity exchange, the partnership sold all of its assets (including goodwill, going concern value, and any other intangibles) for cash equal to the fair market value of those assets and then liquidated.

(c) *Example.* The following example illustrates the provisions of this section:

Example. (i) AB partnership has $1,000 of outstanding indebtedness owed to C. C agrees to transfer to AB partnership the $1,000 indebtedness in a debt-for-equity exchange for a debt-for-equity interest in AB partnership. The liquidation value of C's debt-for-equity interest is $700, which is the amount of cash that C would receive with respect to that interest if, immediately after the debt-for-equity exchange, AB partnership sold all of its assets for cash equal to the fair market value of those assets and then liquidated. Each of the requirements of the liquidation value safe harbor described in paragraph (b)(2) of this section is satisfied.

(ii) Because the requirements in paragraph (b)(2) of this section are satisfied, the fair market value of C's debt-for-equity interest in AB partnership for purposes of determining AB partnership's COD income is the liquidation value of C's debt-for-equity interest, or $700. Accordingly, AB partnership is treated as satisfying the $1,000 indebtedness for $700 under section 108(e)(8).

(d) *Effective/applicability date.* This section applies to debt-for-equity exchanges occurring on or after November 17, 2011.

[T.D. 9557, 76 FR 71258, Nov. 17, 2011]

§ 1.108(c)–1T [Reserved]

§ 1.108(i)–0T Definitions (temporary).

(a) *Definitions.* For purposes of regulations under section 108(i)—

(1) *Acquisition.* An *acquisition*, with respect to any applicable debt instrument, includes an acquisition of the debt instrument for cash or other property, the exchange of the debt instrument for another debt instrument (including an exchange resulting from a modification of the debt instrument), the exchange of the debt instrument for corporate stock or a partnership interest, the contribution of the debt instrument to capital, the complete forgiveness of the indebtedness by the

holder of the debt instrument, and a direct or an indirect acquisition within the meaning of §1.108–2;

(2) *Applicable debt instrument.* An *applicable debt instrument* is a debt instrument that was issued by a C corporation or any other person in connection with the conduct of a trade or business by such person. In the case of an intercompany obligation (as defined in §1.1502–13(g)(2)(ii)), *applicable debt instrument* includes only an instrument for which COD income is realized upon the instrument's deemed satisfaction under §1.1502–13(g)(5);

(3) *C corporation issuer. C corporation issuer* means a C corporation that issues a debt instrument with any deferred OID deduction;

(4) *C corporation partner.* A *C corporation partner* is a C corporation that is a direct or indirect partner of an electing partnership or a related partnership;

(5) *COD income. COD income* means income from the discharge of indebtedness, as determined under sections 61(a)(12) and 108(a) and the regulations under those sections;

(6) *COD income amount.* A *COD income amount* is a partner's distributive share of COD income with respect to an applicable debt instrument of an electing partnership;

(7) *Debt instrument. Debt instrument* means a bond, debenture, note, certificate, or any other instrument or contractual arrangement constituting indebtedness (within the meaning of section 1275(a)(1));

(8) *Deferral period.* For a reacquisition that occurs in 2009, *deferral period* means the taxable year of the reacquisition and the four taxable years following such taxable year. For a reacquisition that occurs in 2010, *deferral period* means the taxable year of the reacquisition and the three taxable years following such taxable year;

(9) *Deferred amount.* A *deferred amount* is the portion of a partner's COD income amount with respect to an applicable debt instrument that is deferred under section 108(i);

(10) *Deferred COD income. Deferred COD income* means COD income that is deferred under section 108(i);

(11) *Deferred item.* A *deferred item* is any item of deferred COD income or deferred OID deduction that has not been previously taken into account under section 108(i);

(12) *Deferred OID deduction.* A *deferred OID deduction* means an otherwise allowable deduction for OID that is deferred under section 108(i)(2) with respect to a debt instrument issued (or treated as issued under section 108(e)(4)) in a debt-for-debt exchange described in section 108(i)(2)(A) or a deemed debt-for-debt exchange described in §1.108(i)–3T(a);

(13) *Deferred section 465 amount.* A *deferred section 465 amount* is described in paragraph (d)(3) of §1.108(i)–2T;

(14) *Deferred section 752 amount.* A *deferred section 752 amount* is described in paragraph (b)(3) of §1.108(i)–2T;

(15) *Direct partner.* A *direct partner* is a person that owns a direct interest in a partnership;

(16) *Electing corporation.* An *electing corporation* is a C corporation with deferred COD income by reason of a section 108(i) election;

(17) *Electing entity.* An *electing entity* is an entity that is a taxpayer that makes an election under section 108(i);

(18) *Electing member.* An *electing member* is an electing corporation that is a member of an affiliated group that files a consolidated return;

(19) *Electing partnership.* An *electing partnership* is a partnership that makes an election under section 108(i);

(20) *Electing S corporation.* An *electing S corporation* is an S corporation that makes an election under section 108(i);

(21) *Included amount.* An *included amount* is the portion of a partner's COD income amount with respect to an applicable debt instrument that is not deferred under section 108(i) and is included in the partner's distributive share of partnership income for the taxable year of the partnership in which the reacquisition occurs;

(22) *Inclusion period.* The *inclusion period* is the five taxable years following the last taxable year of the deferral period;

(23) *Indirect partner.* An *indirect partner* is a person that owns an interest in a partnership through an S corporation and/or one or more partnerships;

(24) *Issuing entity.* An *issuing entity* is any entity that is—

(i) A related partnership;

(ii) A related S corporation;

(iii) An electing partnership that issues a debt instrument (or is treated as issuing a debt instrument under section 108(e)(4)) in a debt-for-debt exchange described in section 108(i)(2)(A) or a deemed debt-for-debt exchange described in §1.108(i)–3T(a); or

(iv) An electing S corporation that issues a debt instrument (or is treated as issuing a debt instrument under section 108(e)(4)) in a debt-for-debt exchange described in section 108(i)(2)(A) or a deemed debt-for-debt exchange described in §1.108(i)–3T(a);

(25) *OID. OID* means original issue discount, as determined under sections 1271 through 1275 (and the regulations under those sections). If the amount of OID with respect to a debt instrument is less than a de minimis amount as determined under §1.1273–1(d), the OID is treated as zero for purposes of section 108(i)(2);

(26) *Reacquisition.* A *reacquisition,* with respect to any applicable debt instrument, is any event occurring after December 31, 2008 and before January 1, 2011, that causes COD income with respect to such applicable debt instrument, including any acquisition of the debt instrument by the debtor that issued (or is otherwise the obligor under) the debt instrument or a person related to such debtor (within the meaning of section 108(i)(5)(A));

(27) *Related partnership.* A *related partnership* is a partnership that is related to the electing entity (within the meaning of section 108(i)(5)(A)) and that issues a debt instrument in a debt-for-debt exchange described in section 108(i)(2)(A) or a deemed debt-for-debt exchange described in §1.108(i)–3T(a);

(28) *Related S corporation.* A *related S corporation* is an S corporation that is related to the electing entity (within the meaning of section 108(i)(5)(A)) and that issues a debt instrument in a debt-for-debt exchange described in section 108(i)(2)(A) or a deemed debt-for-debt exchange described in §1.108(i)–3T(a);

(29) *Separate interest.* A *separate interest* is a direct interest in an electing partnership or in a partnership or S corporation that is a direct or indirect partner of an electing partnership;

(30) *S corporation partner.* An *S corporation partner* is an S corporation that is a direct or indirect partner of an electing partnership or a related partnership.

(b) *Effective/Applicability dates*—(1) *In general.* This section, §1.108(i)–2T, and, except as provided in paragraph (b)(2) of this section, §1.108(i)–1T apply to reacquisitions of applicable debt instruments in taxable years ending after December 31, 2008. In addition, §1.108(i)–3T applies to debt instruments issued after December 31, 2008, in connection with reacquisitions of applicable debt instruments in taxable years ending after December 31, 2008.

(2) *Acceleration events*—(i) *In general.* Section 1.108(i)–1T(b) (acceleration rules) generally applies to acceleration events occurring on or after August 11, 2010. However, an electing corporation or C corporation issuer may apply the acceleration rules to all acceleration events occurring prior to August 11, 2010 by taking a return position consistent with these provisions beginning with the first acceleration event occurring prior to August 11, 2010. Also, in the case of a consolidated group, if the common parent of the consolidated group applies the acceleration rules on behalf of one member of the consolidated group, then the common parent must apply the acceleration rules to all acceleration events with respect to all members of the group. If the electing corporation, common parent (under the preceding sentence), or C corporation issuer, as the case may be, does not apply the acceleration rules to all acceleration events occurring prior to August 11, 2010, then it is, with respect to all deferred items, subject to the rules of section 108(i)(5)(D)(i).

(3) *Transitional rules*—(i) *Net value acceleration rule and corrective action to restore net value rule.* If an electing corporation applies the acceleration rules of §1.108(i)–1T(b) to all acceleration events occurring prior to August 11, 2010 and the due date of its tax return (including extensions) for the taxable year of the mandatory acceleration event occurs prior to August 11, 2010, then for purposes of the net value acceleration rule described in §1.108(i)–1T(b)(2)(iii), an electing corporation may restore value by the fifteenth day of the ninth month following August 11, 2010.

(ii) *Elective acceleration.* If an electing member cannot timely file an election under §1.108(i)–1T(b)(3) to accelerate its remaining deferred COD income by the due date of the electing member's tax return (including extensions) which occurs prior to August 11, 2010, then an amended return must be filed with the required information statement by the fifteenth day of the ninth month following August 11, 2010.

[T.D. 9497, 75 FR 49401, Aug. 13, 2010; 75 FR 57163, Sept. 20, 2010]

§ 1.108(i)–1T Deferred discharge of indebtedness income and deferred original issue discount deductions of C corporations (temporary).

(a) *Overview.* Section 108(i)(1) provides an election for the deferral of COD income arising in connection with the reacquisition of an applicable debt instrument. An electing corporation generally includes deferred COD income ratably over the inclusion period. Paragraph (b) of this section provides rules for the mandatory acceleration of an electing corporation's remaining deferred COD income, the mandatory acceleration of a C corporation issuer's deferred OID deductions, and for the elective acceleration of an electing member's (other than the common parent's) remaining deferred COD income. Paragraph (c) of this section provides examples illustrating the application of the mandatory and elective acceleration rules. Paragraph (d) of this section provides rules for the computation of an electing corporation's earnings and profits. Paragraph (e) of this section refers to the effective/applicability dates.

(b) *Acceleration events*—(1) *Deferred COD income.* Except as otherwise provided in paragraphs (b)(2) and (3) of this section, and §1.108(i)–2T(b)(6) (in the case of a corporate partner), an electing corporation's deferred COD income is taken into account ratably over the inclusion period.

(2) *Mandatory acceleration events.* An electing corporation takes into account all of its remaining deferred COD income, including its share of an electing partnership's deferred COD income, immediately before the occurrence of any one of the events described in this paragraph (b)(2) (mandatory acceleration events).

(i) *Changes in tax status.* The electing corporation changes its tax status. For purposes of the preceding sentence, an electing corporation is treated as changing its tax status if it becomes one of the following entities:

(A) A tax-exempt entity as defined in §1.337(d)–4(c)(2).

(B) An S corporation as defined in section 1361(a)(1).

(C) A qualified subchapter S subsidiary as defined in section 1361(b)(3)(B).

(D) An entity operating on a cooperative basis within the meaning of section 1381.

(E) A regulated investment company (RIC) as defined in section 851 or a real estate investment trust (REIT) as defined in section 856.

(F) A qualified REIT subsidiary as defined in section 856(i), but only if the qualified REIT subsidiary was not a REIT immediately before it became a qualified REIT subsidiary.

(ii) *Cessation of corporate existence*—(A) *In general.* The electing corporation ceases to exist for Federal income tax purposes.

(B) *Exception for section 381(a) transactions*—(*1*) *In general.* The electing corporation is not treated as ceasing to exist and is not required to take into account its remaining deferred COD income solely because its assets are acquired in a transaction to which section 381(a) applies. In such a case, the acquiring corporation succeeds to the electing corporation's remaining deferred COD income and becomes subject to section 108(i) and the regulations thereunder, including all reporting requirements, as if the acquiring corporation were the electing corporation. A transaction is not treated as one to which section 381(a) applies for purposes of this paragraph (b)(2)(ii)(B) in any one of the following circumstances:

(*i*) The acquisition of the assets of an electing corporation by an S corporation, if the acquisition is described in section 1374(d)(8).

(*ii*) The acquisition of the assets of an electing corporation by a RIC or REIT, if the acquisition is described in §1.337(d)–7(a)(2)(ii).

(*iii*) The acquisition of the assets of a domestic electing corporation by a foreign corporation.

(*iv*) The acquisition of the assets of a foreign electing corporation by a domestic corporation, if as a result of the transaction, one or more exchanging shareholders include in income as a deemed dividend the all earnings and profits amount with respect to stock in the foreign electing corporation pursuant to §1.367(b)–3(b)(3).

(*v*) The acquisition of the assets of an electing corporation by a tax-exempt entity as defined in §1.337(d)–4(c)(2).

(*vi*) The acquisition of the assets of an electing corporation by an entity operating on a cooperative basis within the meaning of section 1381.

(*2*) *Special rules for consolidated groups*—(*i*) *Liquidations*. For purposes of paragraph (b)(2)(ii)(B) of this section, the acquisition of assets by distributee members of a consolidated group upon the liquidation of an electing corporation is not treated as a transaction to which section 381(a) applies, unless immediately prior to the liquidation, one of the distributee members owns stock in the electing corporation meeting the requirements of section 1504(a)(2) (without regard to §1.1502–34). *See* §1.1502–80(g).

(*ii*) *Taxable years*. In the case of an intercompany transaction to which section 381(a) applies, the transaction does not cause the transferor or distributor to have a short taxable year for purposes of determining the taxable year of the deferral and inclusion period.

(iii) *Net value acceleration rule*—(A) *In general*. The electing corporation engages in an impairment transaction and, immediately after the transaction, the gross value of the electing corporation's assets (gross asset value) is less than one hundred and ten percent of the sum of its total liabilities and the tax on the net amount of its deferred items (the net value floor) (the net value acceleration rule). Impairment transactions are any transactions, however effected, that impair an electing corporation's ability to pay the amount of Federal income tax liability on its deferred COD income and include, for example, distributions (including section 381(a) transactions), redemptions, below-market sales, charitable contributions, and the incurrence of additional indebtedness without a corresponding increase in asset value. Value-for-value sales or exchanges (for example, an exchange to which section 351 or section 721 applies), or mere declines in the market value of the electing corporation's assets are not impairment transactions. In addition, an electing corporation's investments and expenditures in pursuance of its good faith business judgment are not impairment transactions. For purposes of determining an electing corporation's gross asset value, the amount of any distribution that is not treated as an impairment transaction under paragraph (b)(2)(iii)(D) of this section (distributions and charitable contributions consistent with historical practice) or under paragraph (b)(2)(iii)(E) of this section (special rules for RICs and REITs) is treated as an asset of the electing corporation. Solely for purposes of computing the amount of the net value floor, the tax on the deferred items is determined by applying the highest rate of tax specified in section 11(b) for the taxable year.

(B) *Transactions integrated*. Any transaction that occurs before the reacquisition of an applicable debt instrument, but that occurs pursuant to the same plan as the reacquisition, is taken into account in determining whether the gross asset value of the electing corporation is less than the net value floor.

(C) *Corrective action to restore net value*. An electing corporation is not required to take into account its deferred COD income under the net value acceleration rule of paragraph (b)(2)(iii)(A) of this section if, before the due date of the electing corporation's return (including extensions), value is restored in a transaction in an amount equal to the lesser of—

(*1*) The amount of value that was removed from the electing corporation in one or more impairment transactions (net of amounts previously restored under this paragraph (b)(2)(iii)(C)); or

(*2*) The amount by which the electing corporation's net value floor exceeds its gross asset value. For purposes of this paragraph (b)(2)(iii)(C), for example, assume an electing corporation incurs $50 of debt, distributes the $50 of proceeds to its shareholder, and immediately after the distribution, the electing corporation's gross asset value is below the net value floor by $25. The electing corporation may avoid the inclusion of its remaining deferred COD income if value of at least $25 is restored to it before the due date of the electing corporation's tax return (including extensions) for the taxable year that includes the distribution. The value that must be restored is determined at the time of the impairment transaction on a net value basis (for example, additional borrowings by an electing corporation do not restore value).

(D) *Exceptions for distributions and charitable contributions that are consistent with historical practice.* An electing corporation's distributions are not treated as impairment transactions (and are not taken into account as a reduction of the electing corporation's gross asset value when applying the net value acceleration rule to any impairment transaction), to the extent that the distributions are described in section 301(c) and the amount of these distributions, in the aggregate, for the applicable taxable year (applicable distribution amount) does not exceed the annual average amount of section 301(c) distributions over the preceding three taxable years (average distribution amount). If an electing corporation's applicable distribution amount exceeds its average distribution amount (excess amount), then the amount of the impairment transaction equals the excess amount. Appropriate adjustments must be made to take into account any issuances or redemptions of stock, or similar transactions, occurring during the year of distribution or any of the three preceding years. If the electing corporation has a short taxable year for the year of the distribution or for any of the three preceding years, the amounts are determined on an annualized basis. If an electing corporation has been in existence for less than three years, the period during which the electing corporation has been in existence is substituted for the preceding three taxable years. For purposes of determining an electing corporation's average distribution amount, the electing corporation does not take into account the distribution history of a distributor or transferor in a transaction to which section 381(a) applies (other than a transaction described in section 368(a)(1)(F)). Rules similar to those prescribed in this paragraph (b)(2)(iii)(D) also apply to an electing corporation's charitable contributions (within the meaning of section 170(c)) that are consistent with its historical practice.

(E) *Special rules for RICs and REITs*—(*1*) *Distributions.* Notwithstanding paragraph (b)(2)(iii)(D) of this section, in the case of a RIC or REIT, any distribution with respect to stock that is treated as a dividend under section 852 or 857 is not treated as an impairment transaction (and is not taken into account as a reduction in gross asset value when applying the net value acceleration rule to any impairment transaction).

(*2*) *Redemptions by RICs.* Any redemption of a redeemable security, as defined in 15 U.S.C. section 80a–2(a)(32), by a RIC in the ordinary course of business is not treated as an impairment transaction (and is not taken into account as a reduction in gross asset value when applying the net value acceleration rule to any impairment transaction).

(F) *Special rules for consolidated groups*—(*1*) *Impairment transactions and net value acceleration rule.* In the case of an electing member, the determination of whether the member has engaged in an impairment transaction is made on a group-wide basis. An electing member is treated as engaging in an impairment transaction if any member's transaction impairs the group's ability to pay the tax liability associated with all electing members' deferred COD income. Accordingly, intercompany transactions are not impairment transactions. Similarly, the net value acceleration rule is applied by reference to the gross asset value of all members (excluding stock of members whether or not described in section 1504(a)(4)), the liabilities of all members, and the tax on all members' deferred items. For example, assume P is the common parent of the P–S consolidated group, S has a section 108(i) election in effect, and S makes a $100 distribution to P which, on a separate entity basis, would reduce S's gross asset value below the net value floor. S's intercompany distribution to P is not an impairment transaction. However, if P makes a $100 distribution to its shareholder, P's distribution is an impairment transaction (unless the distribution is consistent with its historical practice under paragraph (b)(2)(iii)(D) of this section), and the net value acceleration rule is applied by reference to the assets, liabilities, and deferred items of the P–S group.

(*2*) *Departing member*. If an electing member that previously engaged in one or more impairment transactions on a separate entity basis ceases to be a member of a consolidated group (departing member), the cessation is treated as an impairment transaction and the net value acceleration rule under paragraph (b)(2)(iii)(A) of this section is applied to the departing member on a separate entity basis immediately after ceasing to be a member (and taking into account the impairment transaction(s) that occurred on a separate entity basis). If the departing member's gross asset value is below the net value floor, the departing member's remaining deferred COD income is taken into account immediately before the departing member ceases to be a member (unless value is restored under paragraph (b)(2)(iii)(C) of this section). If the departing member's deferred COD income is not accelerated, the departing member is subject to the reporting requirements of section 108(i) on a separate entity basis. If the departing member becomes a member of another consolidated group, the cessation is treated as an impairment transaction and the net value acceleration rule under paragraph (b)(2)(iii)(A) of this section is applied by reference to the assets, liabilities, and the tax on deferred items of the members of the acquiring group immediately after the transaction. If the acquiring group's gross asset value is below the net value floor, the departing member's remaining deferred COD income is taken into account immediately before the departing member ceases to be a member (unless value is restored under paragraph (b)(2)(iii)(C) of this section). If the departing member's remaining deferred COD income is not accelerated, the common parent of the acquiring group succeeds to the reporting requirements of section 108(i) with respect to the departing member.

(3) *Elective acceleration for certain consolidated group members*—(i) *In general*. An electing member (other than the common parent) of a consolidated group may elect at any time to accelerate in full (and not in part) the inclusion of its remaining deferred COD income with respect to all applicable debt instruments by filing a statement described in paragraph (b)(3)(ii) of this section. Once made, an election to accelerate deferred COD income under this paragraph (b)(3) is irrevocable.

(ii) *Time and manner for making election*—(A) *In general*. The election to accelerate the inclusion of an electing member's remaining deferred COD income with respect to all applicable debt instruments is made on a statement attached to a timely filed tax return (including extensions) for the year in which the deferred COD income is taken into account. The election is made by the common parent on behalf of the electing member. *See* §1.1502–77(a).

(B) *Additional information*. The statement must include—

(*1*) *Label*. A label entitled ''SECTION 1.108(i)–1T ELECTION AND INFORMATION STATEMENT BY [INSERT NAME AND EMPLOYER IDENTIFICATION NUMBER OF THE ELECTING MEMBER]''; and

(*2*) *Required information*. An identification of each applicable debt instrument to which an election under this paragraph (b)(3) applies and the corresponding amount of—

(*i*) Deferred COD income that is accelerated under this paragraph (b)(3); and

(*ii*) Deferred OID deductions that are accelerated under paragraph (b)(4) of this section.

(4) *Deferred OID deductions*—(i) *In general*. Except as otherwise provided in paragraph (b)(4)(ii) of this section and §1.108(i)–2T(b)(6) (in the case of a C corporation partner), a C corporation issuer's deferred OID deductions are

taken into account ratably over the inclusion period.

(ii) *OID acceleration events.* A C corporation issuer takes into account all of its remaining deferred OID deductions with respect to a debt instrument immediately before the occurrence of any one of the events described in this paragraph (b)(4)(ii).

(A) *Inclusion of deferred COD income.* An electing entity or its owners take into account all of the remaining deferred COD income to which the C corporation issuer's deferred OID deductions relate. If, under §1.108(i)–2T(b) or (c), an electing entity or its owners take into account only a portion of the deferred COD income to which the deferred OID deductions relate, then the C corporation issuer takes into account a proportionate amount of the remaining deferred OID deductions.

(B) *Changes in tax status.* The C corporation issuer changes its tax status within the meaning of paragraph (b)(2)(i) of this section.

(C) *Cessation of corporate existence*—(*1*) *In general.* The C corporation issuer ceases to exist for Federal income tax purposes.

(*2*) *Exception for section 381(a) transactions*—(*i*) *In general.* A C corporation issuer is not treated as ceasing to exist and does not take into account its remaining deferred OID deductions in a transaction to which section 381(a) applies, taking into account the application of §1.1502–34, as appropriate. *See* §1.1502–80(g). This exception does not apply to a transaction which is not treated as one to which section 381(a) applies under paragraph (b)(2)(iii)(B)(*1*) of this section.

(*ii*) *Taxable years.* In the case of an intercompany transaction to which section 381(a) applies, the transaction does not cause the transferor or distributor to have a short taxable year for purposes of determining the taxable year of the deferral and inclusion period.

(c) *Examples.* The application of this section is illustrated by the following examples. Unless otherwise stated, P, S, S1, and X are domestic C corporations, and each files a separate return on a calendar year basis:

Example 1. Net value acceleration rule. (i) *Facts.* On January 1, 2009, S reacquires its own note and realizes $400 of COD income. Pursuant to an election under section 108(i), S defers recognition of the entire $400 of COD income. Therefore, absent a mandatory acceleration event, S will take into account $80 of its deferred COD income in each year of the inclusion period. On December 31, 2010, S makes a $25 distribution to its sole shareholder, P, and this is the only distribution made by S in the past four years. Immediately following the distribution, S's gross asset value is $100, S has no liabilities, and the Federal income tax on S's $400 of deferred COD income is $140. Accordingly, S's net value floor is $154 (110% × $140).

(ii) *Analysis.* Under paragraph (b)(2)(iii)(A) of this section, S's distribution is an impairment transaction. Immediately following the distribution, S's gross asset value of $100 is less than the net value floor of $154. Accordingly, under the net value acceleration rule of paragraph (b)(2)(iii)(A) of this section, S takes into account its $400 of deferred COD income immediately before the distribution.

(iii) *Corrective action to restore value.* The facts are the same as in paragraph (i) of this *Example 1,* except that P contributes assets with a value of $25 to S before the due date of S's 2010 return (including extensions). Because P restores $25 of value to S (the lesser of the amount of value removed in the distribution ($25) or the amount by which S's net value floor exceeds its gross asset value ($54)), under paragraph (b)(2)(iii)(C) of this section, S does not take into account its $400 of deferred COD income.

Example 2. Distributions consistent with historical practice. (i) *Facts.* P, a publicly traded corporation, makes a valid section 108(i) election with respect to COD income realized in 2009. On December 31, 2009, P distributes $25 million on its 5 million shares of common stock outstanding. As of January 1, 2006, P has 10 million shares of common stock outstanding, and on March 31, 2006, P distributes $10 million on those 10 million shares. On September 15, 2006, P effects a 2:1 reverse stock split, and on December 31, 2006, P distributes $10 million on its 5 million shares of common stock outstanding. In each of 2007 and 2008, P distributes $5 million on its 5 million shares of common stock outstanding. All of the distributions are described in section 301(c).

(ii) *Amount of impairment transaction.* Under paragraph (b)(2)(iii)(D) of this section, P's 2009 distributions are not treated as impairment transactions (and are not taken into account as a reduction of P's gross asset value when applying the net value acceleration rule to any impairment transaction), to the extent that the aggregate amount distributed in 2009 (the applicable distribution amount) does not exceed the annual average amount of distributions (the average distribution amount) over the preceding three taxable years. Accordingly, P's applicable distribution amount for 2009 is $25 million, and its average distribution amount is $10 million ($20 million (2006) plus $5 million (2007) plus $5 million (2008) divided by 3). The reverse stock split in 2006 is not a transaction requiring an adjustment to the determination of the average distribution amount. Because P's applicable distribution amount of $25 million exceeds its average distribution amount of $10 million, under paragraph (b)(2)(iii)(D) of this section, the amount of P's 2009 distribution that is treated as an impairment transaction is $15 million. The balance of the 2009 distribution, $10 million, is not treated as an impairment transaction (and is not taken into account as a reduction in P's gross asset value when applying the net value acceleration rule to any impairment transaction).

(iii) *Distribution history*. The facts are the same as in paragraph (i) of this *Example 2*, except that in 2010, P merges into X in a transaction to which section 381(a) applies, with X succeeding to P's deferred COD income, and X makes a distribution to its shareholders. For purposes of determining whether X's distribution is consistent with its historical practice, the average distribution amount is determined solely with respect to X's distribution history.

Example 3. Cessation of corporate existence. (i) *Transaction to which section 381(a) applies*. P owns all of the stock of S. In 2009, S reacquires its own note and elects to defer recognition of its $400 of COD income under section 108(i). On December 31, 2010, S liquidates into P in a transaction that qualifies under section 332. Under paragraph (b)(2) of this section, S must take into account all of its remaining deferred COD income upon the occurrence of any one of the mandatory acceleration events. Although S ceases its corporate existence as a result of the liquidation, S is not required to take into account its remaining deferred COD income under the exception in paragraph (b)(2)(ii)(B) of this section because its assets are acquired in a transaction to which section 381(a) applies. However, under paragraph (b)(2)(iii)(A) of this section, S's distribution to P is an impairment transaction and the net value acceleration rule is applied with respect to the assets, liabilities, and deferred items of P (S's successor) immediately following the distribution. If S's deferred COD income is not taken into account under the net value acceleration rule of (b)(2)(iii) of this section, P succeeds to S's remaining deferred COD income and to S's reporting requirements as if P were the electing corporation.

(ii) *Debt-laden distributee*. The facts are the same as in paragraph (i) of this *Example 3*, except that in the liquidation, S distributes $100 of assets to P, a holding company whose only asset is its stock in S. Assume that immediately following the distribution, P's gross asset value is $100, P has $60 of liabilities, and the Federal income tax on the $400 of deferred COD income is $140. Under paragraph (b)(2) of this section, S must take into account all of its remaining deferred COD income upon the occurrence of any one of the mandatory acceleration events. Although S ceases its corporate existence as a result of the liquidation, S is not required to take into account its remaining deferred COD income under the exception in paragraph (b)(2)(ii)(B) of this section because its assets are acquired in a transaction to which section 381(a) applies. However, under paragraph (b)(2)(iii)(A) of this section, S's distribution to X is an impairment transaction and the net value acceleration rule is applied with respect to the assets, liabilities, and deferred items of P (S's successor). Immediately following the distribution, P's gross asset value of $100 is less than the net value floor of $220 [110% × ($60 + $140)]. Accordingly, under the net value acceleration rule of paragraph (b)(2)(iii)(A) of this section, S is required to take into account its $400 of deferred COD income immediately before the distribution, unless value is restored to P pursuant to (b)(2)(iii)(C) of this section.

(iii) *Foreign acquirer*. The facts are the same as in paragraph (i) of this *Example 3*, except that P is a foreign corporation. Although S's assets are acquired in a transaction to which section 381(a) applies, under paragraph (b)(2)(ii)(B)(*1*)(*iii*) of this section, the exception to accelerated inclusion does not apply and S takes into account its remaining deferred COD income immediately before the liquidation. *See* also section 367(e)(2) and the regulations thereunder.

(iv) *Section 338 transaction*. P, the common parent of a consolidated group (P group), owns all the stock of S1, one of the members of the P group. In 2009, S1 reacquires its own indebtedness and realizes $30 of COD income. Pursuant to an election under section 108(i), S1 defers recognition of the entire $30 of COD income. In 2010, P sells all the stock of S1 to X, an unrelated corporation, for $300, and P and X make a timely section 338(h)(10) election with respect to the sale. Under paragraph (b)(2)(ii)(A) of this section, an electing corporation takes into account its remaining deferred COD income when it ceases its existence for Federal income tax purposes unless the exception in paragraph (b)(2)(ii)(B) of this section applies. Pursuant to section 338(h)(10) and the regulations, S1 is treated as transferring all of its assets to an unrelated person in exchange for consideration that includes the discharge of its liabilities. This deemed value-for-value exchange is not an impairment transaction. Following the deemed sale, while S1 is still a member of the P group, S1 is treated as distributing all of its assets to P and as ceasing its existence. Under these facts, the distribution of all of S1's assets constitutes a deemed liquidation, and is a transaction to which sections 332 and 381(a) apply. Although S1 ceases its corporate existence as a result of the liquidation, S1 is not required to take into account its remaining deferred COD income under the exception in paragraph (b)(2)(ii)(B) of this section because its assets are acquired in a transaction to which section 381(a) applies. P succeeds to S1's remaining deferred COD income and to S1's reporting requirements as if P were the electing corporation. Under paragraph (b)(2)(iii)(F)(*1*) of this section, the intercompany distribution from S1 to P is not an impairment transaction.

(d) *Earnings and profits*—(1) *In general*. Deferred COD income increases earnings and profits in the taxable year that it is realized and not in the taxable year or years that the deferred COD income is includible in gross income. Deferred OID deductions decrease earnings and profits in the taxable year or years in which the deduction would be allowed without regard to section 108(i).

(2) *Exceptions*—(i) *RICs and REITs*. Notwithstanding paragraph (d)(1) of this section, deferred COD income increases earnings and profits of a RIC or REIT in the taxable year or years in which the deferred COD income is includible in gross income and not in the year that the deferred COD income is realized. Deferred OID deductions decrease earnings and profits of a RIC or REIT in the taxable year or years that the deferred OID deductions are deductible.

(ii) *Alternative minimum tax*. For purposes of calculating alternative minimum taxable income, any items of deferred COD income or deferred OID deduction increase or decrease, respectively, adjusted current earnings under section 56(g)(4) in the taxable year or years that the item is includible or deductible.

(e) *Effective/applicability dates*. For *effective/applicability dates, see* §1.108(i)–0T(b).

(f) *Expiration date*. This section expires August 9, 2013.

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§ 1.108(i)–2T Application of section 108(i) to partnerships and S corporations (temporary).

(a) *Overview*. Under section 108(i), a partnership or an S corporation may elect to defer COD income arising in connection with a reacquisition of an applicable debt instrument for the deferral period. COD income deferred under section 108(i) is included in gross income ratably over the inclusion period, or earlier upon the occurrence of any acceleration event described in paragraph (b)(6) or (c)(3) of this section. If a debt instrument is issued (or treated as issued under section 108(e)(4)) in a debt-for-debt exchange described in section 108(i)(2)(A) or a deemed debt-for-debt exchange described in §1.108(i)–3T(a), some or all of the deductions for OID with respect to such debt instrument must be deferred during the deferral period. The aggregate amount of OID deductions deferred during the deferral period is generally allowed as a deduction ratably over the inclusion period, or earlier upon the occurrence of any acceleration event described in paragraph (b)(6) or (c)(3) of this section. Paragraph (b) of this section provides rules that apply to partnerships. Paragraph (c) of this section provides rules that apply to S corporations. Paragraph (d) of this section provides general rules that apply to partnerships and S corporations. Paragraph (e) of this section provides election procedures and reporting requirements. Paragraph (f) of this section contains the effective/applicability date. *See* §1.108(i)–0T(a) for definitions that apply to this section.

(b) *Specific rules applicable to partnerships*—(1) *Allocation of COD income and partner's deferred amounts*. An electing partnership that defers any portion of COD income realized from a reacquisition of an applicable debt instrument under section 108(i) must allocate all of the COD income with respect to the applicable debt instrument to its direct partners that are partners in the electing partnership immediately before the reacquisition in the manner in which the income would be included in the distributive shares of the partners under section 704 and the regulations under section 704, including §1.704–1(b)(2)(iii), without regard to section

108(i). The electing partnership may determine, in any manner, the portion, if any, of a partner's COD income amount with respect to an applicable debt instrument that is the deferred amount, and the portion, if any, that is the included amount. However, no partner's deferred amount with respect to an applicable debt instrument may exceed that partner's COD income amount with respect to such applicable debt instrument, and the aggregate amount of the partners' COD income amounts and deferred amounts with respect to each applicable debt instrument must equal the electing partnership's COD income amount and deferred amount, respectively, with respect to each such applicable debt instrument.

(2) *Basis adjustments and capital account maintenance*—(i) *Basis adjustments*. The adjusted basis of a partner's interest in a partnership is not increased under section 705(a)(1) by the partner's deferred amount in the taxable year of the reacquisition. The adjusted basis of a partner's interest in a partnership is not decreased under section 705(a)(2) by the partner's share of any deferred OID deduction in the taxable year in which the deferred OID accrues. The adjusted basis of a partner's interest in a partnership is adjusted under section 705(a) by the partner's share of the electing partnership's deferred items for the taxable year in which the partner takes into account such deferred items under this section.

(ii) *Capital account maintenance*. For purposes of maintaining a partner's capital account under §1.704–1(b)(2)(iv) and notwithstanding §1.704–1(b)(2)(iv)(*n*), the capital account of a partner of a partnership is adjusted under §1.704–1(b)(2)(iv) for a partner's share of an electing partnership's deferred items as if no election under section 108(i) were made.

(3) *Deferred section 752 amount*—(i) *In general*. An electing partnership shall determine, for each of its direct partners with a deferred amount, the partner's deferred section 752 amount, if any, with respect to an applicable debt instrument. A partner's deferred section 752 amount with respect to an applicable debt instrument equals the decrease in the partner's share of a partnership liability under section 752(b) resulting from the reacquisition of the applicable debt instrument that is not treated as a current distribution of money under section 752(b) by reason of section 108(i)(6) (deferred section 752 amount). A partner's deferred section 752 amount is treated as a distribution of money by the partnership to the partner under section 752(b), at the same time and to the extent remaining in the same amount, as the partner recognizes the deferred amount with respect to the applicable debt instrument.

(ii) *Electing partnership's computation of a partner's deferred section 752 amount*. To compute a partner's deferred section 752 amount, the electing partnership must first determine the amount of gain that its direct partner would recognize in the taxable year of a reacquisition under section 731 as a result of the reacquisition of one or more applicable debt instruments during the taxable year absent the deferral provided in the second sentence of section 108(i)(6) (the section 108(i)(6) deferral). If a direct partner of an electing partnership would not recognize any gain under section 731 as a result of the reacquisition of one or more applicable debt instruments during the taxable year absent the section 108(i)(6) deferral, the partner will not have a deferred section 752 amount with respect to any applicable debt instrument that is reacquired during the taxable year. If a direct partner of an electing partnership would recognize gain under section 731 as a result of the reacquisition of one or more applicable debt instruments during the taxable year absent the section 108(i)(6) deferral, the partner's deferred section 752 amount for all applicable debt instruments that are reacquired during the taxable year is equal to the lesser of the partner's aggregate deferred amounts from the electing partnership for all applicable debt instruments reacquired during the taxable year, or the gain that the partner would recognize in the taxable year of the reacquisitions under section 731 as a result of the reacquisitions absent the section 108(i)(6) deferral. In determining the amount of gain that the direct partner would recognize in the taxable year of a reacquisition under section 731 as a result of the reacquisition of one or more applicable debt instruments during the taxable year absent the section 108(i)(6) deferral, the rule under §1.731–1(a)(1)(ii) applies to any deemed distribution of money under section 752(b) resulting from a decrease in the partner's share of a reacquired applicable debt instrument that is treated as an advance or drawing of money. The amount of any deemed distribution of money under section 752(b) resulting from a decrease in the partner's share of a reacquired applicable debt instrument that is treated as an advance or drawing of money under §1.731–1(a)(1)(ii) is determined as if no COD income resulting from the reacquisition of the applicable debt instrument is deferred under section 108(i).

(iii) *Multiple section 108(i) elections.* If a direct partner of an electing partnership has a deferred section 752 amount under paragraph (b)(3)(ii) of this section for the taxable year of a reacquisition and the partner has a deferred amount with respect to more than one applicable debt instrument from the electing partnership for which a section 108(i) election is made in that taxable year, the partner's deferred section 752 amount with respect to each such applicable debt instrument equals the partner's deferred section 752 amount as determined under paragraph (b)(3)(ii) of this section, multiplied by a ratio, the numerator of which is the partner's deferred amount with respect to such applicable debt instrument, and the denominator of which is the partner's aggregate deferred amounts from the electing partnership for all applicable debt instruments reacquired during the taxable year.

(iv) *Electing partnership's request for information.* At the request of an electing partnership, each direct partner of the electing partnership that has a deferred amount with respect to such partnership must provide to the electing partnership a written statement containing information requested by the partnership that is necessary to determine the partner's deferred section 752 amount (such as the partner's adjusted basis in the partner's interest in the electing partnership). The written statement must be signed under penalties of perjury and provided to the requesting partnership within 30 days of the date of the request by the electing partnership.

(v) *Examples.* The following examples illustrate the rules under paragraph (b)(3) of this section:

Example 1. (i) A and B each hold a 50 percent interest in Partnership, a calendar-year partnership. As of January 1, 2009, A and B each have an adjusted basis of $50 in their partnership interests. Partnership has two applicable debt instruments outstanding, debt one of $300 and debt two of $200. On March 1, 2009, debt one is cancelled and Partnership realizes $300 of COD income. On December 1, 2009, debt two is cancelled and Partnership realizes $200 of COD income. The Partnership has no other income or loss items for 2009. A and B are each allocated $150 of COD income from debt one and $100 of COD income from debt two. Partnership makes an election under section 108(i) to defer $225 of the $300 of COD income realized from the reacquisition of debt one, $150 of which is A's deferred amount, and $75 of which is B's deferred amount. Partnership also makes an election under section 108(i) to defer $125 of the $200 of COD income realized from the reacquisition of debt two, $100 of which is A's deferred amount, and $25 of which is B's deferred amount. A has no included amount for either debt. B has an included amount of $75 with respect to debt one and an included amount of $75 with respect to debt two for 2009.

(ii) Under paragraph (b)(3)(ii) of this section, the amount of gain that A would recognize under section 731 as a result of the reacquisitions absent the section 108(i)(6) deferral is $200. Thus, A's deferred section 752 amount with respect to debt one and debt two equals $200 (the lesser of A's aggregate deferred amounts with respect to debt one and debt two of $250, or gain that A would recognize under section 731 in 2009, as a result of the reacquisitions absent the section 108(i)(6) deferral, of $200). Under paragraph (b)(3)(iii) of this section, $120 of A's $200 deferred section 752 amount relates to debt one ($200 × $150/$250) and $80 relates to debt two ($200 × $100/$250).

(iii) Under paragraph (b)(3)(ii) of this section, the amount of gain that B would recognize under section 731 as a result of the reacquisitions absent the section 108(i)(6) deferral is $50. Thus, B's deferred section 752 amount with respect to debt one and debt two equals $50 (the lesser of B's aggregate deferred amounts with respect to debt one and debt two of $100, or gain that B would recognize under section 731 in 2009, as a result of the reacquisitions absent the section 108(i)(6) deferral, of $50). Under paragraph (b)(3)(iii) of this section, $37.50 of B's $50 deferred section

752 amount relates to debt one ($50 × $75/$100) and $12.50 relates to debt two ($50 × $25/$100).

Example 2. (i) The facts are the same as in *Example 1*, except that Partnership has gross income for the year (including the $500 of COD income) of $700 and other separately stated losses of $500. A's and B's distributive share of each item is 50 percent.

(ii) In determining the amount of gain that A would recognize under section 731 as a result of the reacquisitions absent the section 108(i)(6) deferral, Partnership first increases A's $50 adjusted basis in his interest in Partnership by A's distributive share of Partnership income (other than the deferred amounts relating to debt one and debt two) of $100, and then decreases A's adjusted basis in Partnership by deemed distributions under section 752(b) of $250 and, thereafter, by A's distributive share of Partnership losses of $250, but only to the extent that A's basis is not reduced below zero. Under paragraph (b)(3)(ii) of this section, the amount of gain that A would recognize under section 731 as a result of the reacquisitions absent section 108(i)(6) deferral is $100. Thus, A's deferred section 752 amount with respect to debt one and debt two equals $100 (the lesser of A's aggregate deferred amounts with respect to debt one and debt two of $250, or gain that A would recognize under section 731 as a result of the reacquisitions absent the deferral section 108(i)(6) deferral of $100). Under paragraph (b)(3)(iii) of this section, A's deferred section 752 amount with respect to debt one is $60 ($100 × $150/$250), and A's deferred section 752 amount with respect to debt two is $40 ($100 × $100/$250). A's $250 of Partnership losses are suspended under section 704(d).

(iii) In determining the amount of gain that B would recognize under section 731 as a result of the reacquisitions absent the section 108(i)(6) deferral, Partnership first increases B's $50 adjusted basis in his interest in Partnership by B's distributive share of Partnership income (other than the deferred amounts relating to debt one and debt two) of $250 ($100 other income plus 150 included amount with respect to debt one and debt two), and then decreases B's adjusted basis in Partnership by deemed distributions under section 752(b) of $250 and, thereafter, by B's distributive share of Partnership losses of $250, but only to the extent that B's basis is not reduced below zero. Under paragraph (b)(3)(ii) of this section, B would not recognize any gain under section 731 as a result of the reacquisitions absent the section 108(i)(6) deferral. Thus, B has no deferred section 752 amount with respect to either debt one or debt two. B may deduct his distributive share of Partnership losses to the extent of $50, with the remaining $200 suspended under section 704(d).

(4) *Tiered partnerships*—(i) *In general.* If a partnership (upper-tier partnership) is a direct or indirect partner of an electing partnership and directly or indirectly receives an allocation of a COD income amount from the electing partnership, all or a portion of which is deferred under section 108(i), the upper-tier partnership must allocate its COD income amount to its partners that are partners in the upper-tier partnership immediately before the reacquisition in the manner in which the income would be included in the distributive shares of the partners under section 704 and the regulations under section 704, including §1.704–1(b)(2)(iii), without regard to section 108(i). The upper-tier partnership may determine, in any manner, the portion, if any, of a partner's COD income amount with respect to an applicable debt instrument that is the deferred amount, and the portion, if any, that is the included amount. However, no partner's deferred amount with respect to an applicable debt instrument may exceed that partner's COD income amount with respect to such applicable debt instrument, and the aggregate amount of the partners' COD income amounts and deferred amounts with respect to each applicable debt instrument must equal the upper-tier partnership's COD income amount and deferred amount, respectively, with respect to each such applicable debt instrument.

(ii) *Deferred section 752 amount.* The computation of a partner's deferred section 752 amount, as described in paragraph (b)(3)(ii) of this section, is calculated only for direct partners of the electing partnership. An upper-tier partnership's deferred section 752 amount with respect to an applicable debt instrument of the electing partnership is allocated only to those partners of the upper-tier partnership that have a deferred amount with respect to that applicable debt instrument, and in proportion to such partners' share of the upper-tier partnership's deferred amount with respect to that applicable debt instrument. A partner's share of the upper-tier partnership's deferred section 752 amount with respect to an applicable debt instrument must not exceed that partner's share of the upper-tier partnership's deferred amount with respect to the applicable debt instrument to which the deferred section 752 amount relates. The deferred section 752 amount of a partner of an upper-tier partnership is treated as a distribution of money by the upper-tier partnership to the partner under section 752(b), at the same time and to the extent remaining in the same amount, as the partner recognizes the deferred amount with respect to the applicable debt instrument.

(iii) *Examples*. The following examples illustrate the rules under paragraph (b)(4) of this section:

Example 1. (i) PRS, a calendar-year partnership, has two equal partners, A, an individual, and XYZ, a partnership. As of January 1, 2009, A and XYZ each have an adjusted basis of $50 in their partnership interests. PRS has a $500 applicable debt instrument outstanding. On June 1, 2009, the creditor agrees to cancel the $500 indebtedness. PRS realizes $500 of COD income as a result of the reacquisition. PRS has no other income or loss items for 2009. PRS makes an election under section 108(i) to defer $200 of the $500 of COD income. PRS allocates the $500 of COD income equally between its partners ($250 each). PRS determines that, for each partner, $100 of the COD income amount is the deferred amount, and $150 is the included amount. For 2009, each of A's and XYZ's share of the decrease in PRS's reacquired applicable debt instrument is $250.

(ii) XYZ has two equal partners, individuals X and Y. X and Y share equally in XYZ's liabilities. XYZ allocates the $250 COD income amount from PRS equally between X and Y ($125 each). XYZ determines that X has a deferred amount of $100 and an included amount of $25. All $125 of Y's COD income amount is Y's included amount. For 2009, each of X's and Y's share of XYZ's $250 decrease in liability with respect to the reacquired applicable debt instrument of PRS is $125.

(iii) Under paragraph (b)(3)(ii) of this section, PRS determines that XYZ has a deferred section 752 amount of $50. Therefore, for 2009, of XYZ's $250 share of the decrease in PRS's reacquired applicable debt instrument, $200 is treated as a deemed distribution under section 752(b) and $50 is the deferred section 752 amount.

(iv) Under paragraph (b)(4)(ii) of this section, none of XYZ's $50 deferred section 752 amount is allocated to Y because Y does not have a deferred amount with respect to the reacquired applicable debt interest. XYZ's entire $50 of deferred section 752 amount is allocated to X. Therefore, of X's $125 share of the XYZ's decrease in liability with respect to the reacquired applicable debt instrument of PRS, $75 is treated as a deemed distribution under section 752(b) and $50 is X's deferred section 752 amount. Y's $125 share of XYZ's decrease in liability with respect to the reacquired applicable debt instrument of PRS is treated as a deemed distribution under section 752(b) and none is a deferred section 752 amount.

Example 2. (i) The facts are the same as in *Example 1*, except for the following: XYZ has three partners, X, Y, and Z. The profits and losses of XYZ are shared 25 percent by X, 25 percent by Y, and 50 percent by Z. XYZ allocates its $250 COD income amount from PRS $62.50 to each of X and Y, and $125 to Z. XYZ determines that X has a deferred amount of $50 and an included amount of $12.50, Y has a deferred amount of $0 and an included amount of $62.50, and Z has a deferred amount of $50 and an included amount of $75 with respect to the applicable debt instrument. X's, Y's, and Z's share of XYZ's decrease in liability with respect to the reacquired applicable debt instrument of PRS is $62.50, $62.50 and $125, respectively.

(ii) Under paragraph (b)(4)(ii) of this section, none of XYZ's $50 deferred section 752 amount is allocated to Y because Y does not have a deferred amount with respect to the reacquired applicable debt instrument. XYZ's $50 deferred section 752 amount is allocated to X and Z in proportion to X's and Z's share of XYZ's deferred amount, or $25 each ($50 × ($50/$100)). Therefore, of X's $62.50 share of XYZ's decrease in liability with respect to the reacquired applicable debt instrument, $37.50 is treated as a deemed distribution under section 752(b) and $25 is X's deferred section 752 amount. All of Y's $62.50 share of XYZ's decrease in liability with respect to the reacquired applicable debt instrument is treated as a deemed distribution under section 752(b). Of Z's $125 share of XYZ's decrease in liability with respect to the reacquired applicable debt instrument, $100 is treated as a deemed distribution under section 752(b) and $25 is Z's deferred section 752 amount.

(5) *S corporation partner*—(i) *In general*. If an S corporation partner has a deferred amount with respect to an applicable debt instrument of an electing partnership, such deferred amount is shared pro rata only among those shareholders that are shareholders of the S corporation partner immediately before the reacquisition of the applicable debt instrument.

(ii) *Basis adjustments*. The adjusted basis of a shareholder's stock in an S corporation partner is not increased under section 1367(a)(1) by the shareholder's share of the S corporation partner's deferred amount in the taxable year of the reacquisition. The adjusted basis of a shareholder's stock in an S corporation partner is not decreased under section 1367(a)(2) by the shareholder's share of the S corporation partner's deferred OID deduction in the taxable year in which the deferred OID accrues. The adjusted basis of a shareholder's stock in an S corporation partner is adjusted under section 1367(a) by the shareholder's share of the S corporation partner's share of the electing partnership's deferred items for the taxable year in which the shareholder takes into account its share of such deferred items under this section.

(iii) *Accumulated adjustments account.* The accumulated adjustments account (AAA), as defined in section 1368(e)(1), of an S corporation partner that has a deferred amount with respect to an applicable debt instrument of an electing partnership is not increased by its deferred amount in the taxable year of the reacquisition. The AAA of an S corporation partner is not decreased by its share of any deferred OID deduction in the taxable year in which the deferred OID accrues. The AAA of an S corporation partner is adjusted under section 1368(e) by a shareholder's share of the S corporation partner's share of the electing partnership's deferred items for the S period (as defined in section 1368(e)(2)) in which the shareholder of the S corporation partner takes into account its share of the deferred items under this section.

(6) *Acceleration of deferred items*—(i) *Electing partnership-level events*—(A) *General rules.* Except as provided in paragraph (b)(6)(iii) of this section, a direct or indirect partner's share of an electing partnership's deferred items is accelerated and must be taken into account by such partner—

(*1*) In the taxable year in which the electing partnership liquidates;

(*2*) In the taxable year in which the electing partnership sells, exchanges, transfers (including contributions and distributions), or gifts substantially all of its assets;

(*3*) In the taxable year in which the electing partnership ceases doing business; or

(*4*) In the taxable year that includes the day before the day on which the electing partnership files a petition in a title 11 or similar case.

(B) *Substantially all requirement.* For purposes of this paragraph (b)(6), substantially all of a partnership's assets means assets representing at least 90 percent of the fair market value of the net assets, and at least 70 percent of the fair market value of the gross assets, held by the partnership immediately prior to the sale, exchange, transfer, or gift. For purposes of applying the rule in paragraph (b)(6)(i)(A)(*2*) of this section, a sale, exchange, transfer, or gift by any direct or indirect lower-tier partnership of the electing partnership (lower-tier partnership) of all or part of its assets is not treated as a sale, exchange, transfer, or gift of the assets of any partnership that holds, directly or indirectly, an interest in such lower-tier partnership. However, for purposes of applying the rule in paragraph (b)(6)(i)(A)(*2*) of this section, a sale, exchange, transfer, or gift of substantially all of the assets of a transferee partnership (as described in paragraph (b)(6)(iii)(A)(*1*) of this section), or of a lower-tier partnership that received assets of the electing partnership from a transferee partnership or another lower-tier partnership in a transaction governed all or in part by section 721, is treated as a sale, exchange, transfer, or gift by the holder of an interest in such transferee partnership or lower-tier partnership of its entire interest in that transferee partnership or lower-tier partnership.

(ii) *Direct or indirect partner-level events*—(A) *General rules.* Except as provided in paragraph (b)(6)(iii) of this section, a direct or indirect partner's share of an electing partnership's deferred items with respect to a separate interest is accelerated and must be taken into account by such partner in the taxable year in which—

(*1*) The partner dies or liquidates;

(*2*) The partner sells, exchanges (including redemptions treated as exchanges under section 302), transfers (including contributions and distributions), or gifts (including transfers treated as gifts under section 1041) all or a portion of its separate interest;

(*3*) The partner's separate interest is redeemed within the meaning of paragraph (b)(6)(ii)(B)(*2*) of this section; or

(*4*) The partner abandons its separate interest.

(B) *Meaning of terms; special rules*—(*1*) *Partial transfers*. For purposes of paragraph (b)(6)(ii)(A)(*2*) of this section, if a partner sells, exchanges (including redemptions treated as exchanges under section 302), transfers (including contributions and distributions), or gifts (including transfers treated as gifts under section 1041) a portion of its separate interest, such partner's share of the electing partnership's deferred items with respect to the separate interest proportionate to the separate interest sold, exchanged, transferred, or gifted is accelerated and must be taken into account by such partner.

(*2*) *Redemptions*. For purposes of paragraph (b)(6)(ii)(A)(*3*) of this section, a partner's separate interest is redeemed if the partner receives a distribution of cash and/or property in complete liquidation of such separate interest.

(*3*) *S corporation partners*. In addition to the rules in paragraphs (b)(6)(i) and (ii) of this section, an S corporation partner's share of the electing partnership's deferred items is accelerated and the shareholders of the S corporation partner must take into account their respective shares of the S corporation partner's share of the electing partnership's deferred items in the taxable year in which the S corporation partner's election under section 1362(a) terminates.

(*4*) *C corporation partners*. In addition to the rules in paragraphs (b)(6)(i), (ii), and (iii) of this section, the acceleration rules in §1.108(i)–1T(b) and the earnings and profits rules in §1.108(i)–1T(d) apply to partners that are electing corporations.

(iii) *Events not constituting acceleration*. Notwithstanding the rules in paragraphs (b)(6)(i) and (ii) of this section, a direct or indirect partner's share of an electing partnership's deferred items with respect to a separate interest is not accelerated by any of the events described in this paragraph (b)(6)(iii).

(A) *Section 721 contributions*—(*1*) *Electing partnership contributions*. A direct or indirect partner's share of an electing partnership's deferred items is not accelerated if the electing partnership contributes all or a portion of its assets in a transaction governed all or in part by section 721(a) to another partnership (transferee partnership) in exchange for an interest in the transferee partnership provided that the electing partnership does not terminate under section 708(b)(1)(A) or transfer its assets and liabilities in a transaction described in section 708(b)(2)(A) or section 708(b)(2)(B). *See* paragraph (b)(6)(iii)(D) of this section for transactions governed by section 708(b)(2)(A). Notwithstanding the rules in this paragraph (b)(6)(iii)(A)(*1*), the rules in paragraphs (b)(6)(i)(A) and (b)(6)(ii)(A) of this section apply to any part of the transaction to which section 721(a) does not apply.

(*2*) *Partner contributions*. A direct or indirect partner's share of an electing partnership's deferred items with respect to a separate interest is not accelerated if the holder of such interest (contributing partner) contributes its entire separate interest (contributed separate interest) in a transaction governed all or in part by section 721(a) to another partnership (transferee partnership) in exchange for an interest in the transferee partnership provided that the partnership in which the separate interest is held does not terminate under section 708(b)(1)(A) or transfer its assets and liabilities in a transaction described in section 708(b)(2)(A) or section 708(b)(2)(B). *See* paragraph (b)(6)(iii)(D) of this section for transactions governed by section 708(b)(2)(A). The transferee partnership becomes subject to section 108(i), including all reporting requirements under this section, with respect to the contributing partner's share of the electing partnership's deferred items associated with the contributed separate interest. The transferee partnership must allocate and report the share of the electing partnership's deferred items that is associated with the contributed separate interest to the contributing partner to the same extent that such share of the electing partnership's deferred items would have been allocated and reported to the contributing partner in the absence of such contribution. Notwithstanding the rules in this paragraph (b)(6)(iii)(A)(*2*), the rules in paragraph (b)(6)(ii)(A) of this section apply to any part of the transaction to which section 721(a) does not apply.

(B) *Section 1031 exchanges.* A direct or indirect partner's share of the electing partnership's deferred items is not accelerated if the electing partnership transfers property held for productive use in a trade or business or for investment in exchange for property of like kind which is to be held either for productive use in a trade or business or for investment in a transaction to which section 1031(a)(1) applies. Notwithstanding the rules in this paragraph (b)(6)(iii)(B), to the extent the electing partnership receives money or other property which does not meet the requirements of section 1031(a) (boot) in the exchange, a proportionate amount of the property transferred by the electing partnership equal to the proportion of the boot to the total consideration received in the exchange shall be treated as sold for purposes of paragraph (b)(6)(i)(A)(*2*) of this section.

(C) *Section 708(b)(1)(B) terminations.* A direct or indirect partner's share of the deferred items of an electing partnership with respect to a separate interest is not accelerated if the electing partnership or a partnership that is a direct or indirect partner of the electing partnership terminates under section 708(b)(1)(B). Notwithstanding the rules in this paragraph (b)(6)(iii)(C), the rules in paragraph (b)(6)(ii)(A) of this section apply to the event that causes the termination under section 708(b)(1)(B) to the extent not otherwise excepted under paragraph (b)(6)(iii) of this section.

(D) *Section 708(b)(2)(A) mergers or consolidations.* A direct or indirect partner's share of the deferred items of an electing partnership with respect to a separate interest is not accelerated if the partnership in which the separate interest is held (the merger transaction partnership) merges into or consolidates with another partnership in a transaction to which section 708(b)(2)(A) applies. The resulting partnership or new partnership, as determined under §1.708–1(c)(1), becomes subject to section 108(i), including all reporting requirements under this section, to the same extent that the merger transaction partnership was so subject prior to the transaction, and must allocate and report any merger transaction partnership's deferred items to the same extent and to the same partners that the merger transaction partnership allocated and reported such items prior to such transaction. Notwithstanding the rules in this paragraph (b)(6)(iii)(D), the rules in paragraphs (b)(6)(i)(A)(*2*) and (b)(6)(ii)(A)(*2*) of this section apply to that portion of the transaction that is treated as a sale, and the rules of (b)(6)(ii)(A)(*3*) apply if, as part of the transaction, the partner's separate interest is redeemed and the partner does not receive an interest in the resulting partnership with respect to such separate interest.

(E) *Certain distributions of separate interests.* If a partnership (upper-tier partnership) that is a direct or indirect partner of an electing partnership distributes its entire separate interest (distributed separate interest) to one or more of its partners (distributee partners) that have a share of the electing partnership's deferred items from upper-tier partnership with respect to the distributed separate interest, the distributee partners' shares of the electing partnership's deferred items with respect to such distributed separate interest are not accelerated. The partnership, the interest in which was distributed, must allocate and report the share of the electing partnership's deferred items associated with the distributed separate interest only to such distributee partners that had a share of the electing partnership's deferred items from the upper-tier partnership with respect to the distributed separate interest prior to the distribution.

(F) *Section 381 transactions.* A C corporation partner's share of an electing partnership's deferred items is not accelerated if, as part of a transaction described in paragraph (b)(6)(ii)(A) of this section, the assets of the C corporation partner are acquired by another C corporation (acquiring C corporation) in a transaction that is treated, under §1.108(i)–1T(b)(2)(ii)(B), as a transaction to which section 381(a) applies. An S corporation partner's share of an electing partnership's deferred items is not accelerated if, as part of a transaction described in paragraph (b)(6)(ii)(A) of this section, the assets of the S corporation partner are acquired by another S corporation (acquiring S corporation) in a transaction to which section 381(a) applies. In such cases, the acquiring C corporation or acquiring S corporation, as the case may be, succeeds to the C corporation partner's or the S corporation partner's remaining share of the electing partnership's deferred items and becomes subject to section 108(i), including all reporting requirements under this section, as if the acquiring C corporation or acquiring S corporation were the C corporation partner or the S corporation partner, respectively. The acquiring S corporation must allocate and report the S corporation partner's deferred items to the same extent and only to those shareholders of the S corporation partner who had a share of the S corporation partner's deferred items from the electing partnership prior to the transaction.

(G) *Intercompany transfers.* A C corporation partner's share of an electing partnership's deferred items is not accelerated if, as part of a transaction described in paragraph (b)(6)(ii)(A) of this section, the C corporation partner transfers its entire separate interest in an intercompany transaction, as described in §1.1502–13(b)(1)(i), and the electing partnership does not terminate under section 708(b)(1)(A) as a result of the intercompany transaction.

(H) *Retirement of a debt instrument. See* §1.108(i)–3T(c)(1) for rules regarding the retirement of a debt instrument that is subject to section 108(i).

(I) *Other non-acceleration events.* A direct or indirect partner's share of an electing partnership's deferred items is not accelerated with respect to any transaction if the Commissioner makes a determination by published guidance that such transaction is not an acceleration event under the rules of this paragraph (b)(6).

(iv) *Related partnerships.* A direct or indirect partner's share of a related partnership's deferred OID deduction (as determined in paragraph (d)(2) of this section) that has not previously been taken into account is accelerated and taken into account by the direct or indirect partner in the taxable year in which, and to the extent that, deferred COD income attributable to the related partnership's deferred OID deduction is taken into account by the electing entity or its owners.

(v) *Examples.* The following examples illustrate the rules under this paragraph (b)(6):

Example 1. Meaning of "separate interest." (i) Electing partnership (EP) has three partners, MT1, MT2, and UT, each of which is a partnership. The partners of MT1 are X and UT. The partners of MT2 are Y, UT, and B. The partners of UT are A, B, and C. In addition to their interests in the partnerships noted, MT1, MT2, and UT own other assets.

(ii) Within the meaning of paragraph (a)(29) of §1.108(i)–0T, A and C each hold one separate interest (their interests in UT), B holds two separate interests (its interests in UT and MT2), UT holds three separate interests (its interests in MT1, MT2, and EP), MT1 and MT2 each hold one separate interest (their interests in EP), and X and Y each hold one separate interest (their interests in MT1 and MT2, respectively) with respect to EP.

Example 2. Distributions of separate interests in an electing partnership. (i) The facts are the same as in *Example 1*, except that A, as a direct partner of UT, has a share of EP's deferred items with respect to UT's interests in MT1 and EP. A does not have a share of EP's deferred items with respect to UT's interest in MT2. B, as a direct partner of UT, has a share of EP's deferred items with respect to UT's interest in MT1 and MT2, but not with respect to UT's interest in EP. B also has a share of EP's deferred items with respect to its separate interest in MT2. C does not have any share of EP's deferred items with respect to UT's interest in MT1, MT2, or EP.

(ii) UT distributes 40 percent of its separate interest in MT1 to A in redemption of A's interest in UT. Under paragraphs (b)(6)(ii)(A)(*2*) and (b)(6)(ii)(B)(*1*) of this section, a portion of UT's interest in MT1 has been transferred and a corresponding portion (40 percent) of UT's share of EP's deferred items from MT1 is accelerated. Thus, 40 percent of A's and B's share of EP's deferred items from UT with respect to UT's interest in MT1 is accelerated. Further, because A's interest in UT is redeemed within the meaning of paragraph (b)(6)(ii)(B)(*2*) of this section, all of A's shares of EP's deferred items from UT are accelerated under paragraph (b)(6)(ii)(A)(*3*) of this section. UT continues to allocate and report to B its remaining share of EP's deferred items from its separate interest in MT1 that was not distributed to A.

(iii) UT distributes its entire separate interest in MT1 to B (other than in redemption of B's interest in UT). Under paragraph (b)(6)(ii)(A)(*2*) of this section, UT's share of EP's deferred items from MT1 would be accelerated. However, because UT distributes its entire separate interest in MT1 to B, B's share of EP's deferred items from UT with respect to UT's separate interest in MT1 is not accelerated under paragraph (b)(6)(iii)(E) of this section. MT1 allocates and reports to B B's share of EP's deferred items from UT's separate interest in MT1 that was distributed to B.

(iv) UT distributes its entire separate interest in MT1 to A and B (other than in redemption of their interests in UT). Under paragraph (b)(6)(iii)(E) of this section, none of A's or B's shares of EP's deferred items from UT with respect to UT's separate interest in MT1 is accelerated, and MT1 allocates and reports to A and B their respective share of EP's deferred items from UT's separate interest in MT1 that was distributed to A and B.

Example 3. Partial sale of interest by an indirect partner. (i) Individual A holds a 50 percent partnership interest in UTP, a partnership that holds a 50 percent interest in EP, a partnership that makes an election to defer COD income under section 108(i). A's share of UTP's deferred amount with respect to EP's election under section 108(i) is $100. During a taxable year within the deferral period, A sells 25 percent of his partnership interest in UTP to an unrelated third party.

(ii) Under paragraphs (b)(6)(ii)(A)(*2*) and (b)(6)(ii)(B)(*1*) of this section, 25 percent of A's $100 deferred amount is accelerated as a result of A's partial sale of his interest in UTP. Thus, A must recognize $25 of his deferred amount in the taxable year of the sale. A's remaining deferred amount is $75.

Example 4. Section 708(b)(1)(B) termination of electing partnership. (i) A and B are equal partners in partnership AB. On January 1, 2009, AB reacquires an applicable debt instrument and makes an election under section 108(i) to defer $400 of COD income. A and B each have a deferred amount with respect to the applicable debt instrument of $200. On January 1, 2010, A sells its entire 50 percent interest in AB to C in a transfer that terminates the partnership under section 708(b)(1)(B).

(ii) Under paragraph (b)(6)(iii)(C) of this section, the technical termination of AB under section 708(b)(1)(B) does not cause A's or B's shares of AB's deferred items to be accelerated. However, A's $200 deferred amount is accelerated under paragraph (b)(6)(ii)(A)(*2*) of this section as a result of the sale.

Example 5. Section 708(b)(2)(A) mergers. (i) A, B, and C are equal partners in partnership X, which has made an election under section 108(i) to defer $150 of COD income. The fair market value of each interest in partnership X is $100. A, B, and C each has a deferred amount of $50 with respect to partnership X's election under section 108(i). E, F, and G are partners in partnership Y. Partnership X and partnership Y merge in a taxable year during the deferral period of partnership X's election under section 108(i). Under section 708(b)(2)(A), the resulting partnership is considered a continuation of partnership Y and partnership X is considered terminated. Under state law, partnerships X and Y undertake the assets-over form of §1.708–1(c)(3)(i) to accomplish the merger. C does not want to become a partner in partnership Y, and partnership X does not have the resources to redeem C's interest before the merger. C, partnership X, and partnership Y enter into a merger agreement that satisfies the requirements of §1.708–1(c)(4) and specifies that partnership Y will purchase C's interest in partnership X for $100 before the merger, and as part of the agreement, C consents to treat the transaction in a manner that is consistent with the agreement. As part of the merger, partnership X receives from partnership Y $100 (which will be distributed to C immediately before the merger), $100 (which will be distributed equally to A and B ($50 each)), and interests in partnership Y with a value of $100 (which will be distributed equally to A and B) in exchange for partnership X's assets and liabilities.

(ii) Under the general rule of paragraph (b)(6)(iii)(D) of this section, and except as provided below, the deferred items of partnership X are not accelerated as a result of the merger with partnership Y. Partnership Y, the resulting partnership that is considered the continuation of partnership X, becomes subject to section 108(i), including all reporting requirements under section 108(i), to the same extent that partnership X was subject to such rules. Under paragraph (b)(6)(iii)(D) of this section, partnership Y must allocate and report partnership X's deferred items to A and B in the same manner as partnership X had prior to the merger transaction.

(iii) Under §1.708–1(c)(4), C is treated as selling its interest in partnership X immediately before the merger. As a result, C's $50 deferred amount is accelerated under paragraph (b)(6)(ii)(A)(*2*) of this section.

(iv) Under section 707(a)(2)(B), partnership X is deemed to have sold a portion of its assets to partnership Y. Because partnership X is not treated as selling substantially all of its assets under paragraph (b)(6)(i)(B) of this section, A's and B's deferred amounts are not accelerated under paragraph (b)(6)(i)(A)(*2*) of this section.

(v) Because A's and B's interests in partnership X are redeemed within the meaning of paragraph (b)(6)(ii)(B)(*2*) of this section, all of their shares of partnership X's deferred items would be accelerated under paragraph (b)(6)(ii)(A)(*3*). However, because they receive an interest in partnership Y in the merger, none of A's and B's share of partnership X's deferred items is accelerated.

(7) *Withholding under section 1446.* See section 1446 regarding withholding by a partnership on a foreign partner's share of income effectively connected with a U.S. trade or business.

(c) *Specific rules applicable to S corporations*—(1) *Deferred COD income.* An electing S corporation's COD income deferred under section 108(i) (an S corporation's deferred COD income) is shared pro rata among those shareholders that are shareholders of the electing S corporation immediately before the reacquisition of the applicable debt instrument. Any COD income deferred under section 108(i) is taken into account under section 1366(a) by those shareholders in the inclusion period, or earlier upon the occurrence of an acceleration event described in paragraph (c)(3) of this section.

(2) *Basis adjustments and accumulated adjustments account*—(i) *Basis adjustments.* The adjusted basis of a shareholder's stock in an electing S corporation is not increased under section 1367(a)(1) by the shareholder's share of the S corporation's deferred COD income in the taxable year of the reacquisition. The adjusted basis of a shareholder's stock in an electing S corporation or a related S corporation is not decreased under section 1367(a)(2) by the shareholder's share of the S corporation's deferred OID deduction in the taxable year in which the deferred OID accrues. The adjusted basis of a shareholder's stock in an electing S corporation or a related S corporation is adjusted under section 1367(a) by the shareholder's share of the S corporation's deferred items for the taxable year in which the shareholder takes into account its share of the deferred items under this section.

(ii) *Accumulated adjustments account.* The AAA of an electing S corporation is not increased by the S corporation's deferred COD income in the taxable year of a reacquisition. The AAA of an electing S corporation or a related S corporation is not decreased by the S corporation's deferred OID deduction in the taxable year in which the deferred OID accrues. The AAA of an electing S corporation or a related S corporation is adjusted under section 1368(e) by a shareholder's share of the S corporation's deferred items for the S period (as defined in section 1368(e)(2)) in which a shareholder of the S corporation takes into account its share of the deferred items under this section.

(3) *Acceleration of deferred items*—(i) *Electing S corporation-level events*—(A) *General rules.* Except as provided in paragraph (c)(3)(iii) of this section, a shareholder's share of an electing S corporation's deferred items is accelerated and must be taken into account by such shareholder—

(*1*) In the taxable year in which the electing S corporation liquidates;

(*2*) In the taxable year in which the electing S corporation sells, exchanges, transfers (including contributions and distributions), or gifts substantially all of its assets;

(*3*) In the taxable year in which the electing S corporation ceases doing business;

(*4*) In the taxable year in which the electing S corporation's election under section 1362(a) terminates; or

(*5*) In the taxable year that includes the day before the day on which the electing S corporation files a petition in a title 11 or similar case.

(B) *Substantially all requirement.* For purposes of this paragraph (c)(3), substantially all of an electing S corporation's or partnership's assets means assets representing at least 90 percent of the fair market value of the net assets, and at least 70 percent of the fair market value of the gross assets, held by the S corporation or partnership immediately prior to the sale, exchange, transfer, or gift. For purposes of applying the rule in paragraph (c)(3)(i)(A)(*2*) of this section, a sale, exchange, transfer, or gift by any direct or indirect lower-tier partnership of the electing S corporation (lower-tier partnership) of all or part of its assets is not treated as a sale, exchange, transfer, or gift of the assets of any person that holds, directly or indirectly, an interest in such lower-tier partnership. However, for purposes of applying the rule in paragraph (c)(3)(i)(A)(*2*) of this section, a sale, exchange, transfer, or gift of substantially all of the assets of a transferee partnership (as described in paragraph (c)(3)(iii)(A) of this section), or of a lower-tier partnership that received assets of the electing S corporation from a transferee partnership of the electing S corporation or another lower-tier partnership in a transaction governed all or in part by section 721, is treated as a sale, exchange, transfer, or gift by the holder of an interest in such transferee partnership or lower-tier partnership of its entire interest in that transferee partnership or lower-tier partnership.

(ii) *Shareholder events*—(A) *General rules*. Except as provided in paragraph (c)(3)(iii) of this section, a shareholder's share of an electing S corporation's deferred items is accelerated and must be taken into account by such shareholder in the taxable year in which—

(*1*) The shareholder dies;

(*2*) The shareholder sells, exchanges (including redemptions treated as exchanges under section 302), transfers (including contributions and distributions), or gifts (including transfers treated as gifts under section 1041) all or a portion of its interest in the electing S corporation; or

(*3*) The shareholder abandons its interest in the electing S corporation.

(B) *Partial transfers*. For purposes of paragraph (c)(3)(ii)(A)(*2*) of this section, if a shareholder of an electing S corporation sells, exchanges (including redemptions treated as exchanges under section 302), transfers, or gifts (including transfers treated as gifts under section 1041) a portion of its interest in the electing S corporation, such shareholder's share of the electing S corporation's deferred items proportionate to the interest that was sold, exchanged, transferred, or gifted is accelerated and must be taken into account by such shareholder.

(iii) *Events not constituting acceleration*. Notwithstanding the rules in paragraphs (c)(3)(i) and (ii) of this section, a shareholder's share of an electing S corporation's deferred items is not accelerated by any of the events described in this paragraph (c)(3)(iii).

(A) *Electing S corporation's contributions*. A shareholder's share of an electing S corporation's deferred items is not accelerated if the electing S corporation contributes all or a portion of its assets in a transaction governed all or in part by section 721(a) to a partnership (transferee partnership) in exchange for an interest in the transferee partnership. Notwithstanding the rules in this paragraph (c)(3)(iii)(A), the rules in paragraph (c)(3)(i)(A) of this section apply to any part of the transaction to which section 721(a) does not apply.

(B) *Section 1031 exchanges*. A shareholder's share of an electing S corporation's deferred items is not accelerated if the electing S corporation transfers property held for productive use in a trade or business or for investment in exchange for property of like kind which is to be held either for productive use in a trade or business or for investment in a transaction to which section 1031(a)(1) applies. Notwithstanding the rules in this paragraph (c)(3)(iii)(B), to the extent the electing S corporation receives money or other property which does not meet the requirements of section 1031(a) (boot) in the exchange, a proportionate amount of the property transferred by the electing S corporation equal to the proportion of the boot to the total consideration received in the exchange shall be treated as sold for purposes of paragraph (c)(3)(i)(A)(*2*) of this section.

(C) *Section 381 transactions*. A shareholder's share of an electing S corporation's deferred items is not accelerated if, as part of a transaction described in paragraph (c)(3)(i)(A) of this section, the electing S corporation's assets are acquired by another S corporation (acquiring S corporation) in a transaction to which section 381(a) applies. In such a case, the acquiring S corporation succeeds to the electing S corporation's remaining deferred items and becomes subject to section 108(i), including all reporting requirements under this section, as if the acquiring S corporation were the electing S corporation. The acquiring S corporation must allocate and report the electing S corporation's deferred items to the same extent and only to those shareholders who had a share of the electing S corporation's deferred items prior to the transaction.

(D) *Retirement of a debt instrument*. *See* §1.108(i)–3T(c)(1) for rules regarding the retirement of a debt instrument that is subject to section 108(i).

(E) *Other non-acceleration events*. A shareholder's share of an electing S corporation's deferred items is not accelerated with respect to any transaction if the Commissioner makes a determination by published guidance that such transaction is not an acceleration event under the rules of this paragraph (c)(3).

(iv) *Related S corporations.* A shareholder's share of a related S corporation's deferred OID deduction (as determined in paragraph (d)(2) of this section) that has not previously been taken into account is accelerated and taken into account by the shareholder in the taxable year in which, and to the extent that, deferred COD income attributable to the related S corporation's deferred OID deduction is taken into account by the electing entity or its owners.

(d) *General rules applicable to partnerships and S corporations*—(1) *Applicable debt instrument (trade or business requirement).* The determination of whether a debt instrument issued by a partnership or an S corporation is treated as a debt instrument issued in connection with the conduct of a trade or business by the partnership or S corporation for purposes of this section is based on all the facts and circumstances. However, a debt instrument issued by a partnership or an S corporation shall be treated as an applicable debt instrument for purposes of this section if the electing partnership or electing S corporation can establish that—

(i) The gross fair market value of the trade or business assets of the partnership or S corporation that issued the debt instrument represented at least 80 percent of the gross fair market value of that partnership's or S corporation's total assets on the date of issuance;

(ii) The trade or business expenditures of the partnership or S corporation that issued the debt instrument represented at least 80 percent of the partnership's or S corporation's total expenditures for the taxable year of issuance;

(iii) At least 95 percent of interest paid or accrued on the debt instrument issued by the partnership or S corporation was allocated to one or more trade or business expenditures under §1.163–8T for the taxable year of issuance;

(iv) At least 95 percent of the proceeds from the debt instrument issued by the partnership or S corporation were used by the partnership or S corporation to acquire one or more trades or businesses within six months from the date of issuance; or

(v) The partnership or S corporation issued the debt instrument to a seller of a trade or business to acquire the trade or business.

(2) *Deferral of OID at entity level*—(i) *In general.* For each taxable year during the deferral period, an issuing entity determines the amount of its deferred OID deduction with respect to a debt instrument, if any. An issuing entity's deferred OID deduction for a taxable year is the lesser of:

(A) The OID that accrues in a current taxable year during the deferral period with respect to the debt instrument (less any of such OID that is allowed as a deduction in the current taxable year as a result of an acceleration event), or

(B) The excess, if any, of the electing entity's deferred COD income (less the aggregate amount of such deferred COD income that has been included in income in the current taxable year and any previous taxable year during the deferral period) over the aggregate amount of OID that accrued in previous taxable years during the deferral period with respect to the debt instrument (less the aggregate amount of such OID that has been allowed as a deduction in the current taxable year and any previous taxable year during the deferral period).

(ii) *Excess deferred OID deduction.* If, as a result of an acceleration event during a taxable year in the deferral period, an issuing entity's aggregate deferred OID deduction for previous taxable years with respect to a debt instrument (less the aggregate amount of such deferred OID deduction that has been allowed as a deduction in a previous taxable year during the deferral period) exceeds the amount of the electing entity's deferred COD income (less the aggregate amount of such deferred COD income that has been included in income in the current taxable year and any previous taxable year during the deferral period), the excess deferred OID deduction shall be allowed as a deduction in the taxable year in which the acceleration event occurs.

(iii) *Examples.* The following examples illustrate the rules under paragraph (d)(2) of this section:

Example 1. Partner joins partnership during deferral period. (i) A and B each hold a 50 percent interest in AB partnership, a calendar-year partnership. On January 1, 2009, AB partnership issues a new debt instrument with OID and uses all of the proceeds to reacquire an outstanding applicable debt instrument of AB partnership, realizing $100 of COD income, and makes an election under section 108(i) to defer $50 of the COD income. During the deferral period, a total of $150 of OID accrues on the new debt instrument issued as part of the reacquisition. A and B each have a deferred amount of $25 with respect to the applicable debt instrument reacquired by AB partnership. For 2009, $28 of OID accrues on the new debt instrument and A and B are each allocated $14 of accrued OID with respect to the new debt instrument. On January 1, 2010, C contributes cash to AB partnership in exchange for a ⅓ partnership interest. For 2010, $29 of OID accrues on the new debt instrument, and A, B, and C are each allocated $9.67 of accrued OID.

(ii) Under paragraph (d)(2) of this section, AB partnership's deferred OID deduction for 2009 is the lesser of: $28 of OID that accrues on the new debt instrument in 2009, or the excess of AB partnership's deferred COD income of $50 over the aggregate amount of OID that accrued on the debt instrument in previous taxable years during the deferral period of $0, or $50. Thus, all $28 of the OID that accrues on the debt instrument in 2009 is deferred under section 108(i).

(iii) Under paragraph (d)(2) of this section, AB partnership's deferred OID deduction for 2010 is the lesser of: $29 of OID that accrues on the new debt instrument in 2010, or the excess of AB partnership's deferred COD income of $50 over the aggregate amount of OID that accrued on the debt instrument in previous taxable years during the deferral period of $28, or $22. Thus, $22 of the $29 of OID that accrues in 2010 is deferred under section 108(i). A, B, and C will each defer $7.33 of the $9.67 of accrued OID that was allocated to each of them.

Example 2. Acceleration of deferred items during deferral period. (i) On January 1, 2009, ABC partnership, a calendar-year partnership with three partners, issues a new debt instrument with OID and uses all of the proceeds to reacquire an outstanding applicable debt instrument of ABC partnership. ABC partnership realizes $150 of COD income and makes an election under section 108(i) to defer the $150 of COD income. A's deferred amount with respect to the applicable debt instrument is $75, while B and C each have a deferred amount of $37.50. In 2009, $28 of OID accrues on the new debt instrument and is allocated $7.00 to A and $10.50 to each of B and C. In 2010, $29 of OID accrues on the new debt instrument and is allocated $7.25 to A and $10.87 to each of B and C. In 2011, $30 of OID accrues on the new debt instrument and is allocated $7.50 to A and $11.25 to each of B and C. In 2012, $31 of OID accrues on the new debt instrument and is allocated $7.75 to A and $11.62 to each of B and C. On December 31, 2012, A's entire share of ABC partnership's deferred items is accelerated under paragraph (b)(6) of this section. For 2012, A includes $75 of COD income in income and is allowed a deduction of $21.75 for A's share of ABC partnership's deferred OID deduction for taxable years 2009 through 2011, and a deduction of $7.75 for A's share of ABC partnership's OID that accrues on the debt instrument in 2012.

(ii) Under paragraph (d)(2) of this section, ABC partnership's deferred OID deduction for 2012 is the lesser of: $23.35 ($31 of OID that accrues on the new debt instrument in 2012 less $7.75 of this OID that is allowed as a deduction to A in 2012) or $9.75 (the excess of $75 (ABC partnership's deferred COD income of $150 less A's share of ABC partnership's deferred COD income that is included in A's income for 2012 of $75) over $65.25 (the aggregate amount of OID that accrued in previous taxable years of $87 less the aggregate amount of such OID that has been allowed as a deduction by A in 2012 of $21.75)). Thus, of the $31 of OID that accrues in 2012, $9.75 is deferred under section 108(i).

(3) *Effect of an election under section 108(i) on recapture amounts under section 465(e)*—(i) *In general.* To the extent that a decrease in a partner's or shareholder's amount at risk (as defined in section 465) in an activity as a result of a reacquisition of an applicable debt instrument would cause a partner with a deferred amount or a shareholder with a share of the S corporation's deferred COD income to have income under section 465(e) in the taxable year of the reacquisition, such decrease (not to exceed the partner's deferred amount or the shareholder's share of the S corporation's deferred COD income with respect to that applicable debt instrument) (deferred section 465 amount) shall not be taken into account for purposes of determining the partner's or shareholder's amount at risk in an activity under section 465 as of the close of the taxable year of the reacquisition. A partner's or shareholder's deferred section 465 amount is treated as a decrease in the partner's or shareholder's amount at risk in an activity at the same time, and to the extent remaining in same amount, as

the partner recognizes its deferred amount or the S corporation shareholder recognizes its share of the S corporation's deferred COD income.

(ii) *Example.* The following example illustrates the rules in paragraph (d)(3) of this section:

Example. (i) PRS is a calendar-year partnership with two equal partners, individuals A and B. PRS is engaged in an activity described in section 465(c) (Activity). PRS has a $500 recourse applicable debt instrument outstanding. Each partner's amount at risk on January 1, 2009 is $50. On June 1, 2009, the creditor agrees to cancel the $500 indebtedness. PRS realizes $500 of COD income as a result of the reacquisition. The partners' share of the liabilities of PRS decreases by $500 under section 752(b), and each partner's amount at risk is decreased by $250. Other than the $500 of COD income, PRS's income and expenses for 2009 are equal. PRS makes an election under section 108(i) to defer $200 of the $500 COD income realized in connection with the reacquisition. PRS allocates the $500 of COD income equally between its partners, A and B. A and B each have a COD income amount of $250 with respect to the applicable debt instrument. PRS determines that, for both partners A and B, $100 of the $250 COD income amount is the deferred amount, and $150 is the included amount. Beginning in each taxable year 2014 through 2018, A and B each include $20 of the deferred amount in gross income.

(ii) Under paragraph (d)(3)(i) of this section, $50 of the $250 decrease in A's and B's amount at risk in Activity is the deferred section 465 amount for each of A and B and is not taken into account for purposes of determining A's and B's amount at risk in Activity at the close of 2009. In taxable year 2014, A's and B's amount at risk in Activity is decreased by $20 (deferred section 465 amount that equals the deferred amount included in A's and B's gross income in 2014). In taxable year 2015, A's and B's amount at risk in Activity is decreased by $20 for the deferred section 465 amount that equals the deferred amount included in A's and B's gross income in 2015. In taxable year 2016, A's and B's amount at risk in Activity is decreased by $10 (the remaining amount of the deferred section 465 amount).

(e) *Election procedures and reporting requirements*—(1) *Partnerships*—(i) *In general.* A partnership makes an election under section 108(i) by following procedures outlined in guidance and applicable forms and instructions issued by the Commissioner. An electing partnership (or its successor) must provide to its partners certain information as required by guidance and applicable forms and instructions issued by the Commissioner.

(ii) *Tiered pass-through entities.* A partnership that is a direct or indirect partner of an electing partnership (or its successor) or a related partnership or an S corporation partner must provide to its partners or shareholders, as the case may be, certain information as required by guidance and applicable forms and instructions issued by the Commissioner.

(iii) *Related partnerships.* A related partnership must provide to its partners certain information as required by guidance and applicable forms and instructions issued by the Commissioner.

(2) *S corporations*—(i) *In general.* An S corporation makes an election under section 108(i) by following procedures outlined in guidance and applicable forms and instructions issued by the Commissioner. An electing S corporation (or its successor) must provide to its shareholders certain information as required by guidance and applicable forms and instructions issued by the Commissioner.

(ii) *Related S corporations.* A related S corporation must provide to its shareholders certain information as required by guidance and applicable forms and instructions issued by the Commissioner.

(f) *Effective/applicability date.* For the applicability dates of this section, *see* § 1.108(i)–0T(b).

(g) *Expiration date.* This section expires on August 9, 2013.

[T.D. 9498, 75 FR 49386, Aug. 13, 2010]

§ 1.108(i)–3T Rules for the deduction of OID (temporary).

(a) *Deemed debt-for-debt exchanges*—(1) *In general.* For purposes of section 108(i)(2) (relating to deferred OID deductions that arise in certain debt-for-debt exchanges involving the reacquisition of an applicable debt instrument), if the proceeds of any debt instrument are used directly or indirectly by the issuer or a person related to the issuer (within the meaning of section 108(i)(5)(A)) to reacquire an applicable debt instrument, the debt instrument shall be treated as issued for the applicable debt instrument being reacquired. Therefore, section 108(i)(2) may apply, for example, to a debt instrument issued by a corporation for cash in which some or all of the proceeds are used directly or indirectly by the corporation's related subsidiary in the reacquisition of the subsidiary's applicable debt instrument.

(2) *Directly or indirectly.* Whether the proceeds of an issuance of a debt instrument are used directly or indirectly to reacquire an applicable debt instrument depends upon all of the facts and circumstances surrounding the issuance and the reacquisition. The proceeds of an issuance of a debt instrument will be treated as being used indirectly to reacquire an applicable debt instrument if—

(i) At the time of the issuance of the debt instrument, the issuer of the debt instrument anticipated that an applicable debt instrument of the issuer or a person related to the issuer would be reacquired by the issuer, and the debt instrument would not have been issued if the issuer had not so anticipated such reacquisition;

(ii) At the time of the issuance of the debt instrument, the issuer of the debt instrument or a person related to the issuer anticipated that an applicable debt instrument would be reacquired by a related person and the related person receives cash or property that it would not have received unless the reacquisition had been so anticipated; or

(iii) At the time of the reacquisition, the issuer or a person related to the issuer foresaw or reasonably should have foreseen that the issuer or a person related to the issuer would be required to issue a debt instrument, which it would not have otherwise been required to issue if the reacquisition had not occurred, in order to meet its future economic needs.

(b) *Proportional rule for accruals of OID.* For purposes of section 108(i)(2), if only a portion of the proceeds from the issuance of a debt instrument are used directly or indirectly to reacquire an applicable debt instrument, the rules of section 108(i)(2)(A) will apply to the portion of OID on the debt instrument that is equal to the portion of the proceeds from such instrument used to reacquire the outstanding applicable debt instrument. Except as provided in the last sentence of section 108(i)(2)(A), the amount of deferred OID deduction that is subject to section 108(i)(2)(A) for a taxable year is equal to the product of the amount of OID that accrues in the taxable year under section 1272 or section 1275 (and the regulations under those sections), whichever section is applicable, and a fraction, the numerator of which is the portion of the total proceeds from the issuance of the debt instrument used directly or indirectly to reacquire the applicable debt instrument and the denominator of which is the total proceeds from the issuance of the debt instrument.

(c) *No acceleration*—(1) *Retirement.* Retirement of a debt instrument subject to section 108(i)(2) does not accelerate deferred OID deductions.

(2) *Cross-reference. See* §1.108(i)–1T and §1.108(i)–2T for rules relating to the acceleration of deferred OID deductions.

(d) *Examples.* The application of this section is illustrated by the following examples. Unless otherwise stated, all taxpayers in the following examples are calendar-year taxpayers, and P and S each file separate returns:

Example 1. (i) *Facts.* P, a domestic corporation, owns all of the stock of S, a domestic corporation. S has a debt instrument outstanding that has an adjusted issue price of $100,000. On January 1, 2010, P issues for $160,000 a four-year debt instrument that has an issue price of $160,000 and a stated redemption price at maturity of $200,000, resulting in $40,000 of OID. In P's discussion with potential lenders/holders, and as described in offering materials provided to potential lenders/holders, P disclosed that it planned to use all or a portion of the proceeds from the issuance of the debt instrument to reacquire outstanding debt of P and its affiliates. Following the issuance, P makes a $70,000 capital contribution to S. S then reacquires its debt instrument from X, a person not related to S within the meaning of section 108(i)(5)(A), for $70,000. At the time of the reacquisition, the adjusted issue price of S's debt instrument is $100,000. Under §1.61–12(c), S realizes $30,000 of COD income. S makes a section 108(i) election for the $30,000 of COD income.

(ii) *Analysis.* Under the facts, at the time of P's issuance of its $160,000 debt instrument, P anticipated that the loan proceeds would be used to reacquire the debt of S, and P's debt instrument would not have been issued for an amount greater than $90,000 if P had not anticipated that S would use the proceeds to reacquire its debt. Pursuant to paragraph (a) of this section, the proceeds from P's issuance of its debt instrument are treated as being used indirectly to reacquire S's applicable debt instrument. Therefore, section 108(i)(2)(B) applies to P's debt instrument and P's OID deductions on its debt instrument are subject to deferral under section 108(i)(2)(A). However, because only a portion of the proceeds from P's debt instrument are used by S to reacquire its applicable debt instrument, only a portion of P's total OID deductions will be deferred under section 108(i)(2)(A). *See* section 108(i)(2)(B). Accordingly, a maximum of $17,500 ($40,000 × $70,000/$160,000) of P's $40,000 total OID deductions is subject to deferral under section 108(i)(2)(A). Under paragraph (b) of this section, the amount of P's deferred OID deduction each taxable year under section 108(i)(2)(A) is equal to the product of the amount of OID that accrues in the taxable year under section 1272 for the debt instrument and a fraction ($70,000/$160,000). As a result, P's deferred OID deductions are the following amounts: $4,015.99 for 2010 ($ 9,179.40 × $70,000/$160,000); $4,246.39 for 2011 ($9,706.04 × $70,000/$160,000); $4,490.01 for 2012 ($10,262.88 × $70,000/$160,000); and $4,747.61 for 2013 ($10,851.68 × $70,000/$160,000).

Example 2. (i) *Facts*. The facts are the same as in *Example 1*, except that S makes a section 108(i) election for only $10,000 of the $30,000 of COD income.

(ii) *Analysis*. The maximum amount of P's deferred OID deductions under section 108(i)(2)(A) is $10,000 rather than $17,500 because S made a section 108(i) election for only $10,000 of the $30,000 of COD income. Under section 108(i)(2)(A), because the amount of OID that accrues prior to 2014 attributable to the portion of the debt instrument issued to indirectly reacquire S's applicable debt instrument under paragraph (b) of this section ($17,500) exceeds the amount of deferred COD income under section 108(i) ($10,000), P's deferred OID deductions are the following amounts: $4,015.99 for 2010; $4,246.39 for 2011; $1,737.62 for 2012; and $0 for 2013.

Example 3. (i) *Facts*. The facts are the same as in *Example 1*, except that P pays $200,000 in cash to the lenders/holders on December 31, 2012, to retire the debt instrument. P did not directly or indirectly obtain the funds to retire the debt instrument from the issuance of another debt instrument with OID.

(ii) *Analysis*. Under paragraph (c)(1) of this section, the retirement of P's debt instrument is not an acceleration event for the deferred OID deductions of $4,015.99 for 2010, $4,246.39 for 2011, and $4,490.01 for 2012. Except as provided in § 1.108(i)–1T(b)(4), these amounts will be taken into account during the inclusion period. P, however, paid a repurchase premium of $10,851.68 in 2012 ($200,000 minus the adjusted issue price of $189,148.32) to retire the debt instrument. If otherwise allowable, P may deduct this amount in 2012 under § 1.163–7(c).

(e) *Effective/applicability dates*. For *effective/applicability dates, see* § 1.108(i)–0T(b).

(f) *Expiration date*. This section expires August 9, 2013.

[T.D. 9497, 75 FR 49406, Aug. 13, 2010]

§ 1.109–1 Exclusion from gross income of lessor of real property of value of improvements erected by lessee.

(a) Income derived by a lessor of real property upon the termination, through forfeiture or otherwise, of the lease of such property and attributable to buildings erected or other improvements made by the lessee upon the leased property is excluded from gross income. However, where the facts disclose that such buildings or improvements represent in whole or in part a liquidation in kind of lease rentals, the exclusion from gross income shall not apply to the extent that such buildings or improvements represent such liquidation. The exclusion applies only with respect to the income realized by the lessor upon the termination of the lease and has no application to income, if any, in the form of rent, which may be derived by a lessor during the period of the lease and attributable to buildings erected or other improvements made by the lessee. It has no application to income which may be realized by the lessor upon the termination of the lease but not attributable to the value of such buildings or improvements. Neither does it apply to income derived by the lessor subsequent to the termination of the lease incident to the ownership of such buildings or improvements.

(b) The provisions of this section may be illustrated by the following example:

Example. The A Corporation leased in 1945 for a period of 50 years unimproved real property to the B Corporation under a lease providing that the B Corporation erect on the leased premises an office building costing $500,000, in addition to paying the A Corporation a lease rental of $10,000 per annum beginning on the date of completion of the improvements, the sum of $100,000 being placed in escrow for the payment of the rental. The building was completed on January 1, 1950. The lease provided that all improvements made by the lessee on the leased property would become the absolute property of the A Corporation on the termination of the lease by forfeiture or otherwise and that the lessor would become entitled on such termination to the remainder of the sum, if any, remaining in the escrow fund. The B Corporation forfeited its lease on January 1, 1955, when the improvements had a value of $100,000. Under the provisions of section 109, the $100,000 is excluded from gross income. The amount of $50,000 representing the remainder in the escrow fund is forfeited to the A Corporation and is included in the gross income of that taxpayer. As to the basis of the property in the hands of the A Corporation, see §1.1019–1.

§ 1.110–1 Qualified lessee construction allowances.

(a) *Overview.* Amounts provided to a lessee by a lessor for property to be constructed and used by the lessee pursuant to a lease are not includible in the lessee's gross income if the amount is a qualified lessee construction allowance under paragraph (b) of this section.

(b) *Qualified lessee construction allowance*—(1) *In general.* A qualified lessee construction allowance means any amount received in cash (or treated as a rent reduction) by a lessee from a lessor—

(i) Under a short-term lease of retail space;

(ii) For the purpose of constructing or improving qualified long-term real property for use in the lessee's trade or business at that retail space; and

(iii) To the extent the amount is expended by the lessee in the taxable year received on the construction or improvement of qualified long-term real property for use in the lessee's trade or business at that retail space.

(2) *Definitions*—(i) *Qualified long-term real property* is nonresidential real property under section 168(e)(2)(B) that is part of, or otherwise present at, the retail space referred to in paragraph (b)(1)(i) of this section and which reverts to the lessor at the termination of the lease. Thus, qualified long-term real property does not include property qualifying as section 1245 property under section 1245(a)(3).

(ii) *Short-term lease* is a lease (or other agreement for occupancy or use) of retail space for 15 years or less (as determined pursuant to section 168(i)(3)).

(iii) *Retail space* is nonresidential real property under section 168(e)(2)(B) that is leased, occupied, or otherwise used by the lessee in its trade or business of selling tangible personal property or services to the general public. The term *retail space* includes not only the space where the retail sales are made, but also space where activities supporting the retail activity are performed (such as an administrative office, a storage area, and employee lounge). Examples of services typically sold to the general public include services provided by hair stylists, tailors, shoe repairmen, doctors, lawyers, accountants, insurance agents, stock brokers, securities dealers (including dealers who sell securities out of inventory), financial advisors and bankers. For purposes of this paragraph (b)(2)(iii), a taxpayer is selling to the general public if the products or services for sale are made available to the general public, even if the product or service is targeted to certain customers or clients.

(3) *Purpose requirement.* An amount will meet the requirement in paragraph (b)(1)(ii) of this section only to the extent that the lease agreement for the retail space expressly provides that the construction allowance is for the purpose of constructing or improving qualified long-term real property for use in the lessee's trade or business at the retail space. An ancillary agreement between the lessor and the lessee providing for a construction allowance, executed contemporaneously with the lease or during the term of the lease, is considered a provision of the lease agreement for purposes of the preceding sentence, provided the agreement is executed before payment of the construction allowance.

(4) *Expenditure requirement*—(i) *In general.* Expenditures referred to in paragraph (b)(1)(iii) of this section may be treated as being made first from the lessee's construction allowance. Tracing of the construction allowance to the actual lessee expenditures for the construction or improvement of qualified long-term real property is not required. However, the lessee should maintain accurate records of the amount of the qualified lessee construction allowance received and the expenditures made for qualified long-term real property.

(ii) *Time when expenditures deemed made*. For purposes of paragraph (b)(1)(iii) of this section, an amount is deemed to have been expended by a lessee in the taxable year in which the construction allowance was received by the lessee if—

(A) The amount is expended by the lessee within 8½ months after the close of the taxable year in which the amount was received; or

(B) The amount is a reimbursement from the lessor for amounts expended by the lessee in a prior year and for which the lessee has not claimed any depreciation deductions.

(5) *Consistent treatment by lessor*. Qualified long-term real property constructed or improved with any amount excluded from a lessee's gross income by reason of paragraph (a) of this section must be treated as nonresidential real property owned by the lessor (for purposes of depreciation under 168(e)(2)(B) and determining gain or loss under section 168(i)(8)(B)). For purposes of the preceding sentence, the lessor must treat the construction allowance as fully expended in the manner required by paragraph (b)(1)(iii) of this section unless the lessor is notified by the lessee in writing to the contrary. General tax principles apply for purposes of determining when the lessor may begin depreciation of its nonresidential real property. The lessee's exclusion from gross income under paragraph (a) of this section, however, is not dependent upon the lessor's treatment of the property as nonresidential real property.

(c) *Information required to be furnished*—(1) *In general*. The lessor and the lessee described in paragraph (b) of this section who are paying and receiving a qualified lessee construction allowance, respectively, must furnish the information described in paragraph (c)(3) of this section in the time and manner prescribed in paragraph (c)(2) of this section.

(2) *Time and manner for furnishing information*. The requirement to furnish information under paragraph (c)(1) of this section is met by attaching a statement with the information described in paragraph (c)(3) of this section to the lessor's or the lessee's, as applicable, timely filed (including extensions) Federal income tax return for the taxable year in which the construction allowance was paid by the lessor or received by the lessee (either in cash or treated as a rent reduction), as applicable. A lessor or a lessee may report the required information for several qualified lessee construction allowances on a combined statement. However, a lessor's or a lessee's failure to provide information with respect to each lease will be treated as a separate failure to provide information for purposes of paragraph (c)(4) of this section.

(3) *Information required*—(i) *Lessor*. The statement provided by the lessor must contain the lessor's name (and, in the case of a consolidated group, the parent's name), employer identification number, taxable year and the following information for each lease:

(A) The lessee's name (in the case of a consolidated group, the parent's name).

(B) The address of the lessee.

(C) The employer identification number of the lessee.

(D) The location of the retail space (including mall or strip center name, if applicable, and store name).

(E) The amount of the construction allowance.

(F) The amount of the construction allowance treated by the lessor as nonresidential real property owned by the lessor.

(ii) *Lessee*. The statement provided by the lessee must contain the lessee's name (and, in the case of a consolidated group, the parent's name), employer identification number, taxable year and the following information for each lease:

(A) The lessor's name (in the case of a consolidated group, the parent's name).

(B) The address of the lessor.

(C) The employer identification number of the lessor.

(D) The location of the retail space (including mall or strip center name, if applicable, and store name).

(E) The amount of the construction allowance.

(F) The amount of the construction allowance that is a qualified lessee construction allowance under paragraph (b) of this section.

(4) *Failure to furnish information.* A lessor or a lessee that fails to furnish the information required in this paragraph (c) may be subject to a penalty under section 6721.

(d) *Effective date.* This section is applicable to leases entered into on or after October 5, 2000.

[T.D. 8901, 65 FR 53586, Sept. 5, 2000]

§ 1.111–1 Recovery of certain items previously deducted or credited.

(a) *General.* Section 111 provides that income attributable to the recovery during any taxable year of bad debts, prior taxes, and delinquency amounts shall be excluded from gross income to the extent of the ''recovery exclusion'' with respect to such items. The rule of exclusion so prescribed by statute applies equally with respect to all other losses, expenditures and accruals made the basis of deductions from gross income for prior taxable years, including war losses referred to in section 127 of the Internal Revenue Code of 1939, but not including deductions with respect to depreciation, depletion, amortization, or amortizable bond premiums. The term ''recovery exclusion'' as used in this section means an amount equal to the portion of the bad debts, prior taxes, and delinquency amounts (the items specifically referred to in section 111), and of all other items subject to the rule of exclusion which, when deducted or credited for a prior taxable year, did not result in a reduction of any tax of the taxpayer under subtitle A (other than the accumulated earnings tax imposed by section 531 or the personal holding company tax imposed by section 541) of the Internal Revenue Code of 1954 or corresponding provisions of prior income tax laws (other than the World War II excess profits tax imposed under subchapter E, chapter 2 of the Internal Revenue Code of 1939).

(1) *Section 111 items.* The term ''section 111 items'' as used in this section means bad debts, prior taxes, delinquency amounts, and all other items subject to the rule of exclusion, for which a deduction or credit was allowed for a prior taxable year. If a bad debt was previously charged against a reserve by a taxpayer on the reserve method of treating bad debts, it was not deducted, and it is therefore not considered a section 111 item. Bad debts, prior taxes, and delinquency amounts are defined in section 111(b) (1), (2), and (3), respectively. An example of a delinquency amount is interest on delinquent taxes. An example of the other items not expressly referred to in section 111 but nevertheless subject to the rule of exclusion is a loss sustained upon the sale of stock and later recovered, in whole or in part, through an action against the party from whom such stock had been purchased.

(2) *Definition of ''recovery''.* Recoveries result from the receipt of amounts in respect of the previously deducted or credited section 111 items, such as from the collection or sale of a bad debt, refund or credit of taxes paid, or cancellation of taxes accrued. Care should be taken in the case of bad debts which were treated as only partially worthless in prior years to distinguish between the item described in section 111, that is, the part of such debt which was deducted, and the part not previously deducted, which is not a section 111 item and is considered the first part collected. The collection of the part not deducted is not considered a ''recovery''. Furthermore, the term ''recovery'' does not include the gain resulting from the receipt of an amount on account of a section 111 item which, together with previous such receipts, exceeds the deduction or credit previously allowed for such item. For instance, a $100 corporate bond purchased for $40 and later deducted as worthless is subsequently collected to the extent of $50. The $10 gain (excess of $50 collection over $40 cost) is not a recovery of a section 111 item. Such gain is in no case excluded from gross income under section 111, regardless of whether the $40 recovery is or is not excluded.

(3) *Treatment of debt deducted in more than one year by reason of partial worthlessness.* In the case of a bad debt deducted in part for two or more prior years, each such deduction of a part of the debt is considered a separate section 111 item. A recovery with respect to such debt is considered first a recovery of those items (or portions thereof), resulting from such debt, for which there are recovery exclusions. If there

are recovery exclusions for two or more items resulting from the same bad debt, such items are considered recovered in the order of the taxable years for which they were deducted, beginning with the latest. The recovery exclusion for any such item is determined by considering the recovery exclusion with respect to the prior year for which such item was deducted as being first used to offset all other applicable recoveries in the year in which the bad debt is recovered.

(4) *Special provisions as to worthless bonds, etc., which are treated as capital losses.* Certain bad debts arising from the worthlessness of securities and certain nonbusiness bad debts are treated as losses from the sale or exchange of capital assets. See sections 165(g) and 166(d). The amounts of the deductions allowed for any year under section 1211 on account of such losses for such year are considered to be section 111 items. Any part of such losses which, under section 1211, is a deduction for a subsequent year through the capital loss carryover (any later receipt of an amount with respect to such deducted loss is a recovery) is considered a section 111 item for the year in which such loss was sustained.

(b) *Computation of recovery exclusion*—(1) *Amount of recovery exclusion allowable for year of recovery.* For the year of any recovery, the section 111 items which were deducted or credited for one prior year are considered as a group and the recovery thereon is considered separately from recoveries of any items which were deducted or credited for other years. This recovery is excluded from gross income to the extent of the recovery exclusion with respect to this group of items as (i) determined for the original year for which such items were deducted or credited (see subparagraph (2) of this paragraph) and (ii) reduced by the excludable recoveries in intervening years on account of all section 111 items for such original year. A taxpayer claiming a recovery exclusion shall submit, at the time the exclusion is claimed, the computation of the recovery exclusion claimed for the original year for which the items were deducted or credited, and computations showing the amount recovered in intervening years on account of the section 111 items deducted or credited for the original year.

(2) *Determination of recovery exclusion for original year for which items were deducted or credited.* (i) The recovery exclusion for the taxable year for which section 111 items were deducted or credited (that is, the ''original taxable year'') is the portion of the aggregate amount of such deductions and credits which could be disallowed without causing an increase in any tax of the taxpayer imposed under subtitle A (other than the accumulated earnings tax imposed by section 531 or the personal holding company tax imposed by section 541) of the Internal Revenue Code of 1954 or corresponding provisions of prior income tax laws (other than the World War II excess profits tax imposed under subchapter E, chapter 2 of the Internal Revenue Code of 1939). For the purpose of such recovery exclusion, consideration must be given to the effect of net operating loss carryovers and carrybacks or capital loss carryovers.

(ii) This rule shall be applied by determining the recovery exclusion as the aggregate amount of the section 111 items for the original year for which such items were deducted or credited reduced by whichever of the following amounts is the greater:

(*a*) The difference between (*1*) the taxable income for such original year and (*2*) the taxable income computed without regard to the section 111 items for such original year.

(*b*) In the case of a taxpayer subject to any income tax in lieu of normal tax or surtax or both (except the alternative tax on capital gains imposed by section 1201, which is disregarded), the difference between (*1*) the income subject to such tax for such original year and (*2*) the income subject to such tax computed without regard to the section 111 items for such original year.

(Neither the amount determined under (*1*) nor the amount under (*2*) of (*a*) or (*b*) of this subdivision shall in any case be considered less than zero.) For this determination of the recovery exclusion, the aggregate of the section 111 items must be further decreased by the portion thereof which caused a reduction in tax in preceding or succeeding taxable years through any net operating loss carryovers or carrybacks or capital loss carryovers affected by such items. This decrease is the aggregate of the largest amount determined for each of such preceding and succeeding years under (*a*) and (*b*) of this subdivision, the computation of each carryover or carryback to the preceding or succeeding year being made under (*1*) of (*a*) and (*b*) of this subdivision with regard to the section 111 items for the original year and such computation being made under (*2*) of (*a*) and (*b*) of this subdivision without regard to such items. For the purpose of the preceding sentence, the computations under both (*1*) and (*2*) of (*a*) and (*b*) of this subdivision shall be made without regard to any section 111 items for such preceding or succeeding year and the carryovers and carrybacks to such year shall be determined without regard to any section 111 items for years subsequent to the original year.

(iii) The determination of the recovery exclusion for original taxable years subject to the provisions of the Internal Revenue Code of 1939 shall be made under 26 CFR (1939) 39.22(b)(12)–1(b)(2) (Regulations 118).

(3) *Example.* The provisions of this paragraph may be illustrated by the following example:

Example. A single individual with no dependents has for his 1954 taxable year the following income and deductions:

	With deduction of section 111 items	Without deduction of section 111 items
Gross income	$25,000	$25,000
Less deductions:		
Depreciation	20,000	20,000
Business bad debts and taxes	6,300	
Personal exemption	600	600
	26,900	20,600
Taxable income or (loss)	(1,900)	4,400
Adjustment under section 172(d)(3)	600	
Net operating loss	(1,300)	....

The full amount of the net operating loss of $1,300 is carried back and allowed as a deduction for 1952. The aggregate of the section 111 items for 1954 is $6,300 (bad debts and taxes). The recovery exclusion on account of section 111 items for 1954 is $600, determined by reducing the $6,300 aggregate of the section 111 items by $5,700, *i.e.*, the sum of (1) the difference between the amount of the taxable income for 1954 computed without regard to the section 111 items ($4,400) and the amount of the taxable income for 1954 (not less than zero) computed by taking such items into account, and (2) the amount of the net operating loss ($1,300) which caused the reduction in tax for 1952 by reason of the carryback provisions. If in 1956 the taxpayer recovers $400 of the bad debts, all of the recovery is excluded from the income by reason of the recovery exclusion of $600 determined for the original year 1954. If in 1957 the taxpayer recovers an additional $300 of the bad debts, only $200 is excluded from gross income. That is, the recovery exclusion of $600 determined for the original year 1954 is reduced by the $400 recovered in 1956, leaving a balance of $200 which is used in 1957. The balance of the amount recovered in 1957, $100 ($300 less $200), is included in gross income for 1957.

(c) *Provisions as to taxes imposed by section 531 (relating to the accumulated earnings tax) and section 541 (relating to the tax on personal holding companies).* A recovery exclusion allowed for purposes of subtitle A (other than section 531 or section 541) of the Internal Revenue Code of 1954 shall also be allowed for the purpose of determining the accumulated earnings tax under section 531 or the personal holding company tax under section 541 regardless of whether or not the section 111 items on which such recovery exclusion is based resulted in a reduction of the tax under section 531 or section 541 of the Internal Revenue Code of 1954 (or corresponding provisions of prior income tax laws) for the prior taxable year. Furthermore, if there is recovery of a section 111 item which was not allowable as a deduction or credit for the prior taxable year for purposes of Subtitle A (not including section 531 or section 541) or corresponding provisions of prior income tax laws (other than Subchapter E, Chapter 2 of the Internal Revenue Code of 1939, relating to World War II excess profits tax), but was allowable for such prior taxable year in determining the tax under section 531 or section 541 (or corresponding provisions of prior income tax laws) then for the purpose of determining the tax under section 531 or section 541 a recovery exclusion shall be allowable with respect to such recovery if the section 111 item did not result in a reduction of the tax under section 531 or section 541 (or corresponding provisions of prior income tax laws).

§ 1.112–1 Combat zone compensation of members of the Armed Forces.

(a) *Combat zone compensation exclusion*—(1) *Amount excluded.* In addition to the exemptions and credits otherwise applicable, section 112 excludes from gross income the following compensation of members of the Armed Forces:

(i) *Enlisted personnel.* Compensation received for active service as a member below the grade of commissioned officer in the Armed Forces of the United States for any month during any part of which the member served in a combat zone or was hospitalized at any place as a result of wounds, disease, or injury incurred while serving in the combat zone.

(ii) *Commissioned officers.* Compensation not exceeding the monthly dollar limit received for active service as a commissioned officer in the Armed Forces of the United States for any month during any part of which the officer served in a combat zone or was hospitalized at any place as a result of wounds, disease, or injury incurred while serving in the combat zone. The monthly dollar limit is the monthly amount excludable from the officer's income under section 112(b) as amended. Beginning in 1966, the monthly dollar limit for periods of active service after 1965 became $500. As of September 10, 1993, the monthly dollar limit continues to be $500.

(2) *Time limits on exclusion during hospitalization.* Compensation received for service for any month of hospitalization that begins more than 2 years after the date specified by the President in an Executive Order as the date of the termination of combatant activities in the combat zone cannot be excluded under section 112. Furthermore, compensation received while hospitalized after January 1978 for wounds, disease, or injury incurred in the Vietnam combat zone designated by Executive Order 11216 cannot be excluded under section 112.

(3) *Special terms.* A commissioned warrant officer is not a *commissioned officer* under section 112(b) and is entitled to the exclusion allowed to enlisted personnel under section 112(a). *Compensation*, for the purpose of section 112, does not include pensions and retirement pay. *Armed Forces of the United States* is defined (and members of the Armed Forces are described) in section 7701(a)(15).

(4) *Military compensation only.* Only compensation paid by the Armed Forces of the United States to members of the Armed Forces can be excluded under section 112, except for compensation paid by an agency or instrumentality of the United States or by an international organization to a member of the Armed Forces whose military active duty status continues during the member's assignment to the agency or instrumentality or organization on official detail. Compensation paid by other employers (whether private enterprises or governmental entities) to members of the Armed Forces cannot be excluded under section 112 even if the payment is made to supplement the member's military compensation or is labeled by the employer as compensation for active service in the Armed Forces of the United States. Compensation paid to civilian employees of the federal government, including civilian employees of the Armed Forces, cannot be excluded under section 112, except as provided in section 112(d)(2) (which extends the exclusion to compensation of civilian employees of the federal government in missing status due to the Vietnam conflict).

(b) *Service in combat zone*—(1) *Active service.* The exclusion under section 112 applies only if active service is performed in a combat zone. A member of the Armed Forces is in active service if the member is actually serving in the Armed Forces of the United States. Periods during which a member of the Armed Forces is absent from duty on account of sickness, wounds, leave, internment by the enemy, or other lawful cause are periods of active service. A member of the Armed Forces in active service in a combat zone who becomes a prisoner of war or missing in action in the combat zone is deemed, for the purpose of section 112, to continue in active service in the combat zone for the period for which the member is treated as a prisoner of war or as missing in action for military pay purposes.

(2) *Combat zone status.* Except as provided in paragraphs (e) and (f) of this section, service is performed in a combat zone only if it is performed in an area which the President of the United States has designated by Executive Order, for the purpose of section 112, as an area in which Armed Forces of the United States are or have been engaged in combat, and only if it is performed on or after the date designated by the President by Executive Order as the date of the commencing of combatant activities in that zone and on or before the date designated by the President by Executive Order as the date of the termination of combatant activities in that zone.

(3) *Partial month service.* If a member of the Armed Forces serves in a combat zone for any part of a month, the member is entitled to the exclusion for that month to the same extent as if the member has served in that zone for the entire month. If a member of the Armed Forces is hospitalized for a part of a month as a result of wounds, disease, or injury incurred while serving in that zone, the member is entitled to the exclusion for the entire month.

(4) *Payment time and place.* The time and place of payment are irrelevant in considering whether compensation is excludable under section 112; rather, the time and place of the entitlement to compensation determine whether the compensation is excludable under section 112. Thus, compensation can be excluded under section 112 whether or not it is received outside a combat zone, or while the recipient is hospitalized, or in a year different from that in which the service was rendered for which the compensation is paid, provided that the member's entitlement to the compensation fully accrued in a month during which the member served in the combat zone or was hospitalized as a result of wounds, disease, or injury incurred while serving in the combat zone. For this purpose, entitlement to compensation fully accrues upon the completion of all actions required of the member to receive the compensation. Compensation received by a member of the Armed Forces for services rendered while in active service can be excluded under section 112 even though payment is received subsequent to discharge or release from active service. Compensation credited to a deceased member's account for a period subsequent to the established date of the member's death and received by the member's estate can be excluded from the gross income of the estate under section 112 to the same extent that it would have been excluded from the gross income of the member had the member lived and received the compensation.

(5) *Examples of combat zone compensation.* The rules of this section are illustrated by the following examples:

Example 1. On January 5, outside of a combat zone, an enlisted member received basic pay for active duty services performed from the preceding December 1 through December 31. On December 4 (and no other date), the member performed services within a combat zone. The member may exclude from income the entire payment received on January 5, although the member served in the combat zone only one day during December, received the payment outside of the combat zone, and received the payment in a year other than the year in which the combat zone services were performed.

Example 2. From March through December, an enlisted member became entitled to 25 days of annual leave while serving in a combat zone. The member used all 25 days of leave in the following year. The member may exclude from income the compensation received for those 25 days, even if the member performs no services in the combat zone in the year the compensation is received.

Example 3. From March through December, a commissioned officer became entitled to 25 days of annual leave while serving in a combat zone. During that period the officer also received basic pay of $1,000 per month from which the officer excluded from income $500 per month (exhausting the monthly dollar limit under section 112 for that period). The officer used all 25 days of leave in the following year. The officer may not exclude from income any compensation received in the following year related to those 25 days of leave, since the officer had already excluded from income the maximum amount of combat zone compensation for the period in which the leave was earned.

Example 4. In November, while serving in a combat zone, an enlisted member competing for a cash award submitted an employee suggestion. After November, the member neither served in a combat zone nor was hospitalized for wounds incurred in the combat zone. In June of the following year, the member's suggestion was selected as the winner of the competition and the award was paid. The award can be excluded from income as combat zone compensation although granted and received outside of the combat zone, since the member completed the necessary action to win the award (submission of the suggestion) in a month during which the member served in the combat zone.

Example 5. In July, while serving in a combat zone, an enlisted member voluntarily reenlisted. After July, the member neither served in a combat zone nor was hospitalized for wounds incurred in the combat zone. In February of the following year, the member received a bonus as a result of the July reenlistment. The reenlistment bonus can be excluded from income as combat zone compensation although received outside of the combat zone, since the member completed the necessary action for entitlement to the reenlistment bonus in a month during which the member served in the combat zone.

Example 6. In July, while serving outside a combat zone, an enlisted member voluntarily reenlisted. In February of the following year, the member, while performing services in a combat zone, received a bonus as a result of the July reenlistment. The reenlistment bonus cannot be excluded from income as combat zone compensation although received while serving in the combat zone, since the member completed the necessary action for entitlement to the reenlistment bonus in a month during which the member had neither served in the combat zone nor was hospitalized for wounds incurred while serving in a combat zone.

(c) *Hospitalization*—(1) *Presumption of combat zone injury.* If an individual is hospitalized for wound, disease, or injury while serving in a combat zone, the wound, disease, or injury will be presumed to have been incurred while serving in a combat zone, unless the contrary clearly appears. In certain cases, however, a wound, disease, or injury may have been incurred while serving in a combat zone even though the individual was not hospitalized for it while so serving. In exceptional cases, a wound, disease, or injury will not have been incurred while serving in a combat zone even though the individual was hospitalized for it while so serving.

(2) *Length of hospitalization.* An individual is hospitalized only until the date the individual is discharged from the hospital.

(3) *Examples of combat zone injury.* The rules of this paragraph (c) are illustrated by the following examples:

Example 1. An individual is hospitalized for a disease in the combat zone where the individual has been serving for three weeks. The incubation period of the disease is two to four weeks. The disease is incurred while serving in the combat zone.

Example 2. The facts are the same as in *Example 1* except that the incubation period of the disease is one year. The disease is not incurred while serving in the combat zone.

Example 3. A member of the Air Force, stationed outside the combat zone, is shot while participating in aerial combat over the combat zone, but is not hospitalized until returning to the home base. The injury is incurred while serving in a combat zone.

Example 4. An individual is hospitalized for a disease three weeks after having departed from a combat zone. The incubation period of the disease is two to four weeks. The disease is incurred while serving in a combat zone.

(d) *Married members.* The exclusion under section 112 applies without regard to the marital status of the recipient of the compensation. If both spouses meet the requirements of the statute, then each spouse is entitled to the benefit of an exclusion. In the case of a husband and wife domiciled in a State recognized for Federal income tax purposes as a community property State, any exclusion from gross income under section 112 operates before apportionment of the gross income of the spouses under community property law. For example, a husband and wife are domiciled in a community property State and the member spouse is entitled, as a commissioned officer, to the benefit of the exclusion under section 112(b) of $500 for each month. The member receives $7,899 as compensation for active service for 3 months in a combat zone. Of that amount, $1,500 is excluded from gross income under section 112(b) and $6,399 is taken into account in determining the gross income of both spouses.

(e) *Service in area outside combat zone*—(1) *Combat zone treatment.* For purposes of section 112, a member of the Armed Forces who performs military service in an area outside the area designated by Executive Order as a combat zone is deemed to serve in that combat zone while the member's service is in direct support of military operations in that zone and qualifies the member for the special pay for duty subject to hostile fire or imminent danger authorized under section 310 of title 37 of the United States Code, as amended (37 U.S.C. 310) (hostile fire/imminent danger pay).

(2) *Examples of combat zone treatment.* The examples in this paragraph (e)(2) are based on the following circumstances: Certain areas, airspace, and adjacent waters are designated as a combat zone for purposes of section 112 as of May 1. Some members of the Armed Forces are stationed in the combat zone; others are stationed in two foreign countries outside the combat zone, named Nearby Country and Destination Country.

Example 1. B is a member of an Armed Forces ground unit stationed in the combat zone. On May 31, B's unit crosses into Nearby Country. B performs military service in Nearby Country in direct support of the military operations in the combat zone from June 1 through June 8 that qualifies B for hostile fire/imminent danger pay. B does not return to the combat zone during June. B is deemed to serve in the combat zone from June 1 through June 8. Accordingly, B is entitled to the exclusion under section 112 for June. Of course, B is also entitled to the exclusion for any month (May, in this example) in which B actually served in the combat zone.

Example 2. B is a member of an Armed Forces ground unit stationed in the combat zone. On May 31, B's unit crosses into Nearby Country. On June 1, B is wounded while performing military service in Nearby Country in direct support of the military operations in the combat zone that qualifies B for hostile fire/imminent danger pay. On June 2, B is transferred for treatment to a hospital in the United States. B is hospitalized from June through October for those wounds. B is deemed to have incurred the wounds while serving in the combat zone on June 1. Accordingly, B is entitled to the exclusion under section 112 for June through October. Of course, B is also entitled to the exclusion for any month (May, in this example) in which B actually served in the combat zone.

Example 3. B is stationed in Nearby Country for the entire month of June as a member of a ground crew servicing combat aircraft operating in the combat zone. B's service in Nearby Country during June does not qualify B for hostile fire/imminent danger pay. Accordingly, B is not deemed to serve in the combat zone during June and is not entitled to the exclusion under section 112 for that month.

Example 4. B is assigned to an air unit stationed in Nearby Country for the entire month of June. In June, members of air units of the Armed Forces stationed in Nearby Country fly combat and supply missions into and over Destination Country in direct support of military operations in the combat zone. B flies combat missions over Destination Country from Nearby Country from June 1 through June 8. B's service qualifies B for hostile fire/imminent danger pay. Accordingly, B is deemed to serve in the combat zone during June and is entitled to the exclusion under section 112. The result would be the same if B were to fly supply missions into Destination Country from Nearby Country in direct support of operations in the combat zone qualifying B for hostile fire/imminent danger pay.

Example 5. Assigned to an air unit stationed in Nearby Country, B was killed in June when B's plane crashed on returning to the airbase in Nearby Country. B was performing military service in direct support of the military operations in the combat zone at the time of B's death. B's service also qualified B for hostile fire/imminent danger pay. B is deemed to have died while serving in the combat zone or to have died as a result of wounds, disease, or injury incurred while serving in the combat zone for purposes of section 692(a) and section 692(b) (providing relief from certain income taxes for members of the Armed Forces dying in a combat zone or as a result of wounds, disease, or injury incurred while serving in a combat zone) and section 2201 (providing relief from certain estate taxes for members of the Armed Forces dying in a combat zone or by reason of combat-zone-incurred wounds). The result would be the same if B's mission had been a supply mission instead of a combat mission.

Example 6. In June, B was killed as a result of an off-duty automobile accident while leaving the airbase in Nearby Country shortly after returning from a mission over Destination Country. At the time of B's death, B was not performing military duty qualifying B for hostile fire/imminent danger pay. B is not deemed to have died while serving in the combat zone or to have died as the result of wounds, disease, or injury incurred while serving in the combat zone. Accordingly, B does not qualify for the benefits of section 692(a), section 692(b), or section 2201.

Example 7. B performs military service in Nearby Country from June 1 through June 8 in direct support of the military operations in the combat zone. Nearby Country is designated as an area in which members of the Armed Forces qualify for hostile fire/imminent danger pay due to imminent danger, even though members in Nearby Country are not subject to hostile fire. B is deemed to serve in the combat zone from June 1 through June 8. Accordingly, B is entitled to the exclusion under section 112 for June.

(f) *Nonqualifying presence in combat zone*—(1) *Inapplicability of exclusion.*

The following members of the Armed Forces are not deemed to serve in a combat zone within the meaning of section 112(a)(1) or section 112(b)(1) or to be hospitalized as a result of wounds, disease, or injury incurred while serving in a combat zone within the meaning of section 112(a)(2) or section 112(b)(2)—

(i) Members present in a combat zone while on leave from a duty station located outside a combat zone;

(ii) Members who pass over or through a combat zone during the course of a trip between two points both of which lie outside a combat zone; or

(iii) Members present in a combat zone solely for their own personal convenience.

(2) *Exceptions for temporary duty or special pay*. Paragraph (f)(1) of this section does not apply to members of the Armed Forces who—

(i) Are assigned on official temporary duty to a combat zone (including official temporary duty to the airspace of a combat zone); or

(ii) Qualify for hostile fire/imminent danger pay.

(3) *Examples of nonqualifying presence and its exceptions*. The examples in this paragraph (f)(3) are based on the following circumstances: Certain areas, airspace, and adjacent waters are designated as a combat zone for purposes of section 112 as of May 1. Some members of the Armed Forces are stationed in the combat zone; others are stationed in two foreign countries outside the combat zone, named Nearby Country and Destination Country.

Example 1. B is a member of the Armed Forces assigned to a unit stationed in Nearby Country. On June 1, B voluntarily visits a city within the combat zone while on leave. B is not deemed to serve in a combat zone since B is present in a combat zone while on leave from a duty station located outside a combat zone.

Example 2. B is a member of the Armed Forces assigned to a unit stationed in Nearby Country. During June, B takes authorized leave and elects to spend the leave period by visiting a city in the combat zone. While on leave in the combat zone, B is subject to hostile fire qualifying B for hostile fire/imminent danger pay. Although B is present in the combat zone while on leave from a duty station outside the combat zone, B qualifies for the exclusion under section 112 because B qualifies for hostile fire/imminent danger pay while in the combat zone.

Example 3. B is a member of the Armed Forces assigned to a ground unit stationed in the combat zone. During June, B takes authorized leave and elects to spend the leave period in the combat zone. B is not on leave from a duty station located outside a combat zone, nor is B present in a combat zone solely for B's own personal convenience. Accordingly, B's combat zone tax benefits continue while B is on leave in the combat zone.

Example 4. B is assigned as a navigator to an air unit stationed in Nearby Country. On June 4, during the course of a flight between B's home base in Nearby Country and another base in Destination Country, the aircraft on which B serves as a navigator flies over the combat zone. B is not on official temporary duty to the airspace of the combat zone and does not qualify for hostile fire/imminent danger pay as a result of the flight. Accordingly, B is not deemed to serve in a combat zone since B passes over the combat zone during the course of a trip between two points both of which lie outside the combat zone without either being on official temporary duty to the combat zone or qualifying for hostile fire/imminent danger pay.

Example 5. B is a member of the Armed Forces assigned to a unit stationed in Nearby Country. B enters the combat zone on a 3-day pass. B is not on official temporary duty and does not qualify for hostile fire/imminent danger pay while present in the combat zone. Accordingly, B is not deemed to serve in a combat zone since B is present in the combat zone solely for B's own personal convenience.

Example 6. B, stationed in Nearby Country, is a military courier assigned on official temporary duty to deliver military pouches in the combat zone and in Destination Country. On June 1, B arrives in the combat zone from Nearby Country, and on June 2, B departs for Destination Country. Although B passes through the combat zone during the course of a trip between two points outside the combat zone, B is nevertheless deemed to serve in a combat zone while in the combat zone because B is assigned to the combat zone on official temporary duty.

Example 7. B is a member of an Armed Forces ground unit stationed in Nearby Country. On June 1, B took authorized leave and elected to spend the leave period by visiting a city in the combat zone. On June 2, while on leave in the combat zone, B was wounded by hostile fire qualifying B for hostile fire/imminent danger pay. On June 3, B was transferred for treatment to a hospital in the United States. B is hospitalized from June through October for those wounds. Although B was present in the combat zone while on leave from a duty station outside the combat zone, B is deemed to have incurred the wounds while serving in the combat zone on June 2, because B qualified for hostile fire/imminent danger pay while in the combat zone. Accordingly, B is entitled to the exclusion under section 112 for June through October.

Example 8. The facts are the same as in *Example 7* except that B dies on September 1 as a result of the wounds incurred in the combat zone. B is deemed to have died as a result of wounds, disease, or injury incurred while serving in the combat zone for purposes of section 692(a) and section 692(b) (providing relief from certain income taxes for members of the Armed Forces dying in a combat zone or as a result of wounds, disease, or injury incurred while serving in a combat zone) and section 2201 (providing relief from certain estate taxes for members of the Armed Forces dying in a combat zone or by reason of combat-zone-incurred wounds).

[T.D. 8489, 58 FR 47640, Sept. 10, 1993]

§ 1.113–1 Mustering-out payments for members of the Armed Forces.

For the purposes of the exclusion from gross income under section 113 of mustering-out payments with respect to service in the Armed Forces, mustering-out payments are payments made to any recipients pursuant to the provisions of 38 U.S.C. 2105 (formerly section 5 of the Mustering-out Payment Act of 1944 and section 505 of the Veterans' Readjustment Assistance Act of 1952).

§ 1.117–1 Exclusion of amounts received as a scholarship or fellowship grant.

(a) *In general.* Any amount received by an individual as a scholarship at an educational institution or as a fellowship grant, including the value of contributed services and accommodations, shall be excluded from the gross income of the recipient, subject to the limitations set forth in section 117(b) and §1.117–2. The exclusion from gross income of an amount which is a scholarship or fellowship grant is controlled solely by section 117. Accordingly, to the extent that a scholarship or a fellowship grant exceeds the limitations of section 117(b) and §1.117–2, it is includible in the gross income of the recipient notwithstanding the provisions of section 102 relating to exclusion from gross income of gifts, or section 74(b) relating to exclusion from gross income of certain prizes and awards. For definitions, see §1.117–3.

(b) *Exclusion of amounts received to cover expenses.* (1) Subject to the limitations provided in subparagraph (2) of this paragraph, any amount received by an individual to cover expenses for travel (including meals and lodging while traveling and an allowance for travel of the individual's family), research, clerical help, or equipment is excludable from gross income provided that such expenses are incident to a scholarship or fellowship grant which is excludable from gross income under section 117(a)(1). If, however, only a portion of a scholarship or fellowship grant is excludable from gross income under section 117(a)(1) because of the part-time employment limitation contained in section 117(b)(1) or because of the expiration of the 36-month period described in section 117(b)(2)(B), only the amount received to cover expenses incident to such excludable portion is excludable from gross income. The requirement that these expenses be incident to the scholarship or the fellowship grant means that the expenses of travel, research, clerical help, or equipment must be incurred by the individual in order to effectuate the purpose for which the scholarship or the fellowship grant was awarded.

(2)(i) In the case of a scholarship or fellowship grant which is awarded after July 28, 1956, the exclusion provided under subparagraph (1) of this paragraph is not applicable unless the amount received by the individual is specifically designated to cover expenses for travel, research, clerical help, or equipment.

(ii) In the case of a scholarship or fellowship grant awarded before July 29, 1956, the exclusion provided under subparagraph (1) of this paragraph is not applicable unless the recipient establishes, by competent evidence, that the amount was received to cover expenses for travel, research, clerical help, or equipment, but such amount need not be specifically designated. The fact that the recipient actually incurred expenses for travel, research, clerical help, or equipment is not sufficient to establish that the amount was received to cover such expenses.

(iii) The exclusion provided under subparagraph (1) of this paragraph is applicable only to the extent that the amount received for travel, research, clerical help, or equipment is actually expended for such expenses by the recipient during the term of the scholarship or fellowship grant and within a reasonable time before and after such term.

(3) The portion of any amount received to cover the expenses described in subparagraph (1) of this paragraph which is not actually expended for such expenses within the exclusion period described in subparagraph (2) of this paragraph shall, if not returned to the grantor within this period, be included in the gross income of the recipient for the taxable year in which such exclusion period expires.

§ 1.117–2 Limitations.

(a) *Individuals who are candidates for degrees*—(1) *In general.* Under the limitations provided by section 117(b)(1) in the case of an individual who is a candidate for a degree at an educational institution, the exclusion from gross income shall not apply (except as otherwise provided in subparagraph (2) of this paragraph) to that portion of any amount received as payment for teaching, research, or other services in the nature of parttime employment required as a condition to receiving the scholarship or fellowship grant. Payments for such part-time employment shall be included in the gross income of the recipient in an amount determined by reference to the rate of compensation ordinarily paid for similar services performed by an individual who is not the recipient of a scholarship or a fellowship grant. A typical example of employment under this subparagraph is the case of an individual who is required, as a condition to receiving the scholarship or the fellowship grant, to perform part-time teaching services. A requirement that the individual shall furnish periodic reports to the grantor of the scholarship or the fellowship grant for the purpose of keeping the grantor informed as to the general progress of the individual shall not be deemed to constitute the performance of services in the nature of part-time employment.

(2) *Exception.* If teaching, research, or other services are required of all candidates (whether or not recipients of scholarships or fellowship grants) for a particular degree as a condition to receiving the degree, such teaching, research, or other services on the part of the recipient of a scholarship or fellowship grant who is a candidate for such degree shall not be regarded as part-time employment within the meaning of this paragraph. Thus, if all candidates for a particular education degree are required, as part of their regular course of study or curriculum, to perform part-time practice teaching services, such services are not to be regarded as part-time employment within the meaning of this paragraph.

(b) *Individuals who are not candidates for degrees*—(1) *Conditions for exclusion.* In the case of an individual who is not a candidate for a degree at an educational institution, the exclusion from gross income of an amount received as a scholarship or a fellowship grant shall apply (to the extent provided in subparagraph (2) of this paragraph) only if the grantor of the scholarship or fellowship grant is—

(i) An organization described in section 501(c)(3) which is exempt from tax under section 501(a),

(ii) The United States or an instrumentality or agency thereof, or a State, a territory, or a possession of the United States, or any political subdivision thereof, or the District of Columbia, or

(iii) For taxable years beginning after December 31, 1961, a foreign government, an international organization, or a binational or multinational educational and cultural foundation or commission created or continued pursuant to section 103 of the Mutual Educational and Cultural Exchange Act of 1961 (22 U.S.C. 2453).

(2) *Extent of exclusion.* (i) In the case of an individual who is not a candidate for a degree, the amount received as a scholarship or a fellowship grant which is excludable from gross income under section 117(a)(1) shall not exceed an amount equal to $300 times the number of months for which the recipient received amounts under the scholarship or fellowship grant during the taxable year. In determining the number of

months during the period for which the recipient received amounts under a scholarship or fellowship grant, computation shall be made on the basis of whole calendar months. A whole calendar month means a period of time terminating with the day of the succeeding month numerically corresponding to the day of the month of its beginning, less one, except that if there be no corresponding day of the succeeding month the period terminates with the last day of the succeeding month. For purposes of this computation a fractional part of a calendar month consisting of a period of time including 15 days or more shall be considered to be a whole calendar month and a fractional part of a calendar month consisting of a period of time including 14 days or less shall be disregarded. For example, if an individual receives a fellowship grant on September 13 which is to expire on June 12 of the following year, the grant shall be considered to have extended for a period of 9 months. If in the preceding example the grant expired on June 27, instead of June 12, the grant shall be considered to have extended for a period of 10 months.

(ii) No exclusion shall be allowed under section 117(a)(1) to an individual who is not a candidate for a degree after the recipient has, as an individual who is not a candidate for a degree, been entitled to an exclusion under that section for a period of 36 months. This limitation applies if the individual has received any amount which was either excluded or excludable from his gross income under section 117(a)(1) for any prior 36 months, whether or not consecutive. For example, if the individual received a fellowship grant of $7,200 for 3 years (which he elected to receive in 36 monthly installments of $200), his exclusion period would be exhausted even though he did not in any of the 36 months make use of the maximum exclusion. Accordingly, such individual would be entitled to no further exclusion from gross income with respect to any additional grants which he may receive as an individual who is not a candidate for a degree.

(iii) If an individual who is not a candidate for a degree receives amounts from more than one scholarship or fellowship grant during the taxable year, the total amounts received in the taxable year shall be aggregated for the purpose of computing the amount which may be excludable from gross income for such taxable year. If amounts are received from more than one scholarship or fellowship grant during the same month or months within the taxable year, such month or months shall be counted only once for the purpose of determining the number of months for which the individual received such amounts under the scholarships or fellowship grants during the taxable year. For example, if an individual receives a fellowship grant from one source for the months of January to June of the taxable year and also receives a fellowship grant from another source for the months of March through December of the same taxable year, he shall be considered to have received amounts for 12 months of the taxable year. See example (4) in subparagraph (3) of this paragraph for further illustration.

(3) *Examples.* The application of this paragraph may be further illustrated by the following examples, it being assumed that in each example the grantor is a grantor who is described in section 117(b)(2)(A) and subparagraph (1) of this paragraph:

Example 1. B, an individual who files his return on the calendar year basis, is awarded a post-doctorate fellowship grant in March 1955. The grant is to commence on September 1, 1955, and is to end on May 31, 1956, so that it will extend over a period of 9 months. The amount of the fellowship grant is $4,500 and B receives this amount in monthly installments of $500 on the first day of each month commencing September 1, 1955. During the taxable year 1955, B receives a total of $2,000 with respect to the 4-month period September through December, inclusive. He may exclude $1,200 from gross income in the taxable year 1955 ($300×4) and must include the remaining $800 in gross income for that year. For the year 1956, he will exclude $1,500 ($300×5) from gross income with respect to the $2,500 which he receives in that year and must include in gross income $1,000.

Example 2. Assume the same facts as in example (1) except that B receives the full amount of the grant ($4,500) on September 1, 1955. Since the amount received in the taxable year 1955 is for the full term of the fellowship grant (9 months), B may exclude

$2,700 ($300×9) from gross income for the taxable year 1955. The remaining $1,800 must be included in gross income for that year.

Example 3. C, an individual who files his return on the calendar year basis, is awarded a post-doctorate fellowship grant in March 1955. The amount of the grant is $4,500 for a period commencing on September 1, 1955, and ending 24 months thereafter. C receives the full amount of the grant on September 1, 1955. C may exclude from gross income for the taxable year 1955, the full amount of the grant ($4,500) since this amount does not exceed an amount equal to $300 times the number of months (24) for which he received the amount of the grant during that taxable year.

Example 4. (i) F, an individual who files his return on the calendar year basis, is awarded a post-doctorate fellowship grant (Grant A) for two years commencing June 1, 1955, in the amount of $4,800. He elects to receive his grant in monthly installments of $200 commencing June 1, 1955. On March 1, 1956, F is awarded another post-doctorate fellowship grant (Grant B) for two years commencing September 1, 1956, in the amount of $7,200. He elects to receive this grant in monthly installments of $300 commencing September 1, 1956.

(ii) For the calendar year 1955, F receives $1,400 from Grant A which he is entitled to exclude from gross income since it does not exceed an amount equal to $300 times the number of months (7) for which he received amounts under the grant in the taxable year.

(iii) For the calendar year 1956, F receives $3,600 as the aggregate of amounts received under fellowship grants ($2,400 from Grant A and $1,200 from Grant B). F will be entitled to exclude the entire amount of $3,600 from gross income for the calendar year 1956 since such amount does not exceed an amount equal to $300 times the number of months (12) for which he received amounts under the grants in the taxable year.

(iv) For the calendar year 1957, F receives $4,600 as the aggregate of amounts received under fellowship grants ($1,000 from Grant A and $3,600 from Grant B). F will be entitled to exclude $3,600 ($300×12) from gross income for the calendar year 1957 and he will have to include $1,000 in gross income.

(v) For the calendar year 1958, F receives $2,400 from Grant B. F is entitled to exclude $1,500 ($300×5) from gross income for the calendar year 1958 and he will have to include $900 in gross income. While F receives amounts under fellowship Grant B for 8 months during the calendar year 1958, he is limited to an amount equal to $300 times 5 (months) because of the fact that he has already been entitled to exclude (and has in fact excluded) amounts received as a fellowship grant for a period of 31 months. Accordingly, he can only exclude amounts received under the fellowship grant for 5 months during the calendar year 1958, because of the 36-month limitation period. The fact that he was entitled to exclude only $1,400 ($200 a month for 7 months) instead of the maximum amount of $2,100 ($300×7) in 1955, is immaterial and the limitation period of 36 months is applicable.

(vi) The following chart illustrates the computation of the number of months for which F received amounts under the fellowship grants during the respective taxable years and the computation of the total amounts received under the fellowship grants during each taxable year:

Period for which received and source	Number of months	Amounts received
1955:		
June 1 to December 31	7	
Grant A	....	$1,400
Grant B	....	None
Aggregate	7	1,400
1956:		
January 1 to August 31	8	
Grant A	....	1,600
Grant B	....	None
September 1 to December 31	4	
Grant A	....	800
Grant B	....	1,200
Aggregate	12	3,600
1957:		
January 1 to May 31	5	
Grant A	....	1,000
Grant B	....	1,500
June 1 to December 31	7	
Grant A	....	None
Grant B	....	2,100
Aggregate	12	4,600
1958:		
January 1 to August 31	8	
Grant A	....	None
Grant B	....	2,400
Aggregate	....	2,400

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6782, 29 FR 18355, Dec. 24, 1964]

§ 1.117–3 Definitions.

(a) *Scholarship.* A scholarship generally means an amount paid or allowed to, or for the benefit of, a student, whether an undergraduate or a graduate, to aid such individual in pursuing his studies. The term includes the value of contributed services and accommodations (see paragraph (d) of this section) and the amount of tuition, matriculation, and other fees which are furnished or remitted to a student to aid him in pursuing his studies. The term also includes any amount received in the nature of a family allowance as a part of a scholarship. However, the term does not include any amount provided by an individual to aid a relative, friend, or other individual in pursuing his studies where the grantor is motivated by family or philanthropic considerations. If an educational institution maintains or participates in a plan whereby the tuition of a child of a faculty member of such institution is remitted by any other participating educational institution attended by such child, the amount of the tuition so remitted shall be considered to be an amount received as a scholarship.

(b) *Educational organization.* For definition of ''educational organization'' paragraphs (a) and (b) of section 117 adopt the definition of that term which is prescribed in section 151(e)(4). Accordingly, for purposes of section 117 the term ''educational organization'' means only an educational organization which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on. See section 151(e)(4) and regulations thereunder.

(c) *Fellowship grant.* A fellowship grant generally means an amount paid or allowed to, or for the benefit of, an individual to aid him in the pursuit of study or research. The term includes the value of contributed services and accommodations (see paragraph (d) of this section) and the amount of tuition, matriculation, and other fees which are furnished or remitted to an individual to aid him in the pursuit of study or research. The term also includes any amount received in the nature of a family allowance as a part of a fellowship grant. However, the term does not include any amount provided by an individual to aid a relative, friend, or other individual in the pursuit of study or research where the grantor is motivated by family or philanthropic considerations.

(d) *Contributed services and accommodations.* The term ''contributed services and accommodations'' means such services and accommodations as room, board, laundry service, and similar services or accommodations which are received by an individual as a part of a scholarship or fellowship grant.

(e) *Candidate for a degree.* The term ''candidate for a degree'' means an individual, whether an undergraduate or a graduate, who is pursuing studies or conducting research to meet the requirements for an academic or professional degree conferred by colleges or universities. It is not essential that such study or research be pursued or conducted at an educational institution which confers such degrees if the purpose thereof is to meet the requirements for a degree of a college or university which does confer such degrees. A student who receives a scholarship for study at a secondary school or other educational institution is considered to be a ''candidate for a degree.''

[T.D. 6500, 25 FR 11402, Nov. 26, 1960; 25 FR 14021, Dec. 21, 1960, as amended by T.D. 8032, 50 FR 27232, July 2, 1985]

§ 1.117–4 Items not considered as scholarships or fellowship grants.

The following payments or allowances shall not be considered to be amounts received as a scholarship or a fellowship grant for the purpose of section 117:

(a) *Educational and training allowances to veterans.* Educational and training allowances to a veteran pursuant to section 400 of the Servicemen's Readjustment Act of 1944 (58 Stat. 287) or pursuant to 38 U.S.C. 1631 (formerly section 231 of the Veterans' Readjustment Assistance Act of 1952).

(b) *Allowances to members of the Armed Forces of the United States.* Tuition and subsistence allowances to members of the Armed Forces of the United States who are students at an educational institution operated by the United States or approved by the United States for their education and training, such as the United States Naval Academy and the United States Military Academy.

(c) *Amounts paid as compensation for services or primarily for the benefit of the grantor.* (1) Except as provided in paragraph (a) of §§ 1.117–2 and 1.117–5, any amount paid or allowed to, or on behalf of, an individual to enable him to pursue studies or research, if such amount represents either compensation for past, present, or future employment services or represents payment for services which are subject to the direction or supervision of the grantor.

(2) Any amount paid or allowed to, or on behalf of, an individual to enable him to pursue studies or research primarily for the benefit of the grantor.

However, amounts paid or allowed to, or on behalf of, an individual to enable him to pursue studies or research are considered to be amounts received as a scholarship or fellowship grant for the purpose of section 117 if the primary purpose of the studies or research is to further the education and training of the recipient in his individual capacity and the amount provided by the grantor for such purpose does not represent compensation or payment for the services described in subparagraph (1) of this paragraph. Neither the fact that the recipient is required to furnish reports of his progress to the grantor, nor the fact that the results of his studies or research may be of some incidental benefits to the grantor shall, of itself, be considered to destroy the essential character of such amount as a scholarship or fellowship grant.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960; 25 FR 14021, Dec. 21, 1960, as amended by T.D. 8032, 50 FR 27232, July 2, 1985]

§ 1.117–5 Federal grants requiring future service as a Federal employee.

(a) *In general.* Under section 117(c), amounts received by an individual under a Federal program as a scholarship or grant for qualified tuition and expenses at an institution of higher education are excluded from the gross income of the recipient even though the recipient is required to perform future service as a Federal employee. See paragraph (c) of this section for the definitions of the terms ''qualified tuition and expenses'' and ''institution of higher education.''

(b) *Exception for uniformed services scholarship programs.* The requirements of this section do not apply to amounts received before 1985 by a member of a uniformed service who entered training before 1981 under the Armed Forces Health Professions Scholarship Program, National Public Health Service Corps Scholarship Training Program, or other substantially similar Federal programs requiring the recipient to work for a uniformed Federal service after completion of studies. These awards are governed by section 4 of Pub. L. 93–483 as amended by Pub. L. 95–171, Pub. L. 95–600 and Pub. L. 96–167. See section 101(3) of title 37, United States Code for the definition of the term ''uniformed service.''

(c) *Definitions*—(1) *Qualified tuition and related expenses.* For purposes of section 117(c) and this section, qualified tuition and related expenses are those amounts which under the terms of the Federal program are required to be used and in fact are used for payment of:

(i) Tuition and fees that are required for the recipient's enrollment or attendance at an institution of higher education; and

(ii) Those amounts used for payment of fees, books, supplies and equipment required for courses of instruction at such an institution.

Incidental expenses are not considered related expenses and thus are not excludable from gross income under section 117(c). Incidental expenses include room and board at an institution of higher education, expenses for travel (including expenses for meals and lodging incurred during travel and allowances for travel of the recipient's family), research, clerical help, equipment and other expenses which are not required for enrollment at the institution or in a course of instruction at such institution.

(2) *Institution of higher education.* To qualify as an institution of higher education under this section, the institution must be a public or other nonprofit institution in any state which—

(i) Admits as regular students only individuals who have a certificate of graduation from a high school or the recognized equivalent of such a certificate;

(ii) Is legally authorized within the state to provide a program of education beyond high school; and

(iii) Provides an education program for which it awards a bachelor's or higher degree or which is acceptable for full credit towards such a degree, or which trains and prepares students for gainful employment in a recognized health profession. For purposes of this section, recognized health professions are those health professions which are supervised or monitored by appropriate state or Federal agencies or governing professional associations and which require members to be currently licensed or certified in order to practice.

(3) *Service as a Federal employee*—(i) *In general*. Except as otherwise provided in paragraph (c)(3)(ii) of this section, service as a Federal employee refers to employment of the recipient by the Federal government to work directly for the Federal government. Thus, Federal grants or scholarships which do not require the recipient to work directly for the Federal government are not governed by the rules of this section.

(ii) *Service in a health manpower shortage area*. For purposes of this section an obligation under a grant for the recipient to serve in a health related field in a health manpower shortage area as designated by the Secretary of Health and Human Services according to the criteria of the Public Health Services Act (42 U.S.C. 254(e)) and the regulations promulgated thereunder (42 CFR 5.1–5.4) will be considered an obligation to serve as a Federal employee.

(d) *Records required for exclusion from gross income*. To exclude amounts received under Federal programs requiring future services as a Federal employee, the recipient must maintain records that establish that the amounts received under such programs were used for qualified tuition and related expenses as defined in paragraph (c)(1) of this section. Qualifying uses may be established by providing to the Service, upon request, copies of relevant bills, receipts, cancelled checks or other convenient documentation or records which clearly reflect the use of the money received under the grant. The recipient must also submit, upon request, documentation establishing receipt of the grant and setting out the terms and requirements of the particular grant.

(e) *Applicability of rules of §§117(a) and 117(b)*. Except where a different rule has been expressly provided in this section, amounts received under Federal grants requiring future service as a Federal employee, and which meet the requirements for exclusion from gross income under this section, are subject to the rules, limitations and definitions specified in §§117 (a) and (b) of the Code and §§1.117–1 through 1.117–4.

(f) *Effective date*. Except as provided in paragraph (b) of this section, this section will apply to amounts received after December 31, 1980 under Federal programs which meet the requirements of this section.

[T.D. 8032, 50 FR 27232, July 2, 1985]

§1.118–1 Contributions to the capital of a corporation.

In the case of a corporation, section 118 provides an exclusion from gross income with respect to any contribution of money or property to the capital of the taxpayer. Thus, if a corporation requires additional funds for conducting its business and obtains such funds through voluntary pro rata payments by its shareholders, the amounts so received being credited to its surplus account or to a special account, such amounts do not constitute income, although there is no increase in the outstanding shares of stock of the corporation. In such a case the payments are in the nature of assessments upon, and represent an additional price paid for, the shares of stock held by the individual shareholders, and will be treated as an addition to and as a part of the operating capital of the company. Section 118 also applies to contributions to capital made by persons other than shareholders. For example, the exclusion applies to the value of land or other property contributed to a corporation by a governmental unit or by a civic group for the purpose of inducing the corporation to locate its business in a particular community, or for the purpose of enabling the corporation to expand its operating facilities. However, the exclusion does not apply to any money or property transferred to the corporation in consideration for goods or services rendered, or to subsidies paid for the purpose of inducing the taxpayer to limit production. See section 362 for the basis of property acquired by a corporation through a contribution to its capital by its stockholders or by nonstockholders.

§ 1.118–2 Contribution in aid of construction.

(a) *Special rule for water and sewerage disposal utilities*—(1) *In general.* For purposes of section 118, the term *contribution to the capital of the taxpayer* includes any amount of money or other property received from any person (whether or not a shareholder) by a regulated public utility that provides water or sewerage disposal services if—

(i) The amount is a contribution in aid of construction under paragraph (b) of this section;

(ii) In the case of a contribution of property other than water or sewerage disposal facilities, the amount satisfies the expenditure rule under paragraph (c) of this section; and

(iii) The amount (or any property acquired or constructed with the amount) is not included in the taxpayer's rate base for ratemaking purposes.

(2) *Definitions*—(i) *Regulated public utility* has the meaning given such term by section 7701(a)(33), except that such term does not include any utility which is not required to provide water or sewerage disposal services to members of the general public in its service area.

(ii) *Water or sewerage disposal facility* is defined as tangible property described in section 1231(b) that is used predominately (80% or more) in the trade or business of furnishing water or sewerage disposal services.

(b) *Contribution in aid of construction*—(1) *In general.* For purposes of section 118(c) and this section, the term *contribution in aid of construction* means any amount of money or other property contributed to a regulated public utility that provides water or sewerage disposal services to the extent that the purpose of the contribution is to provide for the expansion, improvement, or replacement of the utility's water or sewerage disposal facilities.

(2) *Advances.* A contribution in aid of construction may include an amount of money or other property contributed to a regulated public utility for a water or sewerage disposal facility subject to a contingent obligation to repay the amount, in whole or in part, to the contributor (commonly referred to as an advance). For example, an amount received by a utility from a developer to construct a water facility pursuant to an agreement under which the utility will pay the developer a percentage of the receipts from the facility over a fixed period may constitute a contribution in aid of construction. Whether an advance is a contribution or a loan is determined under general principles of federal tax law based on all the facts and circumstances. For the treatment of any amount of a contribution in aid of construction that is repaid by the utility to the contributor, see paragraphs (c)(2)(ii) and (d)(2) of this section.

(3) *Customer connection fee*—(i) *In general.* Except as provided in paragraph (b)(3)(ii) of this section, a customer connection fee is not a contribution in aid of construction under this paragraph (b) and generally is includible in income. The term *customer connection fee* includes any amount of money or other property transferred to the utility representing the cost of installing a connection or service line (including the cost of meters and piping) from the utility's main water or sewer lines to the line owned by the customer or potential customer. A customer connection fee also includes any amount paid as a service charge for starting or stopping service.

(ii) *Exceptions*—(A) *Multiple customers.* Money or other property contributed for a connection or service line from the utility's main line to the customer's or the potential customer's line is not a customer connection fee if the connection or service line serves, or is designed to serve, more than one customer. For example, a contribution for a split service line that is designed to serve two customers is not a customer connection fee. On the other hand, if a water or sewerage disposal utility treats an apartment or office building as one utility customer, then the cost of installing a connection or service line from the utility's main water or sewer lines serving that single customer is a customer connection fee.

(B) *Fire protection services.* Money or other property contributed for public and private fire protection services is not a customer connection fee.

(4) *Reimbursement for a facility previously placed in service*—(i) *In general.* If a water or sewerage disposal facility

is placed in service by the utility before an amount is contributed to the utility, the contribution is not a contribution in aid of construction under this paragraph (b) with respect to the cost of the facility unless, no later than 8½ months after the close of the taxable year in which the facility was placed in service, there is an agreement, binding under local law, that the utility is to receive the amount as reimbursement for the cost of acquiring or constructing the facility. An order or tariff, binding under local law, that is issued or approved by the applicable public utility commission requiring current or prospective utility customers to reimburse the utility for the cost of acquiring or constructing the facility, is a binding agreement for purposes of the preceding sentence. If an agreement exists, the basis of the facility must be reduced by the amount of the expected contributions. Appropriate adjustments must be made if actual contributions differ from expected contributions.

(ii) *Example.* The application of paragraph (b)(4)(i) of this section is illustrated by the following example:

Example. M, a calendar year regulated public utility that provides water services, spent $1,000,000 for the construction of a water facility that can serve 200 customers. M placed the facility in service in 2000. In June 2001, the public utility commission that regulates M approves a tariff requiring new customers to reimburse M for the cost of constructing the facility by paying a service availability charge of $5,000 per lot. Pursuant to the tariff, M expects to receive reimbursements for the cost of the facility of $100,000 per year for the years 2001 through 2010. The reimbursements are contributions in aid of construction under paragraph (b) of this section because no later than 8½ months after the close of the taxable year in which the facility was placed in service there was a tariff, binding under local law, approved by the public utility commission requiring new customers to reimburse the utility for the cost of constructing the facility. The basis of the $1,000,000 facility is zero because the expected contributions equal the cost of the facility.

(5) *Classification by ratemaking authority.* The fact that the applicable ratemaking authority classifies any money or other property received by a utility as a contribution in aid of construction is not conclusive as to its treatment under this paragraph (b).

(c) *Expenditure rule*—(1) *In general.* An amount satisfies the expenditure rule of section 118(c)(2) if the amount is expended for the acquisition or construction of property described in section 118(c)(2)(A), the amount is paid or incurred before the end of the second taxable year after the taxable year in which the amount was received as required by section 118(c)(2)(B), and accurate records are kept of contributions and expenditures as provided in section 118(c)(2)(C).

(2) *Excess amount*—(i) *Includible in the utility's income.* An amount received by a utility as a contribution in aid of construction that is not expended for the acquisition or construction of water or sewerage disposal facilities as required by paragraph (c)(1) of this section (the excess amount) is not a contribution to the capital of the taxpayer under paragraph (a) of this section. Except as provided in paragraph (c)(2)(ii) of this section, such excess amount is includible in the utility's income in the taxable year in which the amount was received.

(ii) *Repayment of excess amount.* If the excess amount described in paragraph (c)(2)(i) of this section is repaid, in whole or in part, either—

(A) Before the end of the time period described in paragraph (c)(1) of this section, the repayment amount is not includible in the utility's income; or

(B) After the end of the time period described in paragraph (c)(1) of this section, the repayment amount may be deducted by the utility in the taxable year in which it is paid or incurred to the extent such amount was included in income.

(3) *Example.* The application of this paragraph (c) is illustrated by the following example:

Example. M, a calendar year regulated public utility that provides water services, received a $1,000,000 contribution in aid of construction in 2000 for the purpose of constructing a water facility. To the extent that the $1,000,000 exceeded the actual cost of the facility, the contribution was subject to being returned. In 2001, M built the facility at a cost of $700,000 and returned $200,000 to the contributor. As of the end of 2002, M had not returned the remaining $100,000. Assuming accurate records are kept, the requirement under section 118(c)(2) is satisfied for $700,000 of the contribution. Because $200,000 of the contribution was returned within the time period during which qualifying expenditures could be made, this amount is not includible in M's income. However, the remaining $100,000 is includible in M's income for its 2000 taxable year (the taxable year in which the amount was received) because the amount was neither spent nor repaid during the prescribed time period. To the extent M repays the remaining $100,000 after year 2002, M would be entitled to a deduction in the year such repayment is paid or incurred.

(d) *Adjusted basis*—(1) *Exclusion from basis*. Except for a repayment described in paragraph (d)(2) of this section, to the extent that a water or sewerage disposal facility is acquired or constructed with an amount received as a contribution to the capital of the taxpayer under paragraph (a) of this section, the basis of the facility is reduced by the amount of the contribution. To the extent the water or sewerage disposal facility is acquired as a contribution to the capital of the taxpayer under paragraph (a) of this section, the basis of the contributed facility is zero.

(2) *Repayment of contribution*. If a contribution to the capital of the taxpayer under paragraph (a) of this section is repaid to the contributor, either in whole or in part, then the repayment amount is a capital expenditure in the taxable year in which it is paid or incurred, resulting in an increase in the property's adjusted basis in such year. Capital expenditures allocated to depreciable property under paragraph (d)(3) of this section may be depreciated over the remaining recovery period for that property.

(3) *Allocation of contributions*. An amount treated as a capital expenditure under this paragraph (d) is to be allocated proportionately to the adjusted basis of each property acquired or constructed with the contribution based on the relative cost of such property.

(4) *Example*. The application of this paragraph (d) is illustrated by the following example:

Example. A, a calendar year regulated public utility that provides water services, received a $1,000,000 contribution in aid of construction in 2000 as an advance from B, a developer, for the purpose of constructing a water facility. To the extent that the $1,000,000 exceeds the actual cost of the facility, the contribution is subject to being returned. Under the terms of the advance, A agrees to pay to B a percentage of the receipts from the facility over a fixed period, but limited to the cost of the facility. In 2001, A builds the facility at a cost of $700,000 and returns $300,000 to B. In 2002, A pays $20,000 to B out of the receipts from the facility. Assuming accurate records are kept, the $700,000 advance is a contribution to the capital of A under paragraph (a) of this section and is excludable from A's income. The basis of the $700,000 facility constructed with this contribution to capital is zero. The $300,000 excess amount is not a contribution to the capital of A under paragraph (a) of this section because it does not meet the expenditure rule described in paragraph (c)(1) of this section. However, this excess amount is not includible in A's income pursuant to paragraph (c)(2)(ii) of this section since the amount is repaid to B within the required time period. The repayment of the $300,000 excess amount to B in 2001 is not treated as a capital expenditure by A. The $20,000 payment to B in 2002 is treated as a capital expenditure by A in 2002 resulting in an increase in the adjusted basis of the water facility from zero to $20,000.

(e) *Statute of limitations*—(1) *Extension of statute of limitations*. Under section 118(d)(1), the statutory period for assessment of any deficiency attributable to a contribution to capital under paragraph (a) of this section does not expire before the expiration of 3 years after the date the taxpayer notifies the Secretary in the time and manner prescribed in paragraph (e)(2) of this section.

(2) *Time and manner of notification*. Notification is made by attaching a statement to the taxpayer's federal income tax return for the taxable year in which any of the reportable items in paragraphs (e)(2)(i) through (iii) of this section occur. The statement must contain the taxpayer's name, address, employer identification number, taxable year, and the following information with respect to contributions of property other than water or sewerage disposal facilities that are subject to the expenditure rule described in paragraph (c) of this section—

(i) The amount of contributions in aid of construction expended during the taxable year for property described in section 118(c)(2)(A) (qualified property) as required under paragraph (c)(1) of this section, identified by taxable year in which the contributions were received;

(ii) The amount of contributions in aid of construction that the taxpayer does not intend to expend for qualified property as required under paragraph (c)(1) of this section, identified by taxable year in which the contributions were received; and

(iii) The amount of contributions in aid of construction that the taxpayer failed to expend for qualified property as required under paragraph (c)(1) of this section, identified by taxable year in which the contributions were received.

(f) *Effective date*. This section is applicable for any money or other property received by a regulated public utility that provides water or sewerage disposal services on or after January 11, 2001.

[T.D. 8936, 66 FR 2254, Jan. 11, 2001]

§ 1.119–1 Meals and lodging furnished for the convenience of the employer.

(a) *Meals*—(1) *In general*. The value of meals furnished to an employee by his employer shall be excluded from the employee's gross income if two tests are met: (i) The meals are furnished on the business premises of the employer, and (ii) the meals are furnished for the convenience of the employer. The question of whether meals are furnished for the convenience of the employer is one of fact to be determined by analysis of all the facts and circumstances in each case. If the tests described in subdivisions (i) and (ii) of this subparagraph are met, the exclusion shall apply irrespective of whether under an employment contract or a statute fixing the terms of employment such meals are furnished as compensation.

(2) *Meals furnished without a charge*. (i) Meals furnished by an employer without charge to the employee will be regarded as furnished for the convenience of the employer if such meals are furnished for a substantial noncompensatory business reason of the employer. If an employer furnishes meals as a means of providing additional compensation to his employee (and not for a substantial noncompensatory business reason of the employer), the meals so furnished will not be regarded as furnished for the convenience of the employer. Conversely, if the employer furnishes meals to his employee for a substantial noncompensatory business reason, the meals so furnished will be regarded as furnished for the convenience of the employer, even though such meals are also furnished for a compensatory reason. In determining the reason of an employer for furnishing meals, the mere declaration that meals are furnished for a noncompensatory business reason is not sufficient to prove that meals are furnished for the convenience of the employer, but such determination will be based upon an examination of all the surrounding facts and circumstances. In subdivision (ii) of this subparagraph, there are set forth some of the substantial noncompensatory business reasons which occur frequently and which justify the conclusion that meals furnished for such a reason are furnished for the convenience of the employer. In subdivision (iii) of this subparagraph, there are set forth some of the business reasons which are considered to be compensatory and which, in the absence of a substantial noncompensatory business reason, justify the conclusion that meals furnished for such a reason are not furnished for the convenience of the employer. Generally, meals furnished before or after the working hours of the employee will not be regarded as furnished for the convenience of the employer, but see subdivision (ii) (*d*) and (*f*) of this subparagraph for some exceptions to this general rule. Meals furnished on nonworking days do not qualify for the exclusion under section 119. If the employee is required to occupy living quarters on the business premises of his employer as a condition of his employment (as defined in paragraph (b) of this section), the exclusion applies to the value of any meal furnished without charge to the employee on such premises.

(ii)(*a*) Meals will be regarded as furnished for a substantial noncompensatory business reason of the employer when the meals are furnished to the employee during his working hours to have the employee available for emergency call during his meal period. In order to demonstrate that meals are furnished to the employee to have the employee available for emergency call during the meal period, it must be shown that emergencies have actually occurred, or can reasonably be expected to occur, in the employer's business which have resulted, or will result, in the employer calling on the employee to perform his job during his meal period.

(*b*) Meals will be regarded as furnished for a substantial noncompensatory business reason of the employer when the meals are furnished to the employee during his working hours because the employer's business is such that the employee must be restricted to a short meal period, such as 30 or 45 minutes, and because the employee could not be expected to eat elsewhere in such a short meal period. For example, meals may qualify under this subdivision when the employer is engaged in a business in which the peak work load occurs during the normal lunch hours. However, meals cannot qualify under this subdivision (*b*) when the reason for restricting the time of the meal period is so that the employee can be let off earlier in the day.

(*c*) Meals will be regarded as furnished for a substantial noncompensatory business reason of the employer when the meals are furnished to the employee during his working hours because the employee could not otherwise secure proper meals within a reasonable meal period. For example, meals may qualify under this subdivision (*c*) when there are insufficient eating facilities in the vicinity of the employer's premises.

(*d*) A meal furnished to a restaurant employee or other food service employee for each meal period in which the employee works will be regarded as furnished for a substantial noncompensatory business reason of the employer, irrespective of whether the meal is furnished during, immediately before, or immediately after the working hours of the employee.

(*e*) If the employer furnishes meals to employees at a place of business and the reason for furnishing the meals to each of substantially all of the employees who are furnished the meals is a substantial noncompensatory business reason of the employer, the meals furnished to each other employee will also be regarded as furnished for a substantial noncompensatory business reason of the employer.

(*f*) If an employer would have furnished a meal to an employee during his working hours for a substantial noncompensatory business reason, a meal furnished to such an employee immediately after his working hours because his duties prevented him from obtaining a meal during his working hours will be regarded as furnished for a substantial noncompensatory business reason.

(iii) Meals will be regarded as furnished for a compensatory business reason of the employer when the meals are furnished to the employee to promote the morale or goodwill of the employee, or to attract prospective employees.

(3) *Meals furnished with a charge.* (i) If an employer provides meals which an employee may or may not purchase, the meals will not be regarded as furnished for the convenience of the employer. Thus, meals for which a charge is made by the employer will not be regarded as furnished for the convenience of the employer if the employee has a choice of accepting the meals and paying for them or of not paying for them and providing his meals in another manner.

(ii) If an employer furnishes an employee meals for which the employee is charged an unvarying amount (for example, by subtraction from his stated compensation) irrespective of whether he accepts the meals, the amount of such flat charge made by the employer for such meals is not, as such, part of the compensation includible in the gross income of the employee; whether the value of the meals so furnished is excludable under section 119 is determined by applying the rules of subparagraph (2) of this paragraph. If meals furnished for an unvarying amount are not furnished for the convenience of the employer in accordance with the rules of subparagraph (2) of this paragraph, the employee shall include in gross income the value of the meals regardless of whether the value exceeds or is less than the amount charged for such meals. In the absence of evidence to the contrary, the value of the meals may be deemed to be equal to the amount charged for them.

(b) *Lodging.* The value of lodging furnished to an employee by the employer shall be excluded from the employee's gross income if three tests are met:

(1) The lodging is furnished on the business premises of the employer,

(2) The lodging is furnished for the convenience of the employer, and

(3) The employee is required to accept such lodging as a condition of his employment.

The requirement of subparagraph (3) of this paragraph that the employee is required to accept such lodging as a condition of his employment means that he be required to accept the lodging in order to enable him properly to perform the duties of his employment. Lodging will be regarded as furnished to enable the employee properly to perform the duties of his employment when, for example, the lodging is furnished because the employee is required to be available for duty at all times or because the employee could not perform the services required of him unless he is furnished such lodging. If the tests described in subparagraphs (1), (2), and (3) of this paragraph are met, the exclusion shall apply irrespective of whether a charge is made, or whether, under an employment contract or statute fixing the terms of employment, such lodging is furnished as compensation. If the employer furnishes the employee lodging for which the employee is charged an unvarying amount irrespective of whether he accepts the lodging, the amount of the charge made by the employer for such lodging is not, as such, part of the compensation includible in the gross income of the employee; whether the value of the lodging is excludable from gross income under section 119 is determined by applying the other rules of this paragraph. If the tests described in subparagraph (1), (2), and (3) of this paragraph are not met, the employee shall include in gross income the value of the lodging regardless of whether it exceeds or is less than the amount charged. In the absence of evidence to the contrary, the value of the lodging may be deemed to be equal to the amount charged.

(c) *Business premises of the employer*—(1) *In general.* For purposes of this section, the term ''business premises of the employer'' generally means the place of employment of the employee. For example, meals and lodging furnished in the employer's home to a domestic servant would constitute meals and lodging furnished on the business premises of the employer. Similarly, meals furnished to cowhands while herding their employer's cattle on leased land would be regarded as furnished on the business premises of the employer.

(2) *Certain camps.* For taxable years beginning after December 31, 1981, in the case of an individual who is furnished lodging by or on behalf of his employer in a camp (as defined in paragraph (d) of this section) in a foreign country (as defined in §1.911–2(h)), the camp shall be considered to be part of the business premises of the employer.

(d) *Camp defined*—(1) *In general.* For the purposes of paragraph (c)(2) of this section, a camp is lodging that is all of the following:

(i) Provided by or on behalf of the employer for the convenience of the employer because the place at which the employee renders services is in a remote area where satisfactory housing is not available to the employee on the open market within a reasonable commuting distance of that place;

(ii) Located, as near as practicable, in the vicinity of the place at which the employee renders services; and

(iii) Furnished in a common area or enclave which is not available to the general public for lodging or accommodations and which normally accommodates ten or more employees.

(2) *Satisfactory housing.* For purposes of paragraph (d)(1)(i) of this section, facts and circumstances that may be relevant in determining whether housing available to the employee is satisfactory include, but are not limited to, the size and condition of living space and the availability and quality of utilities such as water, sewers or other waste disposal facilities, electricity, or heat. The general environment in which housing is located (e.g., climate, prevalence of insects, etc.) does not of itself make housing unsatisfactory. The general environment is relevant,

however, if housing is inadequate to protect the occupants from environmental conditions. The individual employee's income level is not relevant in determining whether housing is satisfactory; it may, however, be relevant in determining whether satisfactory housing is available to the employee (see paragraph (d)(3)(i)(B) of this section).

(3) *Availability of satisfactory housing*—(i) *Facts and circumstances.* For purposes of paragraph (d)(1)(i) of this section, facts and circumstances to be considered in determining whether satisfactory housing is available to the employee on the open market include but are not limited to:

(A) The number of housing units available on the open market in relation to the number of housing units required for the employer's employees;

(B) The cost of housing available on the open market;

(C) The quality of housing available on the open market; and

(D) The presence of warfare or civil insurrection within the area where housing would be available which would subject U.S. citizens to unusual risk of personal harm or property loss.

(ii) *Presumptions.* Satisfactory housing will generally be considered to be unavailable to the employee on the open market if either of the following conditions is satisfied:

(A) The foreign government requires the employer to provide housing for its employees other than housing available on the open market; or

(B) An unrelated person awarding work to the employer requires that the employer's employees occupy housing specified by such unrelated person.

The condition of either paragraph (d)(3)(ii) (A) or (B) of this section is not satisfied if the requirement described therein and imposed either by a foreign government or unrelated person applies primarily to U.S. employers and not to a significant number of third country employers or applies primarily to employers of U.S. employees and not to a significant number of employers of third country employees.

(4) *Reasonable commuting distance.* For purposes of paragraph (d)(1)(i) of this section, in determining whether a commuting distance is reasonable, the accessibility of the place at which the employee renders services due to geographic factors, the quality of the roads, the customarily available transportation, and the usual travel time (at the time of day such travel would be required) to the place at which the employee renders services shall be taken into account.

(5) *Common area or enclave.* A cluster of housing units does not satisfy paragraph (d)(1)(iii) of this section if it is adjacent to or surrounded by substantially similar housing available to the general public. Two or more common areas or enclaves that house employees who work on the same project (for example, a highway project) are considered to be one common area or enclave in determining whether they normally accommodate ten or more employees.

(e) *Rules.* The exclusion provided by section 119 applies only to meals and lodging furnished in kind by or on behalf of an employer to his employee. If the employee has an option to receive additional compensation in lieu of meals or lodging in kind, the value of such meals and lodging is not excludable from gross income under section 119. However, the mere fact that an employee, at his option, may decline to accept meals tendered in kind will not of itself require inclusion of the value thereof in gross income. Cash allowances for meals or lodging received by an employee are includible in gross income to the extent that such allowances constitute compensation.

(f) *Examples.* The provisions of section 119 may be illustrated by the following examples:

Example 1. A waitress who works from 7 a.m. to 4 p.m. is furnished without charge two meals a work day. The employer encourages the waitress to have her breakfast on his business premises before starting work, but does not require her to have breakfast there. She is required, however, to have her lunch on such premises. Since the waitress is a food service employee and works during the normal breakfast and lunch periods, the waitress is permitted to exclude from her gross income both the value of the breakfast and the value of the lunch.

Example 2. The waitress in example (1) is allowed to have meals on the employer's premises without charge on her days off. The waitress is not permitted to exclude the value of such meals from her gross income.

Example 3. A bank teller who works from 9 a.m. to 5 p.m. is furnished his lunch without charge in a cafeteria which the bank maintains on its premises. The bank furnishes the teller such meals in order to limit his lunch period to 30 minutes since the bank's peak work load occurs during the normal lunch period. If the teller had to obtain his lunch elsewhere, it would take him considerably longer than 30 minutes for lunch, and the bank strictly enforces the 30-minute time limit. The bank teller may exclude from his gross income the value of such meals obtained in the bank cafeteria.

Example 4. Assume the same facts as in example (3), except that the bank charges the bank teller an unvarying rate per meal regardless of whether he eats in the cafeteria. The bank teller is not required to include in gross income such flat amount charged as part of his compensation, and he is entitled to exclude from his gross income the value of the meals he receives for such flat charge.

Example 5. A Civil Service employee of a State is employed at an institution and is required by his employer to be available for duty at all times. The employer furnishes the employee with meals and lodging at the institution without charge. Under the applicable State statute, his meals and lodging are regarded as part of the employee's compensation. The employee would nevertheless be entitled to exclude the value of such meals and lodging from his gross income.

Example 6. An employee of an institution is given the choice of residing at the institution free of charge, or of residing elsewhere and receiving a cash allowance in addition to his regular salary. If he elects to reside at the institution, the value to the employee of the lodging furnished by the employer will be includible in the employee's gross income because his residence at the institution is not required in order for him to perform properly the duties of his employment.

Example 7. A construction worker is employed at a construction project at a remote job site in Alaska. Due to the inaccessibility of facilities for the employees who are working at the job site to obtain food and lodging and the prevailing weather conditions, the employer is required to furnish meals and lodging to the employee at the camp site in order to carry on the construction project. The employee is required to pay $40 a week for the meals and lodging. The weekly charge of $40 is not, as such, part of the compensation includible in the gross income of the employee, and under paragraphs (a) and (b) of this section the value of the meals and lodging is excludable from his gross income.

Example 8. A manufacturing company provides a cafeteria on its premises at which its employees can purchase their lunch. There is no other eating facility located near the company's premises, but the employee can furnish his own meal by bringing his lunch. The amount of compensation which any employee is required to include in gross income is not reduced by the amount charged for the meals, and the meals are not considered to be furnished for the convenience of the employer.

Example 9. A hospital maintains a cafeteria on its premises where all of its 230 employees may obtain a meal during their working hours. No charge is made for these meals. The hospital furnishes such meals in order to have each of 210 of the employees available for any emergencies that may occur, and it is shown that each such employee is at times called upon to perform services during his meal period. Although the hospital does not require such employees to remain on the premises during meal periods, they rarely leave the hospital during their meal period. Since the hospital furnishes meals to each of substantially all of its employees in order to have each of them available for emergency call during his meal period, all of the hospital employees who obtain their meals in the hospital cafeteria may exclude from their gross income the value of such meals.

[T.D. 6745, 29 FR 9380, July 9, 1964, as amended by T.D. 8006, 50 FR 2964, Jan. 23, 1985]

§ 1.120–1 Statutory subsistence allowance received by police.

(a) Section 120 excludes from the gross income of an individual employed as a police official by a State, Territory, or possession of the United States, by any of their political subdivisions, or by the District of Columbia, any amount received as a statutory subsistence allowance to the extent that such allowance does not exceed $5 per day. For purposes of this section, the term "statutory subsistence allowance" means an amount which is designated as a subsistence allowance under the laws of a State, a Territory, or a possession of the United States, any political subdivision of any of the foregoing, or the District of Columbia and which is paid to an individual who is employed as a police official of such governmental unit. A subsistence allowance paid to a police official by any of the foregoing governmental units which is not so provided by statute may not be excluded from gross income under the provisions of section 120. The term "police official" includes an employee of any of the foregoing governmental units who has police duties, such as a sheriff, a detective, a policeman, or a State police trooper, however designated.

(b) The exclusion provided by section 120 is to be computed on a daily basis, that is, for each day for which the statutory allowance is paid. If the statute providing the allowance does not specify the daily amount of such allowance, the allowance shall be converted to a daily basis for the purpose of applying the limitation provided herein. For example, if a State statute provides for a weekly subsistence allowance, the daily amount is to be determined by dividing the weekly amount by the number of days for which the allowance is paid. Thus, if a State trooper receives a weekly statutory subsistence allowance of $40 would be $8, that is, $40 divided by 5 for 5 days of the week, the daily amount would be $8, that is, $40 divided by 5. However, for purposes of this section, only $5 per day may be excluded, or $25 on a weekly basis.

(c) Expenses in respect of which the allowance under section 120 is paid may not be deducted under any provision of the income tax laws except to the extent that (1) such expenses exceed the amount of the exclusion, and (2) the excess is otherwise allowable as a deduction. For example, if a State statute provides a subsistence allowance of $3 per day and the taxpayer, a state trooper, incurs expenditures of $4.50 for meals while away from home overnight on official police duties only $3 would be excludable under this section. Expenses relating to such exclusion ($3) may not be deducted under any provision of the income tax laws. However, the remaining $1.50 may be an allowable deduction under section 162 as traveling expenses while away from home in the performance of official duties. See § 1.162–2.

(d) In the case of taxable years ending after September 30, 1958, section 120 and this section do not apply to amounts received as a statutory subsistence allowance for any day after September 30, 1958.

§ 1.120–3 Notice of application for recognition of status of qualified group legal services plan.

(a) *In general.* In order for a plan to be a qualified group legal services plan for purposes of the exclusion from gross income provided by section 120(a), the plan must give notice to the Internal Revenue Service that it is applying for recognition of its status as a qualified plan. Paragraph (b) of this section describes how the notice is to be filed for the plan. Paragraph (c) of this section describes the action that the Internal Revenue Service will take in response to the notice submitted for the plan. Paragraph (d) of this section describes the period of plan qualification.

(b) *Filing of notice*—(1) *In general.* A notice of application for recognition of the status of a qualified group legal services plan must be filed with the key district director of internal revenue as described in § 601.201(n). The notice must be filed on Form 1024, Application for Recognition of Exemption Under section 501(a) or for Determination Under section 120, with the accompanying Schedule L, and must contain the information required by the form and any accompanying instructions. The form may be filed by either the employer adopting the plan or the person administering the plan. No Form 1024 and Schedule L may be filed for a plan before an employer adopts the plan, or proposes to adopt the plan contingent only upon the recognition of the plan as a qualified plan.

(2) *Plans to which more than one employer contributes.* In general, for purposes of section 120 the adoption of a plan by an employer constitutes the adoption of a separate plan to which that employer alone contributes, notwithstanding that, in form, the employer purports to adopt a plan with respect to which the employer is one of two or more contributing employers. Accordingly, a separate Schedule L must be filed pursuant to the instructions accompanying Form 1024 for each employer adopting a plan.

(3) *Certain collectively bargained plans.* Notwithstanding subparagraph (2) of this paragraph, if a plan to which more than one employer contributes is a plan to which this subparagraph (3) applies, the plan is treated as a single plan for purposes of section 120. Accordingly, only one Form 1024 and Schedule L is required to be filed for the plan, regardless of the number of employers originally adopting the plan. In addition, once a Form 1024 and Schedule L is filed, no additional filing

is required with respect to an employer who thereafter adopts the plan. In general, this subparagraph (3) applies to any plan that is maintained pursuant to a collective bargaining agreement between employee representatives and more than one employer who is required by the plan instrument or other agreement to contribute to the plan with respect to employees (or their spouses or dependents) participating in the plan. This subparagraph does not apply, however, if all employers required to contribute to the plan are corporations which are members of a controlled group of corporations within the meaning of section 1563(a), determined without regard to section 1563(e)(3)(C). If all employers required to contribute to the plan are corporations which are members of such a controlled group, the filing requirements described in subparagraph (2) of this paragraph apply, notwithstanding that the plan is maintained pursuant to a collective bargaining agreement.

(c) *Internal Revenue Service action on notice of application for recognition.* The Internal Revenue Service will issue to the person submitting Form 1024 and Schedule L a ruling or determination letter stating that the plan is or is not a qualified group legal services plan. For general procedural rules, see §601.201 (a) through (n), as that section relates to rulings and determination letters.

(d) *Period of plan qualification*—(1) *In general.* In the case of a favorable determination, the plan will be considered a qualified group legal services plan. If a Form 1024 and Schedule L required to be filed by or on behalf of an employer is filed before—

(i) The end of the first plan year (as determined under the plan),

(ii) The end of the plan year within which the employer adopts the plan, or

(iii) July 29, 1980,

the period of plan qualification with respect to the employer will begin on the date the plan is adopted by the employer (or, if later, January 1, 1977). If the form and schedule are not filed before the latest of the dates described in subdivisions (i), (ii) and (iii), the period of plan qualification with respect to the employer will begin on the date of filing. In any case in which either the Form 1024 or Schedule L filed by or on behalf of an employer is incomplete, the date of filing is the date on which the incomplete form or schedule is filed, if the necessary additional information is provided at the request of the Commissioner within the additional time period allowed by the Commissioner. If the additional information is not provided within the additional time period, allowed, the date of filing is the date on which the additional information is filed. If no separate Form 1024 and Schedule L are required to be filed by or on behalf of an employer (see paragraph (b)(3) of this section), the period of plan qualification with respect to the employer will begin on the date the plan is adopted by the employer (or, if later, January 1, 1977). In any case in which a plan is materially modified to conform to the requirements of section 120, either before or after a Form 1024 and Schedule L are filed, the period of plan qualification will not include any period before the effective date of the modification.

(2) *Plans in existence on June 4, 1976.* (i) Notwithstanding paragraph (d)(1) of this section, a written group legal services plan providing for employer contributions which was in existence on June 4, 1976, will be considered a qualified group legal services plan for the period January 1, 1977, through April 2, 1977. However, if the plan is maintained pursuant to one or more agreements which were in effect on October 4, 1976, and which the Secretary of Labor finds to be collective bargaining agreements, the period of deemed qualification will extend beyond April 2, 1977, and end on the date on which the last of the collective bargaining agreements relating to the plan terminates. Extensions of a bargaining agreement which are agreed to after October 4, 1976, are to be disregarded. The period of deemed qualification for a plan maintained pursuant to a collective bargaining agreement will not, however, extend beyond December 31, 1981.

(ii) A written group legal services plan will be considered to have been in existence on June 4, 1976, if on or before that date the plan was reduced to writing and adopted by one or more employers. No amounts need have been contributed under the plan as of June 4, 1976.

(iii) Notwithstanding that a plan is a qualified plan for the period of deemed qualification described in this paragraph (d)(2), the rules of paragraphs (c) and (d)(1) of this section still apply with respect to a Form 1024 and Schedule L filed for the plan. For example, if a Form 1024 and Schedule L filed by or on behalf of an employer are filed before the latest of the 3 dates described in paragraph (d)(1) of this section, in the case of a favorable determination the plan will be a qualified plan from the date the plan is adopted by the employer (or, if later, January 1, 1977), and any period of deemed qualification and the period of qualification based upon the favorable determination will overlap. However, in the case of a plan to which this paragraph (d)(2) applies, if a Form 1024 and Schedule L required to be filed by or on behalf of an employer is not filed before the latest of the 3 dates described in paragraph (d)(1) of this section, the following rules shall apply. In general, if Form 1024 and Schedule L are filed before the end of the plan year following the plan year with or within which the plan's period of deemed qualification expires, in the event of a favorable determination the plan will be a qualified plan with respect to the employer beginning on the earlier of the day following the date on which the period of deemed qualification expires or the date on which the Form 1024 and Schedule L are filed. The period of plan qualification with respect to an employer cannot, however, include any period before the employer adopts the plan. If the Form 1024 and Schedule L are not filed before the end of the plan year following the plan year with or within which the plan's period of deemed qualification expires, in the case of a favorable determination the plan will be a qualified plan with respect to an employer from the later of the date of filing or adoption of the plan by the employer. The rules described in paragraph (d)(1) of this section relating to incomplete filings and plan modifications apply with respect to a filing described in this paragraph (d)(2).

(e) *Effective date.* This section is effective for notices of application for recognition of the status of a qualified group legal services plan filed after May 29, 1980.

(Secs. 120(c)(4) and 7805 of the Internal Revenue Code of 1954, 90 Stat. 1926, 68A Stat. 917; (26 U.S.C. 120(c)(4), 7805))

[T.D. 7696, 45 FR 28320, Apr. 29, 1980]

§ 1.121–1 Exclusion of gain from sale or exchange of a principal residence.

(a) *In general.* Section 121 provides that, under certain circumstances, gross income does not include gain realized on the sale or exchange of property that was owned and used by a taxpayer as the taxpayer's principal residence. Subject to the other provisions of section 121, a taxpayer may exclude gain only if, during the 5-year period ending on the date of the sale or exchange, the taxpayer owned and used the property as the taxpayer's principal residence for periods aggregating 2 years or more.

(b) *Residence*—(1) *In general.* Whether property is used by the taxpayer as the taxpayer's residence depends upon all the facts and circumstances. A property used by the taxpayer as the taxpayer's residence may include a houseboat, a house trailer, or the house or apartment that the taxpayer is entitled to occupy as a tenant-stockholder in a cooperative housing corporation (as those terms are defined in section 216(b)(1) and (2)). Property used by the taxpayer as the taxpayer's residence does not include personal property that is not a fixture under local law.

(2) *Principal residence.* In the case of a taxpayer using more than one property as a residence, whether property is used by the taxpayer as the taxpayer's principal residence depends upon all the facts and circumstances. If a taxpayer alternates between 2 properties, using each as a residence for successive periods of time, the property that the taxpayer uses a majority of the time during the year ordinarily will be considered the taxpayer's principal residence. In addition to the taxpayer's use of the property, relevant factors in determining a taxpayer's principal residence, include, but are not limited to—

(i) The taxpayer's place of employment;

(ii) The principal place of abode of the taxpayer's family members;

(iii) The address listed on the taxpayer's federal and state tax returns, driver's license, automobile registration, and voter registration card;

(iv) The taxpayer's mailing address for bills and correspondence;

(v) The location of the taxpayer's banks; and

(vi) The location of religious organizations and recreational clubs with which the taxpayer is affiliated.

(3) *Vacant land*—(i) *In general.* The sale or exchange of vacant land is not a sale or exchange of the taxpayer's principal residence unless—

(A) The vacant land is adjacent to land containing the dwelling unit of the taxpayer's principal residence;

(B) The taxpayer owned and used the vacant land as part of the taxpayer's principal residence;

(C) The taxpayer sells or exchanges the dwelling unit in a sale or exchange that meets the requirements of section 121 within 2 years before or 2 years after the date of the sale or exchange of the vacant land; and

(D) The requirements of section 121 have otherwise been met with respect to the vacant land.

(ii) *Limitations*—(A) *Maximum limitation amount.* For purposes of section 121(b)(1) and (2) (relating to the maximum limitation amount of the section 121 exclusion), the sale or exchange of the dwelling unit and the vacant land are treated as one sale or exchange. Therefore, only one maximum limitation amount of $250,000 ($500,000 for certain joint returns) applies to the combined sales or exchanges of vacant land and the dwelling unit. In applying the maximum limitation amount to sales or exchanges that occur in different taxable years, gain from the sale or exchange of the dwelling unit, up to the maximum limitation amount under section 121(b)(1) or (2), is excluded first and each spouse is treated as excluding one-half of the gain from a sale or exchange to which section 121(b)(2)(A) and §1.121–2(a)(3)(i) (relating to the limitation for certain joint returns) apply.

(B) *Sale or exchange of more than one principal residence in 2-year period.* If a dwelling unit and vacant land are sold or exchanged in separate transactions that qualify for the section 121 exclusion under this paragraph (b)(3), each of the transactions is disregarded in applying section 121(b)(3) (restricting the application of section 121 to only 1 sale or exchange every 2 years) to the other transactions but is taken into account as a sale or exchange of a principal residence on the date of the transaction in applying section 121(b)(3) to that transaction and the sale or exchange of any other principal residence.

(C) *Sale or exchange of vacant land before dwelling unit.* If the sale or exchange of the dwelling unit occurs in a later taxable year than the sale or exchange of the vacant land and after the date prescribed by law (including extensions) for the filing of the return for the taxable year of the sale or exchange of the vacant land, any gain from the sale or exchange of the vacant land must be treated as taxable on the taxpayer's return for the taxable year of the sale or exchange of the vacant land. If the taxpayer has reported gain from the sale or exchange of the vacant land as taxable, after satisfying the requirements of this paragraph (b)(3) the taxpayer may claim the section 121 exclusion with regard to the sale or exchange of the vacant land (for any period for which the period of limitation under section 6511 has not expired) by filing an amended return.

(4) *Examples.* The provisions of this paragraph (b) are illustrated by the following examples:

Example 1. Taxpayer A owns 2 residences, one in New York and one in Florida. From 1999 through 2004, he lives in the New York residence for 7 months and the Florida residence for 5 months of each year. In the absence of facts and circumstances indicating otherwise, the New York residence is A's principal residence. A would be eligible for the section 121 exclusion of gain from the sale or exchange of the New York residence, but not the Florida residence.

Example 2. Taxpayer B owns 2 residences, one in Virginia and one in Maine. During 1999 and 2000, she lives in the Virginia residence. During 2001 and 2002, she lives in the Maine residence. During 2003, she lives in the Virginia residence. B's principal residence during 1999, 2000, and 2003 is the Virginia residence. B's principal residence during 2001 and 2002 is the Maine residence. B would be eligible for the 121 exclusion of gain from the sale or exchange of either residence (but not both) during 2003.

Example 3. In 1991 Taxpayer C buys property consisting of a house and 10 acres that she uses as her principal residence. In May 2005 C sells 8 acres of the land and realizes a gain of $110,000. C does not sell the dwelling unit before the due date for filing C's 2005 return, therefore C is not eligible to exclude the $110,000 of gain. In March 2007 C sells the house and remaining 2 acres realizing a gain of $180,000 from the sale of the house. C may exclude the $180,000 of gain. Because the sale of the 8 acres occurred within 2 years from the date of the sale of the dwelling unit, the sale of the 8 acres is treated as a sale of the taxpayer's principal residence under paragraph (b)(3) of this section. C may file an amended return for 2005 to claim an exclusion for $70,000 ($250,000–$180,000 gain previously excluded) of the $110,000 gain from the sale of the 8 acres.

Example 4. In 1998 Taxpayer D buys a house and 1 acre that he uses as his principal residence. In 1999 D buys 29 acres adjacent to his house and uses the vacant land as part of his principal residence. In 2003 D sells the house and 1 acre and the 29 acres in 2 separate transactions. D sells the house and 1 acre at a loss of $25,000. D realizes $270,000 of gain from the sale of the 29 acres. D may exclude the $245,000 gain from the 2 sales.

(c) *Ownership and use requirements*—(1) *In general.* The requirements of ownership and use for periods aggregating 2 years or more may be satisfied by establishing ownership and use for 24 full months or for 730 days (365×2). The requirements of ownership and use may be satisfied during nonconcurrent periods if both the ownership and use tests are met during the 5-year period ending on the date of the sale or exchange.

(2) *Use.* (i) In establishing whether a taxpayer has satisfied the 2-year use requirement, occupancy of the residence is required. However, short temporary absences, such as for vacation or other seasonal absence (although accompanied with rental of the residence), are counted as periods of use.

(ii) *Determination of use during periods of out-of-residence care.* If a taxpayer has become physically or mentally incapable of self-care and the taxpayer sells or exchanges property that the taxpayer owned and used as the taxpayer's principal residence for periods aggregating at least 1 year during the 5-year period preceding the sale or exchange, the taxpayer is treated as using the property as the taxpayer's principal residence for any period of time during the 5-year period in which the taxpayer owns the property and resides in any facility (including a nursing home) licensed by a State or political subdivision to care for an individual in the taxpayer's condition.

(3) *Ownership*—(i) *Trusts.* If a residence is owned by a trust, for the period that a taxpayer is treated under sections 671 through 679 (relating to the treatment of grantors and others as substantial owners) as the owner of the trust or the portion of the trust that includes the residence, the taxpayer will be treated as owning the residence for purposes of satisfying the 2-year ownership requirement of section 121, and the sale or exchange by the trust will be treated as if made by the taxpayer.

(ii) *Certain single owner entities.* If a residence is owned by an eligible entity (within the meaning of § 301.7701–3(a) of this chapter) that has a single owner and is disregarded for federal tax purposes as an entity separate from its owner under § 301.7701–3 of this chapter, the owner will be treated as owning the residence for purposes of satisfying the 2-year ownership requirement of section 121, and the sale or exchange by the entity will be treated as if made by the owner.

(4) *Examples.* The provisions of this paragraph (c) are illustrated by the following examples. The examples assume that § 1.121–3 (relating to the reduced maximum exclusion) does not apply to the sale of the property. The examples are as follows:

Example 1. Taxpayer A has owned and used his house as his principal residence since 1986. On January 31, 1998, A moves to another state. A rents his house to tenants from that date until April 18, 2000, when he sells it. A is eligible for the section 121 exclusion because he has owned and used the house as his principal residence for at least 2 of the 5 years preceding the sale.

Example 2. Taxpayer B owns and uses a house as her principal residence from 1986 to the end of 1997. On January 4, 1998, B moves to another state and ceases to use the house. B's son moves into the house in March 1999 and uses the residence until it is sold on July 1, 2001. B may not exclude gain from the sale under section 121 because she did not use the property as her principal residence for at least 2 years out of the 5 years preceding the sale.

Example 3. Taxpayer C lives in a townhouse that he rents from 1993 through 1996. On January 18, 1997, he purchases the townhouse. On February 1, 1998, C moves into his daughter's home. On May 25, 2000, while still living in his daughter's home, C sells his townhouse. The section 121 exclusion will apply to gain from the sale because C owned the townhouse for at least 2 years out of the 5 years preceding the sale (from January 19, 1997 until May 25, 2000) and he used the townhouse as his principal residence for at least 2 years during the 5-year period preceding the sale (from May 25, 1995 until February 1, 1998).

Example 4. Taxpayer D, a college professor, purchases and moves into a house on May 1, 1997. He uses the house as his principal residence continuously until September 1, 1998, when he goes abroad for a 1-year sabbatical leave. On October 1, 1999, 1 month after returning from the leave, D sells the house. Because his leave is not considered to be a short temporary absence under paragraph (c)(2) of this section, the period of the sabbatical leave may not be included in determining whether D used the house for periods aggregating 2 years during the 5-year period ending on the date of the sale. Consequently, D is not entitled to exclude gain under section 121 because he did not use the residence for the requisite period.

Example 5. Taxpayer E purchases a house on February 1, 1998, that he uses as his principal residence. During 1998 and 1999, E leaves his residence for a 2-month summer vacation. E sells the house on March 1, 2000. Although, in the 5-year period preceding the date of sale, the total time E used his residence is less than 2 years (21 months), the section 121 exclusion will apply to gain from the sale of the residence because, under paragraph (c)(2) of this section, the 2-month vacations are short temporary absences and are counted as periods of use in determining whether E used the residence for the requisite period.

(d) *Depreciation taken after May 6, 1997*—(1) *In general.* The section 121 exclusion does not apply to so much of the gain from the sale or exchange of property as does not exceed the portion of the depreciation adjustments (as defined in section 1250(b)(3)) attributable to the property for periods after May 6, 1997. Depreciation adjustments allocable to any portion of the property to which the section 121 exclusion does not apply under paragraph (e) of this section are not taken into account for this purpose.

(2) *Example.* The provisions of this paragraph (d) are illustrated by the following example:

Example. On July 1, 1999, Taxpayer A moves into a house that he owns and had rented to tenants since July 1, 1997. A took depreciation deductions totaling $14,000 for the period that he rented the property. After using the residence as his principal residence for 2 full years, A sells the property on August 1, 2001. A's gain realized from the sale is $40,000. A has no other section 1231 or capital gains or losses for 2001. Only $26,000 ($40,000 gain realized—$14,000 depreciation deductions) may be excluded under section 121. Under section 121(d)(6) and paragraph (d)(1) of this section, A must recognize $14,000 of the gain as unrecaptured section 1250 gain within the meaning of section 1(h).

(e) *Property used in part as a principal residence*—(1) *Allocation required.* Section 121 will not apply to the gain allocable to any portion (separate from the dwelling unit) of property sold or exchanged with respect to which a taxpayer does not satisfy the use requirement. Thus, if a portion of the property was used for residential purposes and a portion of the property (separate from the dwelling unit) was used for non-residential purposes, only the gain allocable to the residential portion is excludable under section 121. No allocation is required if both the residential and non-residential portions of the property are within the same dwelling unit. However, section 121 does not apply to the gain allocable to the residential portion of the property to the extent provided by paragraph (d) of this section.

(2) *Dwelling unit.* For purposes of this paragraph (e), the term *dwelling unit* has the same meaning as in section 280A(f)(1), but does not include appurtenant structures or other property.

(3) *Method of allocation.* For purposes of determining the amount of gain allocable to the residential and non-residential portions of the property, the taxpayer must allocate the basis and the amount realized between the residential and the non-residential portions of the property using the same method of allocation that the taxpayer used to determine depreciation adjustments (as defined in section 1250(b)(3)), if applicable.

(4) *Examples.* The provisions of this paragraph (e) are illustrated by the following examples:

Example 1. Non-residential use of property not within the dwelling unit. (i) Taxpayer A owns a property that consists of a house, a stable and 35 acres. A uses the stable and 28 acres for non-residential purposes for more than 3 years during the 5-year period preceding the sale. A uses the entire house and the remaining 7 acres as his principal residence for at least 2 years during the 5-year period preceding the sale. For periods after May 6, 1997, A claims depreciation deductions of $9,000 for the non-residential use of the stable. A sells the entire property in 2004, realizing a gain of $24,000. A has no other section 1231 or capital gains or losses for 2004.

(ii) Because the stable and the 28 acres used in the business are separate from the dwelling unit, the allocation rules under this paragraph (e) apply and A must allocate the basis and amount realized between the portion of the property that he used as his principal residence and the portion of the property that he used for non-residential purposes. A determines that $14,000 of the gain is allocable to the non-residential-use portion of the property and that $10,000 of the gain is allocable to the portion of the property used as his residence. A must recognize the $14,000 of gain allocable to the non-residential-use portion of the property ($9,000 of which is unrecaptured section 1250 gain within the meaning of section 1(h), and $5,000 of which is adjusted net capital gain). A may exclude $10,000 of the gain from the sale of the property.

Example 2. Non-residential use of property not within the dwelling unit and rental of the entire property. (i) In 1998 Taxpayer B buys a property that includes a house, a barn, and 2 acres. B uses the house and 2 acres as her principal residence and the barn for an antiques business. In 2002, B moves out of the house and rents it to tenants. B sells the property in 2004, realizing a gain of $21,000. Between 1998 and 2004 B claims depreciation deductions of $4,800 attributable to the antiques business. Between 2002 and 2004 B claims depreciation deductions of $3,000 attributable to the house. B has no other section 1231 or capital gains or losses for 2004.

(ii) Because the portion of the property used in the antiques business is separate from the dwelling unit, the allocation rules under this paragraph (e) apply. B must allocate basis and amount realized between the portion of the property that she used as her principal residence and the portion of the property that she used for non-residential purposes. B determines that $4,000 of the gain is allocable to the non-residential portion of the property and that $17,000 of the gain is allocable to the portion of the property that she used as her principal residence.

(iii) B must recognize the $4,000 of gain allocable to the non-residential portion of the property (all of which is unrecaptured section 1250 gain within the meaning of section 1(h)). In addition, the section 121 exclusion does not apply to the gain allocable to the residential portion of the property to the extent of the depreciation adjustments attributable to the residential portion of the property for periods after May 6, 1997 ($3,000). Therefore, B may exclude $14,000 of the gain from the sale of the property.

Example 3. Non-residential use of a separate dwelling unit. (i) In 2002 Taxpayer C buys a 3-story townhouse and converts the basement level, which has a separate entrance, into a separate apartment by installing a kitchen and bathroom and removing the interior stairway that leads from the basement to the upper floors. After the conversion, the property constitutes 2 dwelling units within the meaning of paragraph (e)(2) of this section. C uses the first and second floors of the townhouse as his principal residence and rents the basement level to tenants from 2003 to 2007. C claims depreciation deductions of $2,000 for that period with respect to the basement apartment. C sells the entire property in 2007, realizing gain of $18,000. C has no other section 1231 or capital gains or losses for 2007.

(ii) Because the basement apartment and the upper floors of the townhouse are separate dwelling units, C must allocate the gain between the portion of the property that he used as his principal residence and the portion of the property that he used for non-residential purposes under paragraph (e) of this section. After allocating the basis and the amount realized between the residential and non-residential portions of the property, C determines that $6,000 of the gain is allocable to the non-residential portion of the property and that $12,000 of the gain is allocable to the portion of the property used as his residence. C must recognize the $6,000 of gain allocable to the non-residential portion of the property ($2,000 of which is unrecaptured section 1250 gain within the meaning of section 1(h), and $4,000 of which is adjusted net capital gain). C may exclude $12,000 of the gain from the sale of the property.

Example 4. Separate dwelling unit converted to residential use. The facts are the same as in *Example 3* except that in 2007 C incorporates the basement of the townhouse into his principal residence by eliminating the kitchen and building a new interior stairway to the upper floors. C uses all 3 floors of the townhouse as his principal residence for 2 full years and sells the townhouse in 2010, realizing a gain of $20,000. Under section 121(d)(6) and paragraph (d) of this section, C must recognize $2,000 of the gain as unrecaptured section 1250 gain within the meaning of section 1(h). Because C used the entire 3 floors of the townhouse as his principal residence for 2 of the 5 years preceding the sale of the property, C may exclude the remaining $18,000 of the gain from the sale of the house.

Example 5. Non-residential use within the dwelling unit, property depreciated. Taxpayer D, an attorney, buys a house in 2003. The house constitutes a single dwelling unit but D uses a portion of the house as a law office. D claims depreciation deductions of $2,000 during the period that she owns the house. D sells the house in 2006, realizing a gain of $13,000. D has no other section 1231 or capital gains or losses for 2006. Under section 121(d)(6) and paragraph (d) of this section, D must recognize $2,000 of the gain as unrecaptured section 1250 gain within the meaning of section 1(h). D may exclude the remaining $11,000 of the gain from the sale of her house because, under paragraph (e)(1) of this section, she is not required to allocate gain to the business use within the dwelling unit.

Example 6. Non-residential use within the dwelling unit, property not depreciated. The facts are the same as in Example 5, except that D is not entitled to claim any depreciation deductions with respect to her business use of the house. D may exclude $13,000 of the gain from the sale of her house because, under paragraph (e)(1) of this section, she is not required to allocate gain to the business use within the dwelling unit.

(f) *Effective date.* This section is applicable for sales and exchanges on or after Decmeber 24, 2002. For rules on electing to apply the provisions of this section retroactively, see §1.121–4(j).

[T.D. 9030, 67 FR 78361, Dec. 24, 2002]

§ 1.121–2 Limitations.

(a) *Dollar limitations*—(1) *In general.* A taxpayer may exclude from gross income up to $250,000 of gain from the sale or exchange of the taxpayer's principal residence. A taxpayer is eligible for only one maximum exclusion per principal residence.

(2) *Joint owners.* If taxpayers jointly own a principal residence but file separate returns, each taxpayer may exclude from gross income up to $250,000 of gain that is attributable to each taxpayer's interest in the property, if the requirements of section 121 have otherwise been met.

(3) *Special rules for joint returns*—(i) *In general.* A husband and wife who make a joint return for the year of the sale or exchange of a principal residence may exclude up to $500,000 of gain if—

(A) Either spouse meets the 2-year ownership requirements of §1.121–1(a) and (c);

(B) Both spouses meet the 2-year use requirements of §1.121–1(a) and (c); and

(C) Neither spouse excluded gain from a prior sale or exchange of property under section 121 within the last 2 years (as determined under paragraph (b) of this section).

(ii) *Other joint returns.* For taxpayers filing jointly, if either spouse fails to meet the requirements of paragraph (a)(3)(i) of this section, the maximum limitation amount to be claimed by the couple is the sum of each spouse's limitation amount determined on a separate basis as if they had not been married. For this purpose, each spouse is treated as owning the property during the period that either spouse owned the property.

(4) *Examples.* The provisions of this paragraph (a) are illustrated by the following examples. The examples assume that §1.121–3 (relating to the reduced maximum exclusion) does not apply to the sale of the property. The examples are as follows:

Example 1. Unmarried Taxpayers A and B own a house as joint owners, each owning a 50 percent interest in the house. They sell the house after owning and using it as their principal residence for 2 full years. The gain realized from the sale is $256,000. A and B are each eligible to exclude $128,000 of gain because the amount of realized gain allocable to each of them from the sale does not exceed each taxpayer's available limitation amount of $250,000.

Example 2. The facts are the same as in *Example 1*, except that A and B are married taxpayers who file a joint return for the taxable year of the sale. A and B are eligible to exclude the entire amount of realized gain ($256,000) from gross income because the gain realized from the sale does not exceed the limitation amount of $500,000 available to A and B as taxpayers filing a joint return.

Example 3. During 1999, married Taxpayers H and W each sell a residence that each had separately owned and used as a principal residence before their marriage. Each spouse meets the ownership and use tests for his or her respective residence. Neither spouse meets the use requirement for the other spouse's residence. H and W file a joint return for the year of the sales. The gain realized from the sale of H's residence is $200,000. The gain realized from the sale of W's residence is $300,000. Because the ownership and use requirements are met for each residence by each respective spouse, H and W are each eligible to exclude up to $250,000 of gain from the sale of their individual residences. However, W may not use H's unused exclusion to exclude gain in excess of her limitation amount. Therefore, H and W must recognize $50,000 of the gain realized on the sale of W's residence.

Example 4. Married Taxpayers H and W sell their residence and file a joint return for the year of the sale. W, but not H, satisfies the requirements of section 121. They are eligible to exclude up to $250,000 of the gain from the sale of the residence because that is the sum of each spouse's dollar limitation amount determined on a separate basis as if they had not been married ($0 for H, $250,000 for W).

Example 5. Married Taxpayers H and W have owned and used their principal residence since 1998. On February 16, 2001, H dies. On September 24, 2001, W sells the residence and realizes a gain of $350,000. Pursuant to section 6013(a)(3), W and H's executor make a joint return for 2001. All $350,000 of the gain from the sale of the residence may be excluded.

Example 6. Assume the same facts as *Example 5,* except that W does not sell the residence until January 31, 2002. Because W's filing status for the taxable year of the sale is single, the special rules for joint returns under paragraph (a)(3) of this section do not apply and W may exclude only $250,000 of the gain.

(b) *Application of section 121 to only 1 sale or exchange every 2 years*—(1) *In general.* Except as otherwise provided in §1.121–3 (relating to the reduced maximum exclusion), a taxpayer may not exclude from gross income gain from the sale or exchange of a principal residence if, during the 2-year period ending on the date of the sale or exchange, the taxpayer sold or exchanged other property for which gain was excluded under section 121. For purposes of this paragraph (b)(1), any sale or exchange before May 7, 1997, is disregarded.

(2) *Example.* The following example illustrates the rules of this paragraph (b). The example assumes that §1.121–3 (relating to the reduced maximum exclusion) does not apply to the sale of the property. The example is as follows:

Example. Taxpayer A owns a townhouse that he uses as his principal residence for 2 full years, 1998 and 1999. A buys a house in 2000 that he owns and uses as his principal residence. A sells the townhouse in 2002 and excludes gain realized on its sale under section 121. A sells the house in 2003. Although A meets the 2-year ownership and use requirements of section 121, A is not eligible to exclude gain from the sale of the house because A excluded gain within the last 2 years under section 121 from the sale of the townhouse.

(c) *Effective date.* This section is applicable for sales and exchanges on or after December 24, 2002. For rules on electing to apply the provisions of this section retroactively, see §1.121–4(j).

[T.D. 9030, 67 FR 78361, Dec. 24, 2002]

§ 1.121–3 Reduced maximum exclusion for taxpayers failing to meet certain requirements.

(a) *In general.* In lieu of the limitation under section 121(b) and §1.121–2, a reduced maximum exclusion limitation may be available for a taxpayer who sells or exchanges property used as the taxpayer's principal residence but fails to satisfy the ownership and use requirements described in §1.121–1(a) and (c) or the 2-year limitation described in §1.121–2(b).

(b) *Primary reason for sale or exchange.* In order for a taxpayer to claim a reduced maximum exclusion under section 121(c), the sale or exchange must be by reason of a change in place of employment, health, or unforeseen circumstances. If a safe harbor described in this section applies, a sale or exchange is deemed to be by reason of a change in place of employment, health, or unforeseen circumstances. If a safe harbor described in this section does not apply, a sale or exchange is by reason of a change in place of employment, health, or unforeseen circumstances only if the primary reason for the sale or exchange is a change in place of employment (within the meaning of paragraph (c) of this section), health (within the meaning of paragraph (d) of this section), or unforeseen circumstances (within the meaning of paragraph (e) of this section). Whether the requirements of this section are satisfied depends upon all the facts and circumstances. Factors that may be relevant in determining the taxpayer's primary reason for the sale or exchange include (but are not limited to) the extent to which—

(1) The sale or exchange and the circumstances giving rise to the sale or exchange are proximate in time;

(2) The suitability of the property as the taxpayer's principal residence materially changes;

(3) The taxpayer's financial ability to maintain the property is materially impaired;

(4) The taxpayer uses the property as the taxpayer's residence during the period of the taxpayer's ownership of the property;

(5) The circumstances giving rise to the sale or exchange are not reasonably foreseeable when the taxpayer begins using the property as the taxpayer's principal residence; and

(6) The circumstances giving rise to the sale or exchange occur during the period of the taxpayer's ownership and use of the property as the taxpayer's principal residence.

(c) *Sale or exchange by reason of a change in place of employment*—(1) *In general*. A sale or exchange is by reason of a change in place of employment if, in the case of a qualified individual described in paragraph (f) of this section, the primary reason for the sale or exchange is a change in the location of the individual's employment.

(2) *Distance safe harbor*. A sale or exchange is deemed to be by reason of a change in place of employment (within the meaning of paragraph (c)(1) of this section) if—

(i) The change in place of employment occurs during the period of the taxpayer's ownership and use of the property as the taxpayer's principal residence; and

(ii) The qualified individual's new place of employment is at least 50 miles farther from the residence sold or exchanged than was the former place of employment, or, if there was no former place of employment, the distance between the qualified individual's new place of employment and the residence sold or exchanged is at least 50 miles.

(3) *Employment*. For purposes of this paragraph (c), *employment* includes the commencement of employment with a new employer, the continuation of employment with the same employer, and the commencement or continuation of self-employment.

(4) *Examples*. The following examples illustrate the rules of this paragraph (c):

Example 1. A is unemployed and owns a townhouse that she has owned and used as her principal residence since 2003. In 2004 A obtains a job that is 54 miles from her townhouse, and she sells the townhouse. Because the distance between A's new place of employment and the townhouse is at least 50 miles, the sale is within the safe harbor of paragraph (c)(2) of this section and A is entitled to claim a reduced maximum exclusion under section 121(c)(2).

Example 2. B is an officer in the United States Air Force stationed in Florida. B purchases a house in Florida in 2002. In May 2003 B moves out of his house to take a 3-year assignment in Germany. B sells his house in January 2004. Because B's new place of employment in Germany is at least 50 miles farther from the residence sold than is B's former place of employment in Florida, the sale is within the safe harbor of paragraph (c)(2) of this section and B is entitled to claim a reduced maximum exclusion under section 121(c)(2).

Example 3. C is employed by Employer R at R's Philadelphia office. C purchases a house in February 2002 that is 35 miles from R's Philadelphia office. In May 2003 C begins a temporary assignment at R's Wilmington office that is 72 miles from C's house, and moves out of the house. In June 2005 C is assigned to work in R's London office. C sells her house in August 2005 as a result of the assignment to London. The sale of the house is not within the safe harbor of paragraph (c)(2) of this section by reason of the change in place of employment from Philadelphia to Wilmington because the Wilmington office is not 50 miles farther from C's house than is the Philadelphia office. Furthermore, the sale is not within the safe harbor by reason of the change in place of employment to London because C is not using the house as her principal residence when she moves to London. However, C is entitled to claim a reduced maximum exclusion under section 121(c)(2) because, under the facts and circumstances, the primary reason for the sale is the change in C's place of employment.

Example 4. In July 2003 D, who works as an emergency medicine physician, buys a condominium that is 5 miles from her place of employment and uses it as her principal residence. In February 2004, D obtains a job that is located 51 miles from D's condominium. D may be called in to work unscheduled hours and, when called, must be able to arrive at work quickly. Because of the demands of the new job, D sells her condominium and buys a townhouse that is 4 miles from her new place of employment. Because D's new place of employment is only 46 miles farther from the condominium than is D's former place of employment, the sale is not within the safe harbor of paragraph (c)(2) of this section. However, D is entitled to claim a reduced maximum exclusion under section 121(c)(2) because, under the facts and circumstances, the primary reason for the sale is the change in D's place of employment.

(d) *Sale or exchange by reason of health*—(1) *In general.* A sale or exchange is by reason of health if the primary reason for the sale or exchange is to obtain, provide, or facilitate the diagnosis, cure, mitigation, or treatment of disease, illness, or injury of a qualified individual described in paragraph (f) of this section, or to obtain or provide medical or personal care for a qualified individual suffering from a disease, illness, or injury. A sale or exchange that is merely beneficial to the general health or well-being of an individual is not a sale or exchange by reason of health.

(2) *Physician's recommendation safe harbor.* A sale or exchange is deemed to be by reason of health if a physician (as defined in section 213(d)(4)) recommends a change of residence for reasons of health (as defined in paragraph (d)(1) of this section).

(3) *Examples.* The following examples illustrate the rules of this paragraph (d):

Example 1. In 2003 A buys a house that she uses as her principal residence. A is injured in an accident and is unable to care for herself. A sells her house in 2004 and moves in with her daughter so that the daughter can provide the care that A requires as a result of her injury. Because, under the facts and circumstances, the primary reason for the sale of A's house is A's health, A is entitled to claim a reduced maximum exclusion under section 121(c)(2).

Example 2. H's father has a chronic disease. In 2003 H and W purchase a house that they use as their principal residence. In 2004 H and W sell their house in order to move into the house of H's father so that they can provide the care he requires as a result of his disease. Because, under the facts and circumstances, the primary reason for the sale of their house is the health of H's father, H and W are entitled to claim a reduced maximum exclusion under section 121(c)(2).

Example 3. H and W purchase a house in 2003 that they use as their principal residence. Their son suffers from a chronic illness that requires regular medical care. Later that year their son begins a new treatment that is available at a hospital 100 miles away from their residence. In 2004 H and W sell their house so that they can be closer to the hospital to facilitate their son's treatment. Because, under the facts and circumstances, the primary reason for the sale is to facilitate the treatment of their son's chronic illness, H and W are entitled to claim a reduced maximum exclusion under section 121(c)(2).

Example 4. B, who has chronic asthma, purchases a house in Minnesota in 2003 that he uses as his principal residence. B's doctor tells B that moving to a warm, dry climate would mitigate B's asthma symptoms. In 2004 B sells his house and moves to Arizona to relieve his asthma symptoms. The sale is within the safe harbor of paragraph (d)(2) of this section and B is entitled to claim a reduced maximum exclusion under section 121(c)(2).

Example 5. In 2003 H and W purchase a house in Michigan that they use as their principal residence. H's doctor tells H that he should get more outdoor exercise, but H is not suffering from any disease that can be treated or mitigated by outdoor exercise. In 2004 H and W sell their house and move to Florida so that H can increase his general level of exercise by playing golf year-round. Because the sale of the house is merely beneficial to H's general health, the sale of the house is not by reason of H's health. H and W are not entitled to claim a reduced maximum exclusion under section 121(c)(2).

(e) *Sale or exchange by reason of unforeseen circumstances*—(1) *In general.* A sale or exchange is by reason of unforeseen circumstances if the primary reason for the sale or exchange is the occurrence of an event that the taxpayer could not reasonably have anticipated before purchasing and occupying the residence. A sale or exchange by reason of unforeseen circumstances (other than a sale or exchange deemed to be by reason of unforeseen circumstances under paragraph (e)(2) or (3) of this section) does not qualify for the reduced maximum exclusion if the primary reason for the sale or exchange is a preference for a different residence or an improvement in financial circumstances.

(2) *Specific event safe harbors.* A sale or exchange is deemed to be by reason of unforeseen circumstances (within the meaning of paragraph (e)(1) of this section) if any of the events specified in paragraphs (e)(2)(i) through (iii) of this section occur during the period of the taxpayer's ownership and use of the residence as the taxpayer's principal residence:

(i) The involuntary conversion of the residence.

(ii) Natural or man-made disasters or acts of war or terrorism resulting in a casualty to the residence (without regard to deductibility under section 165(h)).

(iii) In the case of a qualified individual described in paragraph (f) of this section—

(A) Death;

(B) The cessation of employment as a result of which the qualified individual is eligible for unemployment compensation (as defined in section 85(b));

(C) A change in employment or self-employment status that results in the taxpayer's inability to pay housing costs and reasonable basic living expenses for the taxpayer's household (including amounts for food, clothing, medical expenses, taxes, transportation, court-ordered payments, and expenses reasonably necessary to the production of income, but not for the maintenance of an affluent or luxurious standard of living);

(D) Divorce or legal separation under a decree of divorce or separate maintenance; or

(E) Multiple births resulting from the same pregnancy.

(3) *Designation of additional events as unforeseen circumstances.* The Commissioner may designate other events or situations as unforeseen circumstances in published guidance of general applicability and may issue rulings addressed to specific taxpayers identifying other events or situations as unforeseen circumstances with regard to those taxpayers (see §601.601(d)(2) of this chapter).

(4) *Examples.* The following examples illustrate the rules of this paragraph (e):

Example 1. In 2003 A buys a house in California. After A begins to use the house as her principal residence, an earthquake causes damage to A's house. A sells the house in 2004. The sale is within the safe harbor of paragraph (e)(2)(ii) of this section and A is entitled to claim a reduced maximum exclusion under section 121(c)(2).

Example 2. H works as a teacher and W works as a pilot. In 2003 H and W buy a house that they use as their principal residence. Later that year W is furloughed from her job for six months. H and W are unable to pay their mortgage and reasonable basic living expenses for their household during the period W is furloughed. H and W sell their house in 2004. The sale is within the safe harbor of paragraph (e)(2)(iii)(C) of this section and H and W are entitled to claim a reduced maximum exclusion under section 121(c)(2).

Example 3. In 2003 H and W buy a two-bedroom condominium that they use as their principal residence. In 2004 W gives birth to twins and H and W sell their condominium and buy a four-bedroom house. The sale is within the safe harbor of paragraph (e)(2)(iii)(E) of this section, and H and W are entitled to claim a reduced maximum exclusion under section 121(c)(2).

Example 4. In 2003 B buys a condominium in a high-rise building and uses it as his principal residence. B's monthly condominium fee is $X. Three months after B moves into the condominium, the condominium association replaces the building's roof and heating system. Six months later, B's monthly condominium fee doubles in order to pay for the repairs. B sells the condominium in 2004 because he is unable to afford the new condominium fee along with a monthly mortgage payment. The safe harbors of paragraph (e)(2) of this section do not apply. However, under the facts and circumstances, the primary reason for the sale, the doubling of the condominium fee, is an unforeseen circumstance because B could not reasonably have anticipated that the condominium fee would double at the time he purchased and occupied the property. Consequently, the sale of the condominium is by reason of unforeseen circumstances and B is entitled to claim a reduced maximum exclusion under section 121(c)(2).

Example 5. In 2003 C buys a house that he uses as his principal residence. The property is located on a heavily traveled road. C sells the property in 2004 because C is disturbed by the traffic. The safe harbors of paragraph (e)(2) of this section do not apply. Under the facts and circumstances, the primary reason for the sale, the traffic, is not an unforeseen circumstance because C could reasonably have anticipated the traffic at the time he purchased and occupied the house. Consequently, the sale of the house is not by reason of unforeseen circumstances and C is not entitled to claim a reduced maximum exclusion under section 121(c)(2).

Example 6. In 2003 D and her fiance E buy a house and live in it as their principal residence. In 2004 D and E cancel their wedding plans and E moves out of the house. Because D cannot afford to make the monthly mortgage payments alone, D and E sell the house in 2004. The safe harbors of paragraph (e)(2) of this section do not apply. However, under the facts and circumstances, the primary reason for the sale, the broken engagement, is an unforeseen circumstance because D and E could not reasonably have anticipated the broken engagement at the time they purchased and occupied the house. Consequently, the sale is by reason of unforeseen circumstances and D and E are each entitled to claim a reduced maximum exclusion under section 121(c)(2).

Example 7. In 2003 F buys a small condominium that she uses as her principal residence. In 2005 F receives a promotion and a large increase in her salary. F sells the condominium in 2004 and purchases a house because she can now afford the house. The safe harbors of paragraph (e)(2) of this section do not apply. Under the facts and circumstances, the primary reason for the sale of the house, F's salary increase, is an improvement in F's financial circumstances. Under paragraph (e)(1) of this section, an improvement in financial circumstances, even if the result of unforeseen circumstances, does not qualify for the reduced maximum exclusion by reason of unforeseen circumstances under section 121(c)(2).

Example 8. In April 2003 G buys a house that he uses as his principal residence. G sells his house in October 2004 because the house has greatly appreciated in value, mortgage rates have substantially decreased, and G can afford a bigger house. The safe harbors of paragraph (e)(2) of this section do not apply. Under the facts and circumstances, the primary reasons for the sale of the house, the changes in G's house value and in the mortgage rates, are an improvement in G's financial circumstances. Under paragraph (e)(1) of this section, an improvement in financial circumstances, even if the result of unforeseen circumstances, does not qualify for the reduced maximum exclusion by reason of unforeseen circumstances under section 121(c)(2).

Example 9. H works as a police officer for City X. In 2003 H buys a condominium that he uses as his principal residence. In 2004 H is assigned to City X's K–9 unit and is required to care for the police service dog at his home. Because H's condominium association does not permit H to have a dog in his condominium, in 2004 he sells the condominium and buys a house. The safe harbors of paragraph (e)(2) of this section do not apply. However, under the facts and circumstances, the primary reason for the sale, H's assignment to the K–9 unit, is an unforeseen circumstance because H could not reasonably have anticipated his assignment to the K–9 unit at the time he purchased and occupied the condominium. Consequently, the sale of the condominium is by reason of unforeseen circumstances and H is entitled to claim a reduced maximum exclusion under section 121(c)(2).

Example 10. In 2003, J buys a small house that she uses as her principal residence. After J wins the lottery, she sells the small house in 2004 and buys a bigger, more expensive house. The safe harbors of paragraph (e)(2) of this section do not apply. Under the facts and circumstances, the primary reason for the sale of the house, winning the lottery, is an improvement in J's financial circumstances. Under paragraph (e)(1) of this section, an improvement in financial circumstances, even if the result of unforeseen circumstances, does not qualify for the reduced maximum exclusion under section 121(c)(2).

(f) *Qualified individual.* For purposes of this section, *qualified individual* means—

(1) The taxpayer;

(2) The taxpayer's spouse;

(3) A co-owner of the residence;

(4) A person whose principal place of abode is in the same household as the taxpayer; or

(5) For purposes of paragraph (d) of this section, a person bearing a relationship specified in sections 152(a)(1) through 152(a)(8) (without regard to qualification as a dependent) to a qualified individual described in paragraphs (f)(1) through (4) of this section, or a descendant of the taxpayer's grandparent.

(g) *Computation of reduced maximum exclusion.* (1) The reduced maximum exclusion is computed by multiplying the maximum dollar limitation of $250,000 ($500,000 for certain joint filers) by a fraction. The numerator of the fraction is the shortest of the period of time that the taxpayer owned the property during the 5-year period ending on the date of the sale or exchange; the period of time that the taxpayer used the property as the taxpayer's principal residence during the 5-year period ending on the date of the sale or exchange; or the period of time between the date of a prior sale or exchange of property for which the taxpayer excluded gain under section 121 and the date of the current sale or exchange. The numerator of the fraction may be expressed in days or months. The denominator of the fraction is 730 days or 24 months (depending on the measure of time used in the numerator).

(2) *Examples.* The following examples illustrate the rules of this paragraph (g):

Example 1. Taxpayer A purchases a house that she uses as her principal residence. Twelve months after the purchase, A sells the house due to a change in place of her employment. A has not excluded gain under section 121 on a prior sale or exchange of property within the last 2 years. A is eligible to exclude up to $125,000 of the gain from the sale of her house ($12/24 \times \$250{,}000$).

Example 2. (i) Taxpayer H owns a house that he has used as his principal residence since 1996. On January 15, 1999, H and W marry and W begins to use H's house as her principal residence. On January 15, 2000, H sells the house due to a change in W's place of employment. Neither H nor W has excluded gain under section 121 on a prior sale or exchange of property within the last 2 years.

(ii) Because H and W have not each used the house as their principal residence for at least 2 years during the 5-year period preceding its sale, the maximum dollar limitation amount that may be claimed by H and W will not be $500,000, but the sum of each spouse's limitation amount determined on a separate basis as if they had not been married. (*See* §1.121–2(a)(3)(ii).)

(iii) H is eligible to exclude up to $250,000 of gain because he meets the requirements of section 121. W is not eligible to exclude the maximum dollar limitation amount. Instead, because the sale of the house is due to a change in place of employment, W is eligible to claim a reduced maximum exclusion of up to $125,000 of the gain (365/730 × $250,000). Therefore, H and W are eligible to exclude up to $375,000 of gain ($250,000 + $125,000) from the sale of the house.

(h) *Effective dates.* Paragraphs (a) and (g) of this section are applicable for sales and exchanges on or after December 24, 2002. Paragraphs (b) through (f) of this section are applicable for sales and exchanges on or after August 13, 2004.

[T.D. 9030, 67 FR 78361, Dec. 24, 2002, as amended by T.D. 9152, 69 FR 50304, Aug. 16, 2004]

§ 1.121–4 Special rules.

(a) *Property of deceased spouse*—(1) *In general.* For purposes of satisfying the ownership and use requirements of section 121, a taxpayer is treated as owning and using property as the taxpayer's principal residence during any period that the taxpayer's deceased spouse owned and used the property as a principal residence before death if—

(i) The taxpayer's spouse is deceased on the date of the sale or exchange of the property; and

(ii) The taxpayer has not remarried at the time of the sale or exchange of the property.

(2) *Example.* The provisions of this paragraph (a) are illustrated by the following example. The example assumes that §1.121–3 (relating to the reduced maximum exclusion) does not apply to the sale of the property. The example is as follows:

Example. Taxpayer H has owned and used a house as his principal residence since 1987. H and W marry on July 1, 1999 and from that date they use H's house as their principal residence. H dies on August 15, 2000, and W inherits the property. W sells the property on September 1, 2000, at which time she has not remarried. Although W has owned and used the house for less than 2 years, W will be considered to have satisfied the ownership and use requirements of section 121 because W's period of ownership and use includes the period that H owned and used the property before death.

(b) *Property owned by spouse or former spouse*—(1) *Property transferred to individual from spouse or former spouse.* If a taxpayer obtains property from a spouse or former spouse in a transaction described in section 1041(a), the period that the taxpayer owns the property will include the period that the spouse or former spouse owned the property.

(2) *Property used by spouse or former spouse.* A taxpayer is treated as using property as the taxpayer's principal residence for any period that the taxpayer has an ownership interest in the property and the taxpayer's spouse or former spouse is granted use of the property under a divorce or separation instrument (as defined in section 71(b)(2)), provided that the spouse or former spouse uses the property as his or her principal residence.

(c) *Tenant-stockholder in cooperative housing corporation.* A taxpayer who holds stock as a tenant-stockholder in a cooperative housing corporation (as those terms are defined in section 216(b)(1) and (2)) may be eligible to exclude gain under section 121 on the sale or exchange of the stock. In determining whether the taxpayer meets the requirements of section 121, the ownership requirements are applied to the holding of the stock and the use requirements are applied to the house or apartment that the taxpayer is entitled to occupy by reason of the taxpayer's stock ownership.

(d) *Involuntary conversions*—(1) *In general.* For purposes of section 121, the destruction, theft, seizure, requisition, or condemnation of property is treated as a sale of the property.

(2) *Application of section 1033.* In applying section 1033 (relating to involuntary conversions), the amount realized

from the sale or exchange of property used as the taxpayer's principal residence is treated as being the amount determined without regard to section 121, reduced by the amount of gain excluded from the taxpayer's gross income under section 121.

(3) *Property acquired after involuntary conversion.* If the basis of the property acquired as a result of an involuntary conversion is determined (in whole or in part) under section 1033(b) (relating to the basis of property acquired through an involuntary conversion), then for purposes of satisfying the requirements of section 121, the taxpayer will be treated as owning and using the acquired property as the taxpayer's principal residence during any period of time that the taxpayer owned and used the converted property as the taxpayer's principal residence.

(4) *Example.* The provisions of this paragraph (d) are illustrated by the following example:

Example. (i) On February 18, 1999, fire destroys Taxpayer A's house which has an adjusted basis of $80,000. A had owned and used this property as her principal residence for 20 years prior to its destruction. A's insurance company pays A $400,000 for the house. A realizes a gain of $320,000 ($400,000—$80,000). On August 27, 1999, A purchases a new house at a cost of $100,000.

(ii) Because the destruction of the house is treated as a sale for purposes of section 121, A will exclude $250,000 of the realized gain from A's gross income. For purposes of section 1033, the amount realized is then treated as being $150,000 ($400,000—$250,000) and the gain realized is $70,000 ($150,000 amount realized—$80,000 basis). A elects under section 1033 to recognize only $50,000 of the gain ($150,000 amount realized—$100,000 cost of new house). The remaining $20,000 of gain is deferred and A's basis in the new house is $80,000 ($100,000 cost—$20,000 gain not recognized).

(iii) A will be treated as owning and using the new house as A's principal residence during the 20-year period that A owned and used the destroyed house.

(e) *Sales or exchanges of partial interests*—(1) *Partial interests other than remainder interests*—(i) *In general.* Except as provided in paragraph (e)(2) of this section (relating to sales or exchanges of remainder interests), a taxpayer may apply the section 121 exclusion to gain from the sale or exchange of an interest in the taxpayer's principal residence that is less than the taxpayer's entire interest if the interest sold or exchanged includes an interest in the dwelling unit. For rules relating to the sale or exchange of vacant land, *see* § 1.121–1(b)(3).

(ii) *Limitations*—(A) *Maximum limitation amount.* For purposes of section 121(b)(1) and (2) (relating to the maximum limitation amount of the section 121 exclusion), sales or exchanges of partial interests in the same principal residence are treated as one sale or exchange. Therefore, only one maximum limitation amount of $250,000 ($500,000 for certain joint returns) applies to the combined sales or exchanges of the partial interests. In applying the maximum limitation amount to sales or exchanges that occur in different taxable years, a taxpayer may exclude gain from the first sale or exchange of a partial interest up to the taxpayer's full maximum limitation amount and may exclude gain from the sale or exchange of any other partial interest in the same principal residence to the extent of any remaining maximum limitation amount, and each spouse is treated as excluding one-half of the gain from a sale or exchange to which section 121(b)(2)(A) and § 1.121–2(a)(3)(i)(relating to the limitation for certain joint returns) apply.

(B) *Sale or exchange of more than one principal residence in 2-year period.* For purposes of applying section 121(b)(3) (restricting the application of section 121 to only 1 sale or exchange every 2 years), each sale or exchange of a partial interest is disregarded with respect to other sales or exchanges of partial interests in the same principal residence, but is taken into account as of the date of the sale or exchange in applying section 121(b)(3) to that sale or exchange and the sale or exchange of any other principal residence.

(2) *Sales or exchanges of remainder interests*—(i) *In general.* A taxpayer may elect to apply the section 121 exclusion to gain from the sale or exchange of a remainder interest in the taxpayer's principal residence.

(ii) *Limitations*—(A) *Sale or exchange of any other interest.* If a taxpayer elects to exclude gain from the sale or exchange of a remainder interest in the taxpayer's principal residence, the section 121 exclusion will not apply to a sale or exchange of any other interest in the residence that is sold or exchanged separately.

(B) *Sales or exchanges to related parties.* This paragraph (e)(2) will not apply to a sale or exchange to any person that bears a relationship to the taxpayer that is described in section 267(b) or 707(b).

(iii) *Election.* The taxpayer makes the election under this paragraph (e)(2) by filing a return for the taxable year of the sale or exchange that does not include the gain from the sale or exchange of the remainder interest in the taxpayer's gross income. A taxpayer may make or revoke the election at any time before the expiration of a 3-year period beginning on the last date prescribed by law (determined without regard to extensions) for the filing of the return for the taxable year in which the sale or exchange occurred.

(3) *Example.* The provisions of this paragraph (e) are illustrated by the following example:

Example. In 1991 Taxpayer A buys a house that A uses as his principal residence. In 2004 A's friend B moves into A's house and A sells B a 50% interest in the house realizing a gain of $136,000. A may exclude the $136,000 of gain. In 2005 A sells his remaining 50% interest in the home to B realizing a gain of $138,000. A may exclude $114,000 ($250,000—$136,000 gain previously excluded) of the $138,000 gain from the sale of the remaining interest.

(f) *No exclusion for expatriates.* The section 121 exclusion will not apply to any sale or exchange by an individual if the provisions of section 877(a) (relating to the treatment of expatriates) applies to the individual.

(g) *Election to have section not apply.* A taxpayer may elect to have the section 121 exclusion not apply to a sale or exchange of property. The taxpayer makes the election by filing a return for the taxable year of the sale or exchange that includes the gain from the sale or exchange of the taxpayer's principal residence in the taxpayer's gross income. A taxpayer may make an election under this paragraph (g) to have section 121 not apply (or revoke an election to have section 121 not apply) at any time before the expiration of a 3-year period beginning on the last date prescribed by law (determined without regard to extensions) for the filing of the return for the taxable year in which the sale or exchange occurred.

(h) *Residences acquired in rollovers under section 1034.* If a taxpayer acquires property in a transaction that qualifies under section 1034 (section 1034 property) for the nonrecognition of gain realized on the sale or exchange of another property and later sells or exchanges such property, in determining the period of the taxpayer's ownership and use of the property under section 121 the taxpayer may include the periods that the taxpayer owned and used the section 1034 property as the taxpayer's principal residence (and each prior residence taken into account under section 1223(7) in determining the holding period of the section 1034 property).

(i) [Reserved]

(j) *Election to apply regulations retroactively.* Taxpayers who would otherwise qualify under §§1.121–1 through 1.121–4 to exclude gain from a sale or exchange of a principal residence before December 24, 2002 but on or after May 7, 1997, may elect to apply §§1.121–1 through 1.121–4 for any years for which the period of limitation under section 6511 has not expired. The taxpayer makes the election under this paragraph (j) by filing a return for the taxable year of the sale or exchange that does not include the gain from the sale or exchange of the taxpayer's principal residence in the taxpayer's gross income. Taxpayers who have filed a return for the taxable year of the sale or exchange may elect to apply the provisions of these regulations for any years for which the period of limitation under section 6511 has not expired by filing an amended return.

(k) *Audit protection.* The Internal Revenue Service will not challenge a taxpayer's position that a sale or exchange of a principal residence occurring before December 24, 2002 but on or after May 7, 1997, qualifies for the section 121 exclusion if the taxpayer has made a reasonable, good faith effort to comply with the requirements of section 121. Compliance with the provisions of the regulations project under section 121 (REG–105235–99 (2000–2 C.B.

447)) generally will be considered a reasonable, good faith effort to comply with the requirements of section 121.

(l) *Effective date.* This section is applicable for sales and exchanges on or after December 24, 2002. For rules on electing to apply the provisions retroactively, see paragraph (j) of this section.

[T.D. 9030, 67 FR 78361, Dec. 24, 2002; 68 FR 6350, Feb. 7, 2003]

§ 1.121–5 Suspension of 5-year period for certain members of the uniformed services and Foreign Service.

(a) *In general.* Under section 121(d)(9), a taxpayer who is serving (or whose spouse is serving) on qualified official extended duty as a member of the uniformed services or Foreign Service of the United States may elect to suspend the running of the 5-year period of ownership and use during such service but for not more than 10 years. The election does not suspend the running of the 5-year period for any period during which the running of the 5-year period with respect to any other property of the taxpayer is suspended by an election under section 121(d)(9).

(b) *Manner of making election.* The taxpayer makes the election under section 121(d)(9) and this section by filing a return for the taxable year of the sale or exchange of the taxpayer's principal residence that does not include the gain in the taxpayer's gross income.

(c) *Application of election to closed years.* A taxpayer who would otherwise qualify under §§ 1.121–1 through 1.121–4 to exclude gain from a sale or exchange of a principal residence on or after May 7, 1997, may elect to apply section 121(d)(9) and this section for any years for which a claim for refund is barred by operation of any law or rule of law by filing an amended return before November 11, 2004.

(d) *Example.* The provisions of this section are illustrated by the following example:

Example. B purchases a house in Virginia in 2003 that he uses as his principal residence for 3 years. For 8 years, from 2006 through 2014, B serves on qualified official extended duty as a member of the Foreign Service of the United States in Brazil. In 2015 B sells the house. B did not use the house as his principal residence for 2 of the 5 years preceding the sale. Under section 121(d)(9)and this section, however, B may elect to suspend the running of the 5-year period of ownership and use during his 8-year period of service with the Foreign Service in Brazil. If B makes the election, the 8-year period is not counted in determining whether B used the house for 2 of the 5 years preceding the sale. Therefore, B may exclude the gain from the sale of the house under section 121.

(e) *Effective date.* This section is applicable for sales and exchanges on or after May 7, 1997.

[T.D. 9152, 69 FR 50306, Aug. 16, 2004]

§ 1.122–1 Applicable rules relating to certain reduced uniformed services retirement pay.

(a) *Rule applicable prior to January 1, 1966.* In the case of a member or former member of the uniformed services of the United States (as defined in 37 U.S.C. 101(3)) who has made an election under Subchapter I of Chapter 73 of title 10 of the U.S. Code (also referred to in this section as the Retired Serviceman's Family Protection Plan (10 U.S.C. 1431)) to receive a reduced amount of retired or retainer pay, gross income shall include the amount of any reduction made in his retired or retainer pay before January 1, 1966, by reason of such election, unless such reduction, or portion thereof, is otherwise excluded from gross income under Part III of Subchapter B of Chapter 1 of the Internal Revenue Code of 1954 or any other provision of law.

(b) *Rule applicable after December 31, 1965*—(1) In a case of a member or former member of the uniformed services of the United States (as defined in 37 U.S.C. 101(3)), gross income shall not include the amount of any reduction made in his or her retired or retainer pay after December 31, 1965, by reason of—

(i) An election made under the Retired Serviceman's Family Protection Plan (10 U.S.C. 1431), or

(ii) The provisions of Subchapter II of Chapter 73 of title 10 of the U.S. Code (also referred to in this section as the Survivor Benefit Plan (10 U.S.C. 1447)).

(2)(i) In a case where a member or former member of the uniformed services has, pursuant to the election described in paragraph (a) of this section, received before January 1, 1966, a reduced amount of retired or retainer pay, he shall, after December 31, 1965, exclude from gross income under section 122(b) and this subdivision all amounts received as uniformed services retired or retainer pay until there has been so excluded an amount of retired or retainer pay equal to the ''consideration for the contract'' (as described in subdivision (iii) of this subparagraph).

(ii) Upon the death of a member or former member of the uniformed services, where the ''consideration for the contract'' (as described in subdivision (iii) of this subparagraph) has not been excluded in whole or in part from gross income under section 122(b) and subdivision (i) of this subparagraph, the survivor of such member who is receiving an annuity under Chapter 73 of title 10 of the U.S. Code shall, after December 31, 1965, exclude from gross income under section 72(o) and this subdivision such annuity payments received after December 31, 1965, until there has been so excluded annuity payments equalling the portion of the ''consideration for the contract'' not previously excluded under subdivision (i) of this subparagraph.

(iii) The term ''consideration for the contract'' as used in this subparagraph means—

(*a*) The total amount of the reductions, if any, before January 1, 1966, in retired or retainer pay by reason of an election under Subchapter I of Chapter 73 of title 10 of the United States Code, plus

(*b*) The total amount, if any, deposited by the serviceman at any time pursuant to the provisions of sections 1438 or 1452(d) of title 10 of the United States Code, plus

(*c*) The total amount, if any, excludable from income under section 101(b)(2)(D) and paragraph (a)(2) of §1.101–2 with respect to a survivor annuity provided by such retired or retainer pay, minus

(*d*) The total amount, if any, excluded from income before January 1, 1966, pursuant to the provisions of section 72 (b) and (d) with respect to a survivor annuity provided by such retired or retainer pay.

(iv) In determining whether there has been a recovery of the ''consideration for the contract'' under subdivision (i) of this subparagraph, the exclusion of retired pay from income after December 31, 1965, under sections 104(a)(4) and 105(d) shall not be considered as recovery of all or part of the ''consideration for the contract.''

(c) *Special rules.* In any of the following situations, the computation of the excludable portion of disability retired pay received by the member or former member of the uniformed services shall be governed by the following rules:

(1) An exclusion under section 122(a) and paragraph (b)(1) of this section is applicable only in the taxable year in which a reduction in retired pay is made under the Retired Serviceman's Family Protection Plan (10 U.S.C. 1431) or the Survivor Benefit Plan (10 U.S.C. 1447).

(2) Where the member or former member of the uniformed services is entitled to exclude the whole or a portion of his retired pay under the provisions of section 104(a)(4) or section 105(d) and under section 122(a) and paragraph (b)(1) of this section, the exclusion under section 122(a) and paragraph (b)(1) of this section shall be applied prior to the exclusions under sections 104(a)(4) and 105(d).

(3) Where the member or former member of the uniformed services waives a portion of his disability retired pay, or such retired pay reduced under the Retired Serviceman's Family Protection Plan (10 U.S.C. 1431),or the Survivor Benefit Plan (10 U.S.C. 1447) in favor of a nontaxable pension or compensation receivable under laws administered by the Veterans Administration (38 U.S.C. 3105), the waived amount of such disability retired pay, or reduced amount thereof, shall first be subtracted from any amounts which are excludable under the provisions of sections 104(a)(4) or 105(d) so as to reduce the amounts otherwise excludable under those sections.

(4) Where the member or former member of the uniformed services receives (before any forfeiture) disability retired pay (whether or not reduced under the Retired Serviceman's Family

Protection Plan) or the Survivor Benefit Plan which is partially excludable under section 104(a)(4), and also forfeits a portion of such disability retired pay under the Dual Compensation Act of 1964 (5 U.S.C. 5531 or any former corresponding provision of law), the amount of the forfeiture under such Act shall be applied against disability retired pay (before any forfeiture) in the same proportion that the excludable portion of such pay under section 104(a)(4) bears to the total amount of such pay after subtraction of any reduction under the Retired Serviceman's Family Protection Plan (10 U.S.C. 1431) or the Survivor Benefit Plan (10 U.S.C. 1447).

(5) The exclusion provided by section 122(b) and paragraph (b)(2)(i) of this section shall be available with respect to repayments made upon removal from the temporary disability retired list even though such repayments were previously excluded from gross income under section 104(a)(4) or 105(d).

However, the exclusion permitted by the prior sentence will apply only to the extent the repaid amount has not been previously excluded under section 122(b) and paragraph (b)(2)(i) of this section.

(d) *Examples with respect to the Retired Serviceman's Family Protection Plan*. The rules discussed in this section relating to the Retired Serviceman's Family Protection Plan (10 U.S.C. 1431) may be illustrated by the following examples:

Example 1. A, a member of the uniformed services, retires on January 1, 1963, and receives nondisability retired pay computed to be 60 percent of his active duty pay of $10,000 per year, or $6,000 per year, based upon 24 years of service. He elects, under the Retired Serviceman's Family Protection Plan (10 U.S.C. 1431), to provide his survivor with an annuity equal to one-fourth of his reduced retired pay. His retired pay of $6,000 is reduced by $600, to $5,400, in order to provide a survivor annuity of $1,350 per year or $112.50 per month. For 1963, 1964, and 1965, A must include in gross income the unreduced amount of retired pay, or $6,000. For 1966 and subsequent years, he may exclude under section 122(a) and paragraph (b)(1) of this section the $600 total annual reductions to provide the survivor annuity, and may, for 1966, further exclude from gross income under section 122(b) and paragraph (b)(2)(i) of this section the $1,800 ''consideration for the contract'' *i.e.*, the total reductions which were made in 1963, 1964, and 1965, to provide the survivor annuity. Accordingly, A will include $3,600 of retired pay in gross income for 1966 ($6,000 minus the sum of $600 and $1,800).

Example 2. Assume the facts in Example (1) except that A retires on disability resulting from active service and his disability is rated at 40 percent. The entire amount of disability retirement pay, prior to and including 1966, is excludable from gross income under sections 104(a)(4) and 105(d), and in 1966, section 122(a). Assume further that A attains retirement age on December 31, 1966, dies on January 1, 1967, and his widow then begins receiving a survivor annuity under the Retired Serviceman's Family Protection Plan (10 U.S.C. 1431). A's widow may exclude from gross income in 1967 and 1968 under section 72(o) and paragraph (b)(2)(ii) of this section, the $1,800 of ''consideration for the contract'' *i.e.*, the reductions in 1963, 1964, and 1965 to provide the survivor annuity. Thus, A's widow will exclude all of the survivor annuity she receives in 1967 ($1,350) and $450 of the $1,350 annuity received in 1968. In addition, if A had not attained retirement age at the time of his death, his widow would, under section 101 and paragraph (a)(2) of §1.101–2, exclude up to $5,000 subject to the limitations of paragraph (b)(2)(ii) of this section.

Example 3. Assume, in the previous example, that A dies on January 1, 1965, and his widow then begins receiving a survivor annuity. Assume further that A's widow is entitled to exclude under section 72(b) $1,000 of the $1,350 she received in 1965. Under section 72(o) and paragraph (b)(2)(ii) of this section, A's widow for 1966 will exclude the $200 remaining consideration for the contract ($1,200 − $1,000) and will include $1,150 of the survivor annuity in gross income.

Example 4. B, a member of the uniformed services, retires on January 1, 1966, after 32 years of active military service, and receives disability retirement pay under section 1401 of title 10, limited to 75 percent of his active duty pay of $15,000 per year, or $11,250. His disability rating is 30 percent. B has not reached retirement age (as defined in §1.79–2(b)(3)). He elects under the Retired Serviceman's Family Protection Plan (10 U.S.C. 1431) to provide his survivor with an annuity equal to one-half of his reduced retired pay and, for that purpose, his retired pay of $11,250 is reduced by $1,250 to provide an annuity of $5,000 per year. B also elects to waive retired pay in the amount of $1,000 in order to receive disability compensation in like amount under laws administered by the Veterans Administration. In addition, B is required to forfeit $4,088 of his retired pay under the Dual Compensation Act of 1964 (5 U.S.C. 5532) ($11,250 − $1,000 = $10,250 less one-half of excess thereof over $2,074) and by reason of his Federal employment is not entitled to an exclusion of his retired pay under section 105(d). B's taxable retired pay for 1966 is $3,002, computed as follows:

Gross retired pay	$11,250
Less: Section 122(a) exclusion	(1,250)
Reduced retired pay	10,000
Less: Retired pay waived to receive V.A. compensation	(1,000)
Adjusted retired pay—	9,000
Less:	
(i) Excludable retired pay computed under section 104(a)(4) as limited by 10 U.S.C. 1403	$4,500
(ii) Less: Retired pay, not to exceed (i), waived to receive V.A. compensation	(1,000)
(iii) Net disability exclusion	(3,500)
Taxable retired pay before adjustment for Dual Compensation forfeiture	5,500
Less:	
Adjustment for Dual Compensation forfeiture of $4,088	
5500÷9000×$4,088 = $2,498 (rounded)	(2,498)
Net taxable retired pay	3,002

Example 5. C, a member of the uniformed services retires on January 1, 1966, and receives disability retirement pay of $11,250 per year, which is reduced by $1,250 to provide a survivor annuity, and $1,000 of which is waived in order to receive disability compensation in like amount under laws administered by the Veterans Administration. C has not reached retirement age for purposes of section 105(d) and is not employed by the Federal Government. C's taxable disability retirement pay for 1966 is $300 computed as follows:

Adjusted retired pay	$9,000	
Less:		
(i) Excludable retired pay under section (a)(4) as limited by 10 U.S.C. 1403	$4,500	
(ii) Excludable retired pay under section 105(d)	5,200	
(iii) Total	9,700	
(iv) Less: Retired pay, not to exceed (iii), waived to receive V.A. compensa- tion "sick pay" exclusion	(1,000)	
(v) Net disability and "sick pay" exclusion		(8,700)
Net taxable retired pay	800	

Example 6. D, a member of the uniformed services, retires for physical disability resulting from active service on January 1, 1966, after 35 years of service and with a disability rated at 20 percent. His active duty pay is $4,000 per year and he attained retirement age prior to retirement. He had an election in effect under the Retired Serviceman's Family Protection Plan to provide his survivor with an annuity and his retired pay is reduced therefor by $500 per year. He waives $1,300 of his retired pay in order to receive compensation from the Veterans Administration in like amount. His taxable retired pay for 1966 is $1,200 computed as follows:

Gross retired pay (75%×$4,000)	$3,000	
Less: Section 122(a) exclusion	(500)	
Reduced retired pay	2,500	
Less: V.A. waiver	(1,300)	
Adjusted retired pay	1,200	
Less:		
(i) Section 104(a)(4) exclusion	$800	
(ii) Less: Retired pay, not to exceed (i), waived to receive V.A. compensation	(800)	
(iii) Net disability exclusion	0	
Net taxable retired pay		1,200

(e) *Principles applicable to the Survivor Benefit Plan*. The principles illustrated by the examples set forth in paragraph (d) of this section apply to an annuity under the Survivor Benefit Plan (10 U.S.C. 1447).

[T.D. 7043, 35 FR 8478, June 2, 1970, as amended by T.D. 7562, 43 FR 38819, Aug. 31, 1978]

§ 1.123–1 Exclusion of insurance proceeds for reimbursement of certain living expenses.

(a) *In general*. (1) Gross income does not include insurance proceeds received by an individual on or after January 1, 1969, pursuant to the terms of an insurance contract for indemnification of the temporary increase in living expenses resulting from the loss of use or occupancy of his principal residence, or a part thereof, due to damage or destruction by fire, storm, or other casualty. The term ''other casualty'' has the same meaning assigned to such term under section 165(c)(3). The exclusion also applies in the case of an individual who is denied access to his principal residence by governmental authorities because of the occurrence (or threat of occurrence) of such a casualty. The amount excludable under this section is subject to the limitation set forth in paragraph (b) of this section.

(2) This exclusion applies to amounts received as reimbursement or compensation for the reasonable and necessary increase in living expenses incurred by the insured and members of his household to maintain their customary standard of living during the loss period.

(3) This exclusion does not apply to an insurance recovery for the loss of rental income. Nor does the exclusion apply to any insurance recovery which compensates for the loss of, or damage to, real or personal property. See section 165(c)(3) relating to casualty losses; section 1231 relating to gain on an involuntary conversion of a capital asset held for more than 1 year (6 months for taxable years beginning before 1977; 9 months for taxable years beginning in 1977); and section 1033 relating to recognition of gain on an involuntary conversion. In the case of property used by an insured partially as a principal residence and partially for other purposes, the exclusion does not apply to the amount of insurance proceeds which compensates for the portion of increased expenses attributable to the nonresidential use of temporary replacement property during the loss period. In the case of denial of access to a principal residence by governmental authority, the exclusion provided by this section does not apply to an insurance recovery received by an individual as reimbursement for living expenses incurred by reason of a governmental condemnation or order not related to a casualty or the threat of a casualty.

(4)(i) Subject to the limitation set forth in paragraph (b), the amount excludable is the amount which is identified by the insurer as being paid exclusively for increased living expenses resulting from the loss of use or occupancy of the principal residence and pursuant to the terms of the insurance contract.

(ii) When a lump-sum insurance settlement includes, but does not specifically identify, compensation for property damage, loss of rental income, and increased living expenses, the amount of such settlement allocable to living expenses shall, in the case of uncontested claims, be that portion of the settlement which bears the same ratio to the total recovery as the amount of claimed increased living expense bears to the total amount of claimed losses and expenses, to the extent not in excess of the coverage limitations specified in the contract for such losses and expenses.

(iii) In the case of a lump-sum settlement involving contested claims, the insured shall establish the amount reasonably allocable to increased living expenses, consistent with the terms of the contract and other facts of the particular case.

(iv) In no event may the amount of a lump-sum settlement which is allocable to increased living expenses exceed the coverage limitation specified in the contract for increased living expenses. Where, however, a coverage limitation is applicable to the total amount payable for increased living expenses and, for example, loss of rental income, the amount of an unitemized settlement which is allocable to increased living expenses may not exceed the portion of the applicable coverage limitation which bears the same ratio to such limitation as the amount of increased living expenses bears to the sum of the amount of such increased living expenses and the amount, if any, of lost rental income.

(5) The portion of any insurance recovery for increased living expenses which exceeds the limitation set forth in paragraph (b) shall be included in gross income under section 61 of the Code.

(b) *Limitation*—(1) *Amount excludable.* The amount excludable under this section is limited to amounts received which are not in excess of the amount by which (i) total actual living expenses incurred by the insured and members of his household which result from the loss of use or occupancy of their residence exceed (ii) the total normal living expenses which would have been incurred during the loss period but are not incurred as a result of the loss of use or occupancy of the principal residence. Generally, the excludable amount represents such excess expenses actually incurred by reason of a casualty, or threat thereof, for renting suitable housing and for extraordinary expenses for transportation, food, utilities, and miscellaneous services during the period of repair or replacement of the damaged principal residence or denial of access by governmental authority.

(2) *Actual living expenses*. For purposes of this section, actual living expenses are the reasonable and necessary expenses incurred as a result of the loss of use or occupancy of the principal residence to maintain the insured and members of his household in accordance with their customary standard of living. Actual living expenses must be of such a nature as to qualify as a reimbursable expense under the terms of the applicable insurance contract without regard to monetary limitations upon coverage. Generally, actual living expenses include the cost during the loss period of temporary housing, utilities furnished at the place of temporary housing, meals obtained at restaurants which customarily would have been prepared in the residence, transportation, and other miscellaneous services. To the extent that the loss of use or occupancy of the principal residence results merely in an increase in the amount expended for items of living expenses normally incurred, such as food and transportation, only the increase in such costs shall be considered as actual living expenses in computing the limitation.

(3) *Normal living expenses not incurred*. Normal living expenses consist of the same categories of expenses comprising actual living expenses which would have been incurred but are not incurred as a result of the casualty or threat thereof. If the loss of use of the residence results in a decrease in the amount normally expended for a living expense item during the loss period, the item of normal living expense is considered not to have been incurred to the extent of the decrease for purposes of computing the limitation.

(4) *Examples*. The application of this paragraph (b) may be illustrated by the following examples:

Example 1. On March 1, 1970, A's principal residence, a dwelling owned by A no part of which was rented to others or used for nonresidential purposes, was extensively damaged by fire. The damaged residence was under repair during the entire month of March making it necessary for A and his spouse to obtain temporary lodging and to take their meals at a restaurant. A and his spouse incur expenses of $200 for lodging at a motel, $180 for meals which customarily would have been prepared in his residence, and $25 for commercial laundry service which customarily would have been done by A's wife. A makes (directly or through mortgage insurance), or remains liable for, the required March payment of $190 on the mortgage note on his residence. The mortgage payment results from a contractual obligation having no causal relationship to the occurrence of the casualty and is not considered as an actual living expense resulting from the loss of use of the residence. A's customary commuting expense of $40 for bus fares to and from work is decreased by $20 for the month because of the motel's closer proximity to his place of employment. Other transportation expenses remain stable. Since there has been a decrease in the amount of A's customary bus fares, normal transportation expenses are considered not to have been incurred to the extent of the decrease. Finally, A does not incur customary expenses of $150 for food obtained for home preparation, $75 for utilities expenses, and $10 for laundry cleansers. The limitation upon the excludable amount of an insurance recovery for excess living expenses is $150, computed as follows:

LIVING EXPENSES

	Actual resulting from casualty	Normal not incurred	Increase (decrease)
Housing	$200.00		$200.00
Utilities		$75.00	(75.00)
Meals	180.00	150.00	30.00
Transportation		20.00	(20.00)
Laundry	25.00	10.00	150.00
Total	405.00	255.00	15.00

Example 2. Assume the same facts as in example (1) except that the damaged residence is not owned by A but is rented to him for $100 per month and that the risk of loss is upon the lessor. Since A would not have incurred the normal rental of $100 for March, the excludable amount is limited to $50 ($150 as in previous example less $100 normal rent not incurred).

(c) *Principal residence*. Whether or not property is used by the insured taxpayer and members of his household as their principal residence depends upon all the facts and circumstances in each case. For purposes of this section, a principal residence may be a dwelling or an apartment leased to the insured as well as a dwelling or apartment owned by the insured.

[T.D. 7118, 36 FR 10729, June 2, 1971, as amended by T.D. 7728, 45 FR 72650, Nov. 3, 1980]

§ 1.125–3 Effect of the Family and Medical Leave Act (FMLA) on the operation of cafeteria plans.

The following questions and answers provide guidance on the effect of the Family and Medical Leave Act (FMLA), 29 U.S.C. 2601 *et seq.*, on the operation of cafeteria plans:

Q–1: May an employee revoke coverage or cease payment of his or her share of group health plan premiums when taking unpaid FMLA, 29 U.S.C. 2601 *et seq.*, leave?

A–1: Yes. An employer must either allow an employee on unpaid FMLA leave to revoke coverage, or continue coverage but allow the employee to discontinue payment of his or her share of the premium for group health plan coverage (including a health flexible spending arrangement (FSA)) under a cafeteria plan for the period of the FMLA leave. See 29 CFR 825.209(e). FMLA does not require that an employer allow an employee to revoke coverage if the employer pays the employee's share of premiums. As discussed in Q&A–3, if the employer continues coverage during an FMLA leave, the employer may recover the employee's share of the premiums when the employee returns to work. FMLA also provides the employee a right to be reinstated in the group health plan coverage (including a health FSA) provided under a cafeteria plan upon returning from FMLA leave if the employee's group health plan coverage terminated while on FMLA leave (either by revocation or due to nonpayment of premiums). Such an employee is entitled, to the extent required under FMLA, to be reinstated on the same terms as prior to taking FMLA leave (including family or dependent coverage), subject to any changes in benefit levels that may have taken place during the period of FMLA leave as provided in 29 CFR 825.215(d)(1). See 29 CFR 825.209(e) and 825.215(d). In addition, such an employee has the right to revoke or change elections under § 1.125–4 (e.g., because of changes in status or cost or coverage changes as provided under § 1.125–4) under the same terms and conditions as are available to employees participating in the cafeteria plan who are working and not on FMLA leave.

Q–2: Who is responsible for making premium payments under a cafeteria plan when an employee on FMLA leave continues group health plan coverage?

A–2: FMLA provides that an employee is entitled to continue group health plan coverage during FMLA leave whether or not that coverage is provided under a health FSA or other component of a cafeteria plan. See 29 CFR 825.209(b). FMLA permits an employer to require an employee who chooses to continue group health plan coverage while on FMLA leave to be responsible for the share of group health premiums that would be allocable to the employee if the employee were working, and, for this purpose, treats amounts paid pursuant to a pre-tax salary reduction agreement as amounts allocable to the employee. However, FMLA requires the employer to continue to contribute the share of the cost of the employee's coverage that the employer was paying before the employee commenced FMLA leave. See 29 CFR 825.100(b) and 825.210(a).

Q–3: What payment options are required or permitted to be offered under a cafeteria plan to an employee who continues group health plan coverage while on unpaid FMLA leave, and what is the tax treatment of these payments?

A–3: (a) *In general.* Subject to the limitations described in paragraph (b) of this Q&A–3, a cafeteria plan may offer one or more of the following payment options, or a combination of these options, to an employee who continues group health plan coverage (including a health FSA) while on unpaid FMLA leave; provided that the payment options for employees on FMLA leave are offered on terms at least as favorable as those offered to employees not on FMLA leave. These options are referred to in this section as pre-pay, pay-as-you-go, and catch-up. See also the FMLA notice requirements at 29 CFR 825.301(b)(1)(iv).

(1) *Pre-pay.* (i) Under the pre-pay option, a cafeteria plan may permit an employee to pay, prior to commencement of the FMLA leave period, the amounts due for the FMLA leave period. However, FMLA provides that the employer may not mandate that an employee pre-pay the amounts due for

the leave period. See 29 CFR 825.210(c)(3) and (4).

(ii) Contributions under the pre-pay option may be made on a pre-tax salary reduction basis from any taxable compensation (including from unused sick days or vacation days). However, see Q&A–5 of this section regarding additional restrictions on pre-tax salary reduction contributions when an employee's FMLA leave spans two cafeteria plan years.

(iii) Contributions under the pre-pay option may also be made on an after-tax basis.

(2) *Pay-as-you-go.* (i) Under the pay-as-you-go option, employees may pay their share of the premium payments on the same schedule as payments would have been made if the employee were not on leave or under any other payment schedule permitted by the Labor Regulations at 29 CFR 825.210(c) (e.g., on the same schedule as payments are made under section 4980B (relating to coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA), 26 U.S.C. 4980B), under the employer's existing rules for payment by employees on leave without pay, or under any other system voluntarily agreed to between the employer and the employee that is not inconsistent with this section or with 29 CFR 825.210(c)).

(ii) Contributions under the pay-as-you-go option are generally made by the employee on an after-tax basis. However, contributions may be made on a pre-tax basis to the extent that the contributions are made from taxable compensation (e.g., from unused sick days or vacation days) that is due the employee during the leave period.

(iii) An employer is not required to continue the group health coverage of an employee who fails to make required premium payments while on FMLA leave, provided that the employer follows the notice procedures required under FMLA. See 29 CFR 825.212. However, if the employer chooses to continue the health coverage of an employee who fails to pay his or her share of the premium payments while on FMLA leave, FMLA permits the employer to recoup the premiums (to the extent of the employee's share). See 29 CFR 825.212(b). Such recoupment may be made as set forth in paragraphs (a)(3)(i) and (ii) of this Q&A–3. See also Q&A–6 of this section regarding coverage under a health FSA when an employee fails to make the required premium payments while on FMLA leave.

(3) *Catch-up.* (i) Under the catch-up option, the employer and the employee may agree in advance that the group coverage will continue during the period of unpaid FMLA leave, and that the employee will not pay premiums until the employee returns from the FMLA leave. Where an employee is electing to use the catch-up option, the employer and the employee must agree in advance of the coverage period that: the employee elects to continue health coverage while on unpaid FMLA leave; the employer assumes responsibility for advancing payment of the premiums on the employee's behalf during the FMLA leave; and these advance amounts are to be paid by the employee when the employee returns from FMLA leave.

(ii) When an employee fails to make required premium payments while on FMLA leave, an employer is permitted to utilize the catch-up option to recoup the employee's share of premium payments when the employee returns from FMLA leave. See, e.g., 29 CFR 825.212(b). If the employer chooses to continue group coverage under these circumstances, the prior agreement of the employee, as set forth in paragraph (a)(3)(i) of this Q&A–3, is not required.

(iii) Contributions under the catch-up option may be made on a pre-tax salary reduction basis from any available taxable compensation (including from unused sick days and vacation days) after the employee returns from FMLA leave. The cafeteria plan may provide for the catch-up option to apply on a pre-tax salary reduction basis if premiums have not been paid on any other basis (*i.e.*, have not been paid under the pre-pay or pay-as-you-go options or on a catch-up after-tax basis).

(iv) Contributions under the catch-up option may also be made on an after-tax basis.

(b) *Exceptions.* Whatever payment options are offered to employees on non-FMLA leave must be offered to employees on FMLA leave. In accordance with 29 CFR 825.210(c), cafeteria plans may offer one or more of the payment options described in paragraph (a) of this Q&A–3, with the following exceptions:

(1) FMLA does not permit the prepay option to be the sole option offered to employees on FMLA leave. However, the cafeteria plan may include pre-payment as an option for employees on FMLA leave, even if such option is not offered to employees on non-FMLA leave-without-pay.

(2) FMLA allows the catch-up option to be the sole option offered to employees on FMLA leave if and only if the catch-up option is the sole option offered to employees on non-FMLA leave-without-pay.

(3) If the pay-as-you-go option is offered to employees on non-FMLA leave-without-pay, the option must also be offered to employees on FMLA leave. The employer may also offer employees on FMLA leave the pre-pay option and/or the catch-up option.

(c) *Voluntary waiver of employee payments*. In addition to the foregoing payment options, an employer may voluntarily waive, on a nondiscriminatory basis, the requirement that employees who elect to continue group health coverage while on FMLA leave pay the amounts the employees would otherwise be required to pay for the leave period.

(d) *Example*. The following example illustrates this Q&A–3:

Example. (i) Employer Y allows employees to pay premiums for group health coverage during an FMLA leave on an after-tax basis while the employee is on unpaid FMLA leave. Under the terms of Y's cafeteria plan, if an employee elects to continue health coverage during an unpaid FMLA leave and fails to pay one or more of the after-tax premium payments due for that coverage, the employee's salary after the employee returns from FMLA leave is reduced to cover unpaid premiums (*i.e.* the premiums that were to be paid by the employee on an after-tax basis during the FMLA leave, but were paid by the employer instead).

(ii) In this *Example*, Y's cafeteria plan satisfies the conditions in this Q&A–3. Y's cafeteria plan would also satisfy the conditions in this Q&A–3 if the plan provided for coverage to cease in the event the employee fails to make a premium payment when due during an unpaid FMLA leave.

Q–4: Do the special FMLA requirements concerning payment of premiums by an employee who continues group health plan coverage under a cafeteria plan apply if the employee is on paid FMLA leave?

A–4: No. The Labor Regulations provide that, if an employee's FMLA leave is paid leave as described at 29 CFR 825.207 and the employer mandates that the employee continue group health plan coverage while on FMLA leave, the employee's share of the premiums must be paid by the method normally used during any paid leave (e.g., by pre-tax salary reduction if the employee's share of premiums were paid by pre-tax salary reduction before the FMLA leave began). See 29 CFR 825.210(b).

Q–5: What restrictions apply to contributions when an employee's FMLA leave spans two cafeteria plan years?

A–5: (a) No amount will be included in an employee's gross income due to participation in a cafeteria plan during FMLA leave, provided that the plan complies with other generally applicable cafeteria plan requirements. Among other requirements, a plan may not operate in a manner that enables employees on FMLA leave to defer compensation from one cafeteria plan year to a subsequent cafeteria plan year. See section 125(d)(2).

(b) The following example illustrates this Q&A–5:

Example. (i) Employee A elects group health coverage under a calendar year cafeteria plan maintained by Employer X. Employee A's premium for health coverage is $100 per month throughout the 12-month period of coverage. Employee A takes FMLA leave for 12 weeks beginning on October 31 after making 10 months of premium payments totaling $1,000 (10 months × $100 = $1,000). Employee A elects to continue health coverage while on FMLA leave and utilizes the pre-pay option by applying his or her unused sick days in order to make the required premium payments due while he or she is on FMLA leave.

(ii) Because A cannot defer compensation from one plan year to a subsequent plan year, A may pre-pay the premiums due in November and December (*i.e.*, $100 per month) on a pre-tax basis, but A cannot prepay the premium payment due in January on a pre-tax basis. If A participates in the cafeteria plan in the subsequent plan year, A must either pre-pay for January on an after-tax basis or use another option (e.g., pay-as-you-go, catch-up, reduction in unused sick days, etc.) to make the premium payment due in January.

Q–6: Are there special rules concerning employees taking FMLA leave who participate in health FSAs offered under a cafeteria plan?

A–6: (a) *In general.* (1) A group health plan that is a flexible spending arrangement (FSA) offered under a cafeteria plan must conform to the generally applicable rules in this section concerning employees who take FMLA leave. Thus, to the extent required by FMLA (see 29 CFR 825.209(b)), an employer must—

(i) Permit an employee taking FMLA leave to continue coverage under a health FSA while on FMLA leave; and

(ii) If an employee is on unpaid FMLA leave, either—

(A) Allow the employee to revoke coverage; or

(B) Continue coverage, but allow the employee to discontinue payment of his or her share of the premium for the health FSA under the cafeteria plan during the unpaid FMLA leave period.

(2) Under FMLA, the plan must permit the employee to be reinstated in health coverage upon return from FMLA leave on the same terms as if the employee had been working throughout the leave period, without a break in coverage. See 29 CFR 825.214(a) and 825.215(d)(1) and paragraph (b)(2) of this Q&A–6. In addition, under FMLA, a plan may require an employee to be reinstated in health coverage upon return from a period of unpaid FMLA leave, provided that employees who return from a period of unpaid leave not covered by the FMLA are also required to resume participation upon return from leave.

(b) *Coverage.* (1) Regardless of the payment option selected under Q&A–3 of this section, for so long as the employee continues health FSA coverage (or for so long as the employer continues the health FSA coverage of an employee who fails to make the required contributions as described in Q&A–3(a)(2)(iii) of this section), the full amount of the elected health FSA coverage, less any prior reimbursements, must be available to the employee at all times, including the FMLA leave period.

(2)(i) If an employee's coverage under the health FSA terminates while the employee is on FMLA leave, the employee is not entitled to receive reimbursements for claims incurred during the period when the coverage is terminated. If an employee subsequently elects or the employer requires the employee to be reinstated in the health FSA upon return from FMLA leave for the remainder of the plan year, the employee may not retroactively elect health FSA coverage for claims incurred during the period when the coverage was terminated. Upon reinstatement into a health FSA upon return from FMLA leave (either because the employee elects reinstatement or because the employer requires reinstatement), the employee has the right under FMLA: to resume coverage at the level in effect before the FMLA leave and make up the unpaid premium payments, or to resume coverage at a level that is reduced and resume premium payments at the level in effect before the FMLA leave. If an employee chooses to resume health FSA coverage at a level that is reduced, the coverage is prorated for the period during the FMLA leave for which no premiums were paid. In both cases, the coverage level is reduced by prior reimbursements.

(ii) FMLA requires that an employee on FMLA leave have the right to revoke or change elections (because of events described in §1.125–4) under the same terms and conditions that apply to employees participating in the cafeteria plan who are not on FMLA leave. Thus, for example, if a group health plan offers an annual open enrollment period to active employees, then, under FMLA, an employee on FMLA leave when the open enrollment is offered must be offered the right to make election changes on the same basis as other employees. Similarly, if a group health plan decides to offer a new benefit package option and allows active employees to elect the new option, then, under FMLA, an employee on FMLA leave must be allowed to elect the new option on the same basis as other employees.

(3) The following examples illustrate the rules in this Q&A–6:

Example 1. (i) Employee B elects $1,200 worth of coverage under a calendar year health FSA provided under a cafeteria plan, with an annual premium of $1,200. Employee

B is permitted to pay the $1,200 through pretax salary reduction amounts of $100 per month throughout the 12-month period of coverage. Employee B incurs no medical expenses prior to April 1. On April 1, B takes FMLA leave after making three months of contributions totaling $300 (3 months × $100 = $300). Employee B's coverage ceases during the FMLA leave. Consequently, B makes no premium payments for the months of April, May, and June, and B is not entitled to submit claims or receive reimbursements for expenses incurred during this period. Employee B returns from FMLA leave and elects to be reinstated in the health FSA on July 1.

(ii) Employee B must be given a choice of resuming coverage at the level in effect before the FMLA leave (*i.e.*, $1,200) and making up the unpaid premium payments ($300), or resuming health FSA coverage at a level that is reduced on a prorata basis for the period during the FMLA leave for which no premiums were paid (*i.e.*, reduced for 3 months or ¼ of the plan year) less prior reimbursements (*i.e.*, $0) with premium payments due in the same monthly amount payable before the leave (*i.e.*, $100 per month). Consequently, if B chooses to resume coverage at the level in effect before the FMLA leave, B's coverage for the remainder of the plan year would equal $1,200 and B's monthly premiums would be increased to $150 per month for the remainder of the plan year, to make up the $300 in premiums missed ($100 per month plus $50 per month ($300 divided by the remaining 6 months)). If B chooses prorated coverage, B's coverage for the remainder of the plan year would equal $900, and B would resume making premium payments of $100 per month for the remainder of the plan year.

Example 2. (i) Assume the same facts as *Example 1* except that B incurred medical expenses totaling $200 in February and obtained reimbursement of these expenses.

(ii) The results are the same as in *Example 1*, except that if B chooses to resume coverage at the level in effect before the FMLA leave, B's coverage for the remainder of the year would equal $1,000 ($1,200 reduced by $200) and the monthly payments for the remainder of the year would still equal $150. If instead B chooses prorated coverage, B's coverage for the remainder of the plan year would equal $700 ($1,200 prorated for 3 months, and then reduced by $200) and the monthly payments for the remainder of the year would still equal $100.

Example 3. (i) Assume the same facts as *Example 1* except that, prior to taking FMLA leave, B elects to continue health FSA coverage during the FMLA leave. The plan permits B (and B elects) to use the catch-up payment option described in Q&A–3 of this section, and as further permitted under the plan, B chooses to repay the $300 in missed payments on a ratable basis over the remaining 6-month period of coverage (*i.e.*, $50 per month).

(ii) Thus, B's monthly premium payments for the remainder of the plan year will be $150 ($100 + $50).

Q–7: Are employees entitled to non-health benefits while taking FMLA leave?

A–7: FMLA does not require an employer to maintain an employee's non-health benefits (e.g., life insurance) during FMLA leave. An employee's entitlement to benefits other than group health benefits under a cafeteria plan during a period of FMLA leave is to be determined by the employer's established policy for providing such benefits when the employee is on non-FMLA leave (paid or unpaid). See 29 CFR 825.209(h). Therefore, an employee who takes FMLA leave is entitled to revoke an election of non-health benefits under a cafeteria plan to the same extent as employees taking non-FMLA leave are permitted to revoke elections of non-health benefits under a cafeteria plan. For example, election changes are permitted due to changes of status or upon enrollment for a new plan year. See § 1.125–4. However, FMLA provides that, in certain cases, an employer may continue an employee's non-health benefits under the employer's cafeteria plan while the employee is on FMLA leave in order to ensure that the employer can meet its responsibility to provide equivalent benefits to the employee upon return from unpaid FMLA. If the employer continues an employee's non-health benefits during FMLA leave, the employer is entitled to recoup the costs incurred for paying the employee's share of the premiums during the FMLA leave period. See 29 CFR 825.213(b). Such recoupment may be on a pre-tax basis. A cafeteria plan must, as required by FMLA, permit an employee whose coverage terminated while on FMLA leave (either by revocation or nonpayment of premiums) to be reinstated in the cafeteria plan on return from FMLA leave. See 29 CFR 825.214(a) and 825.215(d).

Q–8: What is the applicability date of the regulations in this section?

A–8: This section is applicable for cafeteria plan years beginning on or after January 1, 2002.

[T.D. 8966, 66 FR 52677, Oct. 17, 2001; 66 FR 63920, Dec. 11, 2001]

§ 1.125–4 Permitted election changes.

(a) *Election changes.* A cafeteria plan may permit an employee to revoke an election during a period of coverage and to make a new election only as provided in paragraphs (b) through (g) of this section. Section 125 does not require a cafeteria plan to permit any of these changes. See paragraph (h) of this section for special provisions relating to qualified cash or deferred arrangements, and paragraph (i) of this section for special definitions used in this section.

(b) *Special enrollment rights*—(1) *In general.* A cafeteria plan may permit an employee to revoke an election for coverage under a group health plan during a period of coverage and make a new election that corresponds with the special enrollment rights provided in section 9801(f).

(2) *Examples.* The following examples illustrate the application of this paragraph (b):

Example 1. (i) Employer *M* provides health coverage for its employees pursuant to a plan that is subject to section 9801(f). Under the plan, employees may elect either employee-only coverage or family coverage. *M* also maintains a calendar year cafeteria plan under which qualified benefits, including health coverage, are funded through salary reduction. *M*'s employee, *A*, is married to *B* and they have a child, *C*. In accordance with *M*'s cafeteria plan, Employee *A* elects employee-only health coverage before the beginning of the calendar year. During the year, *A* and *B* adopt a child, *D*. Within 30 days thereafter, *A* wants to revoke *A*'s election for employee-only health coverage and obtain family health coverage for *A*'s spouse, *C*, and *D* as of the date of *D*'s adoption. Employee *A* satisfies the conditions for special enrollment of an employee with a new dependent under section 9801(f)(2), so that *A* may enroll in family coverage under *M*'s accident or health plan in order to provide coverage effective as of the date of *D*'s adoption.

(ii) *M*'s cafeteria plan may permit *A* to change *A*'s salary reduction election to family coverage for salary not yet currently available. The increased salary reduction is permitted to reflect the cost of family coverage from the date of adoption. (*A*'s adoption of *D* is also a change in status, and the election of family coverage is consistent with that change in status. Thus, under paragraph (c) of this section, *M*'s cafeteria plan could permit *A* to elect family coverage prospectively in order to cover *B*, *C*, and *D* for the remaining portion of the period of coverage.)

Example 2. (i) The employer plans and permissible coverage are the same as in *Example 1*. Before the beginning of the calendar year, Employee *E* elects employee-only health coverage under *M*'s cafeteria plan. Employee *E* marries *F* during the plan year. *F*'s employer, *N*, offers health coverage to *N*'s employees, and, prior to the marriage, *F* had elected employee-only coverage. Employee *E* wants to revoke the election for employee-only coverage under *M*'s cafeteria plan, and is considering electing family health coverage under *M*'s plan or obtaining family health coverage under *N*'s plan.

(ii) *M*'s cafeteria plan may permit *E* to change *E*'s salary reduction election to reflect the change to family coverage under *M*'s accident or health plan because the marriage would result in special enrollment rights under section 9801(f), pursuant to which an election of family coverage under *M*'s accident or health plan would be required to be effective no later than the first day of the first calendar month beginning after the completed request for enrollment is received by the plan. Since no retroactive coverage is required in the event of marriage under section 9801(f), *E*'s salary reduction election may only be changed on a prospective basis. (*E*'s marriage to *F* is also a change in status under paragraph (c) of this section, as illustrated in Example 1 of paragraph (c)(4) of this section.)

(c) *Changes in status*—(1) *Change in status rule.* A cafeteria plan may permit an employee to revoke an election during a period of coverage with respect to a qualified benefits plan (defined in paragraph (i)(8) of this section) to which this paragraph (c) applies and make a new election for the remaining portion of the period (referred to in this section as an election change) if, under the facts and circumstances—

(i) A change in status described in paragraph (c)(2) of this section occurs; and

(ii) The election change satisfies the consistency rule of paragraph (c)(3) of this section.

(2) *Change in status events.* The following events are changes in status for purposes of this paragraph (c):

(i) *Legal marital status.* Events that change an employee's legal marital status, including the following: marriage; death of spouse; divorce; legal separation; and annulment.

(ii) *Number of dependents.* Events that change an employee's number of dependents, including the following: birth; death; adoption; and placement for adoption.

(iii) *Employment status.* Any of the following events that change the employment status of the employee, the employee's spouse, or the employee's dependent: a termination or commencement of employment; a strike or lockout; a commencement of or return from an unpaid leave of absence; and a change in worksite. In addition, if the eligibility conditions of the cafeteria plan or other employee benefit plan of the employer of the employee, spouse, or dependent depend on the employment status of that individual and there is a change in that individual's employment status with the consequence that the individual becomes (or ceases to be) eligible under the plan, then that change constitutes a change in employment under this paragraph (c) (e.g., if a plan only applies to salaried employees and an employee switches from salaried to hourly-paid with the consequence that the employee ceases to be eligible for the plan, then that change constitutes a change in employment status under this paragraph (c)(2)(iii)).

(iv) *Dependent satisfies or ceases to satisfy eligibility requirements.* Events that cause an employee's dependent to satisfy or cease to satisfy eligibility requirements for coverage on account of attainment of age, student status, or any similar circumstance.

(v) *Residence.* A change in the place of residence of the employee, spouse, or dependent.

(vi) *Adoption assistance.* For purposes of adoption assistance provided through a cafeteria plan, the commencement or termination of an adoption proceeding.

(3) *Consistency rule*—(i) *Application to accident or health coverage and group-term life insurance.* An election change satisfies the requirements of this paragraph (c)(3) with respect to accident or health coverage or group-term life insurance only if the election change is on account of and corresponds with a change in status that affects eligibility for coverage under an employer's plan. A change in status that affects eligibility under an employer's plan includes a change in status that results in an increase or decrease in the number of an employee's family members or dependents who may benefit from coverage under the plan.

(ii) *Application to other qualified benefits.* An election change satisfies the requirements of this paragraph (c)(3) with respect to other qualified benefits if the election change is on account of and corresponds with a change in status that affects eligibility for coverage under an employer's plan. An election change also satisfies the requirements of this paragraph (c)(3) if the election change is on account of and corresponds with a change in status that effects expenses described in section 129 (including employment-related expenses as defined in section 21(b)(2)) with respect to dependent care assistance, or expenses described in section 137 (including qualified adoption expenses as defined in section 137(d)) with respect to adoption assistance.

(iii) *Application of consistency rule.* If the change in status is the employee's divorce, annulment or legal separation from a spouse, the death of a spouse or dependent, or a dependent ceasing to satisfy the eligibility requirements for coverage, an employee's election under the cafeteria plan to cancel accident or health insurance coverage for any individual other than the spouse involved in the divorce, annulment or legal separation, the deceased spouse or dependent, or the dependent that ceased to satisfy the eligibility requirements for coverage, respectively, fails to correspond with that change in status. Thus, if a dependent dies or ceases to satisfy the eligibility requirements for coverage, the employee's election to cancel accident or health coverage for any other dependent, for the employee, or for the employee's spouse fails to correspond with that change in status. In addition, if an employee, spouse, or dependent gains eligibility for coverage under a family member plan (as defined in paragraph (i)(5) of this section) as a result of a change in marital status under paragraph (c)(2)(i) of this section or a change in employment status under paragraph (c)(2)(iii) of this section, an employee's election under the cafeteria plan to cease or decrease coverage for that individual under the cafeteria plan corresponds with that change in status only if coverage for that individual becomes applicable or is increased under the family member plan. With respect to group-term life insurance and disability coverage (as defined in paragraph (i)(4) of this section), an election under a cafeteria plan to increase coverage (or an election to decrease coverage) in response to a change in status described in paragraph (c)(2) of this section is deemed to correspond with that change in status as required by paragraph (c)(3)(i) of this section.

(iv) *Exception for COBRA*. If the employee, spouse, or dependent becomes eligible for continuation coverage under the group health plan of the employee's employer as provided in section 4980B or any similar state law, a cafeteria plan may permit the employee to elect to increase payments under the employer's cafeteria plan in order to pay for the continuation coverage.

(4) *Examples*. The following examples illustrate the application of this paragraph (c):

Example 1. (i) Employer *M* provides health coverage (including a health FSA) for its employees through its cafeteria plan. Before the beginning of the calendar year, Employee *A* elects employee-only health coverage under *M*'s cafeteria plan and elects salary reduction contributions to fund coverage under the health FSA. Employee *A* marries *B* during the year. Employee *B*'s employer, *N*, offers health coverage to *N*'s employees (but not including any health FSA), and, prior to the marriage, *B* had elected employee-only coverage. Employee *A* wants to revoke the election for employee-only coverage, and is considering electing family health coverage under *M*'s plan or obtaining family health coverage under *N*'s plan.

(ii) Employee *A*'s marriage to *B* is a change in status under paragraph (c)(2)(i) of this section, pursuant to which *B* has become eligible for coverage under *M*'s health plan under paragraph (c)(3)(i) of this section. Two possible election changes by *A* correspond with the change in status: Employee *A* may elect family health coverage under *M*'s plan to cover *A* and *B*; or *A* may cancel coverage under *M*'s plan, if *B* elects family health coverage under *N*'s plan to cover *A* and *B*. Thus, *M*'s cafeteria plan may permit *A* to make either election change.

(iii) Employee *A* may also increase salary reduction contributions to fund coverage for *B* under the health FSA.

Example 2. (i) Employee *C*, a single parent, elects family health coverage under a calendar year cafeteria plan maintained by Employer *O*. Employee *C* and *C*'s 21-year old child, *D*, are covered under *O*'s health plan. During the year, *D* graduates from college. Under the terms of the health plan, dependents over the age of 19 must be full-time students to receive coverage. Employee *C* wants to revoke *C*'s election for family health coverage and obtain employee-only coverage under *O*'s cafeteria plan.

(ii) *D*'s loss of eligibility for coverage under the terms of the health plan is a change in status under paragraph (c)(2)(iv) of this section. A revocation of *C*'s election for family coverage and new election for employee-only coverage corresponds with the change in status. Thus, *O*'s cafeteria plan may permit *C* to elect employee-only coverage.

Example 3. (i) Employee *E* is married to *F* and they have one child, *G*. Employee *E* is employed by Employer *P*, and *P* maintains a calendar year cafeteria plan that allows employees to elect no health coverage, employee-only coverage, employee-plus-one-dependent coverage, or family coverage. Under the plan, before the beginning of the calendar year, *E* elects family health coverage for *E*, *F*, and *G*. *E* and *F* divorce during the year and *F* loses eligibility for coverage under *P*'s plan. *G* does not lose eligibility for health coverage under *P*'s plan upon the divorce. *E* now wants to revoke *E*'s election under the cafeteria plan and elect no coverage.

(ii) The divorce is a change in status under paragraph (c)(2)(i). A change in the cafeteria plan election to cancel health coverage for *F* is consistent with that change in status. However, an election change to cancel *E*'s or *G*'s health coverage does not satisfy the consistency rule under paragraph (c)(3)(iii) of this section regarding cancellation of coverage for an employee's other dependents in the event of divorce. Therefore, the cafeteria plan may not permit *E* to elect no coverage. However, an election to change to employee-plus-one-dependent health coverage would correspond with the change in status, and thus the cafeteria plan may permit *E* to elect employee-plus-one-dependent health coverage.

(iii) In addition, under paragraph (f)(4) of this section, if *F* makes an election change to cover *G* under *F*'s employer's plan, then *E* may make a corresponding change to elect employee-only coverage under *P*'s cafeteria plan.

Example 4. (i) Employer *R* maintains a calendar year cafeteria plan under which full-time employees may elect coverage under one of three benefit package options provided under an accident or health plan: an indemnity option or either of two HMO options for employees who work in the respective service areas of the two HMOs. Employee *A*, who works in the service area of HMO #1, elects the HMO #1 option. During the year, *A* is transferred to another work location which is outside the HMO #1 service area and inside the HMO #2 service area.

(ii) The transfer is a change in status under paragraph (c)(2)(iii) of this section (relating to a change in worksite), and, under the consistency rule in paragraph (c)(3) of this section, the cafeteria plan may permit *A* to make an election change to elect the indemnity option or HMO #2 or to cancel accident or health coverage.

(iii) The change in work location has no effect on *A*'s eligibility under R's health FSA, so no change in *A's* health FSA is authorized under this paragraph (c).

Example 5. (i) Employer *S* maintains a calendar year cafeteria plan that allows employees to elect coverage under an accident or health plan providing indemnity coverage and coverage under a health FSA. Prior to the beginning of the calendar year, Employee *B* elects employee-only indemnity coverage, and elects salary reduction contributions of $600 during the year to fund coverage under the health FSA for up to $600 of reimbursements for the year. Employee *B*'s spouse, *C*, has employee-only coverage under an accident or health plan maintained by *C*'s employer. During the year, *C* terminates employment and loses coverage under that plan. *B* now wants to elect family coverage under *S*'s accident or health plan and increase *B*'s FSA election.

(ii) *C*'s termination of employment is a change in status under paragraph (c)(2)(iii) of this section, and the election change satisfies the consistency rule of paragraph (c)(3) of this section. Therefore, the cafeteria plan may permit *B* to elect family coverage under *S*'s accident or health plan and to increase *B*'s FSA coverage.

Example 6. (i) Employer *T* provides group-term life insurance coverage as described under section 79. Under *T*'s plan, an employee may elect life insurance coverage in an amount up to $50,000. *T* also maintains a calendar year cafeteria plan under which qualified benefits, including the group-term life insurance coverage, are funded through salary reduction. Employee *D* has a spouse and a child. Before the beginning of the year, *D* elects $10,000 of group-term life insurance coverage. During the year, *D* is divorced.

(ii) The divorce is a change in status under paragraph (c)(2)(i) of this section. Under paragraph (c)(3)(iii) of this section, either an increase or a decrease in coverage is consistent with this change in status. Thus, *T*'s cafeteria plan may permit *D* to increase or to decrease *D*'s group-term life insurance coverage.

Example 7. (i) Employee *E* is married to F and they have one child, *G*. Employee *E*'s employer, *U*, maintains a cafeteria plan under which employees may elect no coverage, employee-only coverage, or family coverage under a group health plan maintained by *U*, and may make a separate vision coverage election under the plan. Before the beginning of the calendar year, *E* elects family health coverage and no vision coverage under *U*'s cafeteria plan. Employee *F*'s employer, *V*, maintains a cafeteria plan under which employees may elect no coverage, employee-only coverage, or family coverage under a group health plan maintained by *V*, and may make a separate vision coverage election under the plan. Before the beginning of the calendar year, *F* elects no health coverage and employee-only vision coverage under *V*'s plan. During the year, *F* terminates employment with *V* and loses vision coverage under *V*'s plan. Employee *E* now wants to elect family vision coverage under *U*'s group health plan.

(ii) *F*'s termination of employment is a change in status under paragraph (c)(2)(iii) of this section, and the election change satisfies the consistency rule of paragraph (c)(3) of this section. Therefore, *U*'s cafeteria plan may permit *E* to elect family vision coverage (covering *E* and *G* as well as *F*) under *U*'s group health plan.

Example 8. (i) Before the beginning of the year, Employee *H* elects to participate in a cafeteria plan maintained by *H*'s employer, *W*. However, in order to change the election during the year so as to cancel coverage, and by prior understanding with *W*, *H* terminates employment and resumes employment one week later.

(ii) In this *Example 8*, under the facts and circumstances, a principal purpose of the termination of employment was to alter the election, and reinstatement of employment was understood at the time of termination. Accordingly, *H* does not have a change in status under paragraph (c)(2)(iii) of this section.

(iii) However, *H*'s termination of employment would constitute a change in status, permitting a cancellation of coverage during the period of unemployment, if *H*'s original cafeteria plan election for the period of coverage was reinstated upon resumption of employment (for example, if *W*'s cafeteria plan contains a provision requiring an employee who resumes employment within 30 days, without any other intervening event that would permit a change in election, to return to the election in effect prior to termination of employment).

(iv) If, instead, *H* terminates employment and cancels coverage during a period of unemployment, and then returns to work more than 30 days following termination of employment, the cafeteria plan may permit *H* the option of returning to the election in effect prior to termination of employment or making a new election under the plan. Alternatively, the cafeteria plan may prohibit *H* from returning to the plan during that plan year.

Example 9. (i) Employee *A* has one child, *B*. Employee *A*'s employer, *X*, maintains a calendar year cafeteria plan that allows employees to elect coverage under a dependent care FSA. Prior to the beginning of the calendar year, *A* elects salary reduction contributions of $4,000 during the year to fund coverage under the dependent care FSA for up to $4,000 of reimbursements for the year. During the year, *B* reaches the age of 13, and *A* wants to cancel coverage under the dependent care FSA.

(ii) When *B* turns 13, *B* ceases to satisfy the definition of qualifying individual under section 21(b)(1) of the Internal Revenue Code. Accordingly, *B*'s attainment of age 13 is a change in status under paragraph (c)(2)(iv) of this section that affects *A*'s employment-related expenses as defined in section 21(b)(2). Therefore, *A* may make a corresponding change under *X*'s cafeteria plan to cancel coverage under the dependent care FSA.

Example 10. (i) Employer *Y* maintains a calendar year cafeteria plan under which full-time employees may elect coverage under either an indemnity option or an HMO. Employee *C* elects the employee-only indemnity option. During the year, *C* marries *D*. *D* has two children from a previous marriage, and has family group health coverage in a cafeteria plan sponsored by *D*'s employer, *Z*. *C* wishes to change from employee-only indemnity coverage to HMO coverage for the family. *D* wishes to cease coverage in *Z*'s group health plan and certifies to *Z* that *D* will have family coverage under *C*'s plan (and *Z* has no reason to believe the certification is incorrect).

(ii) The marriage is a change in status under paragraph (c)(2)(i) of this section. Under the consistency rule in paragraph (c)(3) of this section, *Y*'s cafeteria plan may permit *C* to change his or her salary reduction contributions to reflect the change from employee-only indemnity to HMO family coverage, and *Z* may permit *D* to revoke coverage under *Z*'s cafeteria plan.

(d) *Judgment, decree, or order*—(1) *Conforming election change.* This paragraph (d) applies to a judgment, decree, or order (order) resulting from a divorce, legal separation, annulment, or change in legal custody (including a qualified medical child support order as defined in section 609 of the Employee Retirement Income Security Act of 1974 (Public Law 93–406 (88 Stat. 829))) that requires accident or health coverage for an employee's child or for a foster child who is a dependent of the employee. A cafeteria plan will not fail to satisfy section 125 if it—

(i) Changes the employee's election to provide coverage for the child if the order requires coverage for the child under the employee's plan; or

(ii) Permits the employee to make an election change to cancel coverage for the child if:

(A) The order requires the spouse, former spouse, or other individual to provide coverage for the child; and

(B) That coverage is, in fact, provided.

(2) *Example.* The following example illustrates the application of this paragraph (d):

Example. (i) Employer *M* maintains a calendar year cafeteria plan that allows employees to elect no health coverage, employee-only coverage, employee-plus-one-dependent coverage, or family coverage. *M*'s employee, *A*, is married to *B* and they have one child, *C*. Before the beginning of the year, *A* elects employee-only health coverage. Employee *A* divorces *B* during the year and, pursuant to *A*'s divorce agreement with *B*, *M*'s health plan receives a qualified medical child support order (as defined in section 609 of the Employee Retirement Income Security Act of 1974) during the plan year. The order requires *M*'s health plan to cover *C*.

(ii) Under this paragraph (d), *M*'s cafeteria plan may change *A*'s election from employee-only health coverage to employee-plus-one-dependent coverage in order to cover *C*.

(e) *Entitlement to Medicare or Medicaid.* If an employee, spouse, or dependent who is enrolled in an accident or health plan of the employer becomes entitled to coverage (*i.e.*, becomes enrolled) under Part A or Part B of title XVIII of the Social Security Act (Medicare) (Public Law 89–97 (79 Stat. 291)) or title XIX of the Social Security Act (Medicaid) (Public Law 89–97 (79 Stat. 343)), other than coverage consisting solely of benefits under section 1928 of the Social Security Act (the program for distribution of pediatric vaccines), a cafeteria plan may permit the employee to make a prospective election change to cancel or reduce coverage of that employee, spouse, or dependent under the accident or health plan. In addition, if an employee, spouse, or dependent who has been entitled to such coverage under Medicare or Medicaid loses eligibility for such coverage, the cafeteria plan may permit the employee to make a prospective election to commence or increase coverage of that employee, spouse, or dependent under the accident or health plan.

(f) *Significant cost or coverage changes*—(1) *In general.* Paragraphs (f)(2) through (5) of this section set forth rules for election changes as a result of changes in cost or coverage. This paragraph (f) does not apply to an election change with respect to a health FSA (or on account of a change in cost or coverage under a health FSA).

(2) *Cost changes*—(i) *Automatic changes.* If the cost of a qualified benefits plan increases (or decreases) during a period of coverage and, under the terms of the plan, employees are required to make a corresponding change in their payments, the cafeteria plan may, on a reasonable and consistent basis, automatically make a prospective increase (or decrease) in affected employees' elective contributions for the plan.

(ii) *Significant cost changes.* If the cost charged to an employee for a benefit package option (as defined in paragraph (i)(2) of this section) significantly increases or significantly decreases during a period of coverage, the cafeteria plan may permit the employee to make a corresponding change in election under the cafeteria plan. Changes that may be made include commencing participation in the cafeteria plan for the option with a decrease in cost, or, in the case of an increase in cost, revoking an election for that coverage and, in lieu thereof, either receiving on a prospective basis coverage under another benefit package option providing similar coverage or dropping coverage if no other benefit package option providing similar coverage is available. For example, if the cost of an indemnity option under an accident or health plan significantly increases during a period of coverage, employees who are covered by the indemnity option may make a corresponding prospective increase in their payments or may instead elect to revoke their election for the indemnity option and, in lieu thereof, elect coverage under another benefit package option including an HMO option (or drop coverage under the accident or health plan if no other benefit package option is offered).

(iii) *Application of cost changes.* For purposes of paragraphs (f)(2)(i) and (ii) of this section, a cost increase or decrease refers to an increase or decrease in the amount of the elective contributions under the cafeteria plan, whether that increase or decrease results from an action taken by the employee (such as switching between full-time and part-time status) or from an action taken by an employer (such as reducing the amount of employer contributions for a class of employees).

(iv) *Application to dependent care.* This paragraph (f)(2) applies in the case of a dependent care assistance plan only if the cost change is imposed by a dependent care provider who is not a relative of the employee. For this purpose, a relative is an individual who is related as described in section 152(a)(1) through (8), incorporating the rules of section 152(b)(1) and (2).

(3) *Coverage changes*—(i) *Significant curtailment without loss of coverage.* If an employee (or an employee's spouse or dependent) has a significant curtailment of coverage under a plan during a period of coverage that is not a loss of coverage as described in paragraph (f)(3)(ii) of this section (for example, there is a significant increase in the deductible, the copay, or the out-of-pocket cost sharing limit under an accident or health plan), the cafeteria plan may permit any employee who had been participating in the plan and receiving that coverage to revoke his or her election for that coverage and, in lieu thereof, to elect to receive on a prospective basis coverage under another benefit package option providing similar coverage. Coverage under a plan is significantly curtailed only if there is an overall reduction in coverage provided under the plan so as to constitute reduced coverage generally. Thus, in most cases, the loss of one particular physician in a network does not constitute a significant curtailment.

(ii) *Significant curtailment with loss of coverage.* If an employee (or the employee's spouse or dependent) has a significant curtailment that is a loss of coverage, the plan may permit that employee to revoke his or her election under the cafeteria plan and, in lieu thereof, to elect either to receive on a prospective basis coverage under another benefit package option providing similar coverage or to drop coverage if no similar benefit package option is available. For purposes of this paragraph (f)(3)(ii), a loss of coverage means a complete loss of coverage under the benefit package option or other coverage option (including the elimination of a benefits package option, an HMO ceasing to be available in the area where the individual resides, or the individual losing all coverage under the option by reason of an overall lifetime or annual limitation). In addition, the cafeteria plan may, in its discretion, treat the following as a loss of coverage—

(A) A substantial decrease in the medical care providers available under the option (such as a major hospital ceasing to be a member of a preferred provider network or a substantial decrease in the physicians participating in a preferred provider network or an HMO);

(B) A reduction in the benefits for a specific type of medical condition or treatment with respect to which the employee or the employee's spouse or dependent is currently in a course of treatment; or

(C) Any other similar fundamental loss of coverage.

(iii) *Addition or improvement of a benefit package option.* If a plan adds a new benefit package option or other coverage option, or if coverage under an existing benefit package option or other coverage option is significantly improved during a period of coverage, the cafeteria plan may permit eligible employees (whether or not they have previously made an election under the cafeteria plan or have previously elected the benefit package option) to revoke their election under the cafeteria plan and, in lieu thereof, to make an election on a prospective basis for coverage under the new or improved benefit package option.

(4) *Change in coverage under another employer plan.* A cafeteria plan may permit an employee to make a prospective election change that is on account of and corresponds with a change made under another employer plan (including a plan of the same employer or of another employer) if—

(i) The other cafeteria plan or qualified benefits plan permits participants to make an election change that would be permitted under paragraphs (b) through (g) of this section (disregarding this paragraph (f)(4)); or

(ii) The cafeteria plan permits participants to make an election for a period of coverage that is different from the period of coverage under the other cafeteria plan or qualified benefits plan.

(5) *Loss of coverage under other group health coverage.* A cafeteria plan may permit an employee to make an election on a prospective basis to add coverage under a cafeteria plan for the employee, spouse, or dependent if the employee, spouse, or dependent loses coverage under any group health coverage sponsored by a governmental or educational institution, including the following—

(i) A State's children's health insurance program (SCHIP) under title XXI of the Social Security Act;

(ii) A medical care program of an Indian Tribal government (as defined in section 7701(a)(40)), the Indian Health Service, or a tribal organization;

(iii) A State health benefits risk pool; or

(iv) A Foreign government group health plan.

(6) *Examples.* The following examples illustrate the application of this paragraph (f):

Example 1. (i) A calendar year cafeteria plan is maintained pursuant to a collective bargaining agreement for the benefit of Employer *M*'s employees. The cafeteria plan offers various benefits, including indemnity health insurance and a health FSA. As a result of mid-year negotiations, premiums for the indemnity health insurance are reduced in the middle of the year, insurance co-payments for office visits are reduced under the indemnity plan by an amount which constitutes a significant benefit improvement, and an HMO option is added.

(ii) Under these facts, the reduction in health insurance premiums is a reduction in cost. Accordingly, under paragraph (f)(2)(i) of this section, the cafeteria plan may automatically decrease the amount of salary reduction contributions of affected participants by an amount that corresponds to the premium change. However, the plan may not permit employees to change their health FSA elections to reflect the mid-year change in copayments under the indemnity plan.

(iii) Also, the decrease in co-payments is a significant benefit improvement and the addition of the HMO option is an addition of a benefit package option. Accordingly, under paragraph (f)(3)(ii) of this section, the cafeteria plan may permit eligible employees to make an election change to elect the indemnity plan or the new HMO option. However, the plan may not permit employees to change their health FSA elections to reflect differences in co-payments under the HMO option.

Example 2. (i) Employer *N* sponsors an accident or health plan under which employees may elect either employee-only coverage or family health coverage. The 12-month period of coverage under *N*'s cafeteria plan begins January 1, 2001. *N*'s employee, *A*, is married to *B*. Employee *A* elects employee-only coverage under *N*'s plan. *B*'s employer, *O*, offers health coverage to *O*'s employees under its accident or health plan under which employees may elect either employee-only coverage or family coverage. *O*'s plan has a 12-month period of coverage beginning September 1, 2001. *B* maintains individual coverage under *O*'s plan at the time *A* elects coverage under *N*'s plan, and wants to elect no coverage for the plan year beginning on September 1, 2001, which is the next period of coverage under *O*'s accident or health plan. *A* certifies to *N* that *B* will elect no coverage under *O*'s accident or health plan for the plan year beginning on September 1, 2001 and *N* has no reason to believe that *A*'s certification is incorrect.

(ii) Under paragraph (f)(4)(ii) of this section, *N*'s cafeteria plan may permit *A* to change *A*'s election prospectively to family coverage under that plan effective September 1, 2001.

Example 3. (i) Employer *P* sponsors a calendar year cafeteria plan under which employees may elect either employee-only or family health coverage. Before the beginning of the year, *P*'s employee, *C*, elects family coverage under *P*'s cafeteria plan. *C* also elects coverage under the health FSA for up to $200 of reimbursements for the year to be funded by salary reduction contributions of $200 during the year. *C* is married to *D*, who is employed by Employer *Q*. *Q* does not maintain a cafeteria plan, but does maintain an accident or health plan providing its employees with employee-only coverage. During the calendar year, *Q* adds family coverage as an option under its health plan. *D* elects family coverage under *Q*'s plan, and *C* wants to revoke *C*'s election for health coverage and elect no health coverage under *P*'s cafeteria plan for the remainder of the year.

(ii) *Q*'s addition of family coverage as an option under its health plan constitutes a new coverage option described in paragraph (f)(3)(ii) of this section. Accordingly, pursuant to paragraph (f)(4)(i) of this section, *P*'s cafeteria plan may permit *C* to revoke *C*'s health coverage election if *D* actually elects family health coverage under *Q*'s accident or health plan. Employer *P*'s plan may not permit *C* to change *C*'s health FSA election.

Example 4. (i) Employer *R* maintains a cafeteria plan under which employees may elect accident or health coverage under either an indemnity plan or an HMO. Before the beginning of the year, *R*'s employee, *E* elects coverage under the HMO at a premium cost of $100 per month. During the year, *E* decides to switch to the indemnity plan, which charges a premium of $140 per month.

(ii) *E*'s change from the HMO to indemnity plan is not a change in cost or coverage under this paragraph (f), and none of the other election change rules under paragraphs (b) through (e) of this section apply.

(iii) Although *R*'s health plan may permit *E* to make the change from the HMO to the indemnity plan, *R*'s cafeteria plan may not permit *E* to make an election change to reflect the increased premium. Accordingly, if *E* switches from the HMO to the indemnity plan, *E* may pay the $40 per month additional cost on an after-tax basis.

Example 5. (i) Employee *A* is married to Employee *B* and they have one child, *C*. Employee *A*'s employer, *M*, maintains a calendar year cafeteria plan that allows employees to elect coverage under a dependent care FSA. Child *C* attends *X*'s on site child care center at an annual cost of $3,000. Prior to the beginning of the year, *A* elects salary reduction contributions of $3,000 during the year to fund coverage under the dependent care FSA for up to $3,000 of reimbursements for the year. Employee *A* now wants to revoke *A*'s election of coverage under the dependent care FSA, because *A* has found a new child care provider.

(ii) The availability of dependent care services from the new child care provider (whether the new provider is a household employee or family member of *A* or *B* or a person who is independent of *A* and *B*) is a significant change in coverage similar to a benefit package option becoming available. Because the FSA is a dependent care FSA rather than a health FSA, the coverage rules of this section apply and *M*'s cafeteria plan may permit *A* to elect to revoke *A*'s previous election of coverage under the dependent care FSA, and make a corresponding new election to reflect the cost of the new child care provider.

Example 6. (i) Employee *D* is married to Employee *E* and they have one child, *F*. Employee *D*'s employer, *N*, maintains a calendar year cafeteria plan that allows employees to elect coverage under a dependent care FSA. Child *F* is cared for by *Y*, *D*'s household employee, who provides child care services five days a week from 9 a.m. to 6 p.m. at an annual cost in excess of $5,000. Prior to the beginning of the year, *D* elects salary reduction contributions of $5,000 during the year to fund coverage under the dependent care FSA for up to $5,000 of reimbursements for the year. During the year, *F* begins school and, as a result, *Y*'s regular hours of work are changed to five days a week from 3 p.m. to 6 p.m. Employee *D* now wants to revoke *D*'s election under the dependent care FSA, and make a new election under the dependent care FSA to an annual cost of $4,000 to reflect a reduced cost of child care due to *Y*'s reduced hours.

(ii) The change in the number of hours of work performed by *Y* is a change in coverage. Thus, *N*'s cafeteria plan may permit *D* to reduce *D*'s previous election under the dependent care FSA to $4,000.

Example 7. (i) Employee *G* is married to Employee *H* and they have one child, *J*. Employee *G*'s employer, *O*, maintains a calendar year cafeteria plan that allows employees to elect coverage under a dependent care FSA. Child *J* is cared for by *Z*, *G*'s household employee, who is not a relative of *G* and who provides child care services at an annual cost of $4,000. Prior to the beginning of the year, *G* elects salary reduction contributions of $4,000 during the year to fund coverage under the dependent care FSA for up to $4,000 of reimbursements for the year. During the year, *G* raises *Z*'s salary. Employee *G* now wants to revoke *G*'s election under the dependent care FSA, and make a new election under the dependent care FSA to an annual amount of $4,500 to reflect the raise.

(ii) The raise in *Z*'s salary is a significant increase in cost under paragraph (f)(2)(ii) of this section, and an increase in election to reflect the raise corresponds with that change in status. Thus, *O*'s cafeteria plan may permit *G* to elect to increase *G*'s election under the dependent care FSA.

Example 8. (i) Employer *P* maintains a calendar year cafeteria plan that allows employees to elect employee-only, employee plus one dependent, or family coverage under an indemnity plan. During the middle of the year, Employer *P* gives its employees the option to select employee-only or family coverage from an HMO plan. *P*'s employee, *J*, who had elected employee plus one dependent coverage under the indemnity plan, decides to switch to family coverage under the HMO plan.

(ii) Employer *P*'s midyear addition of the HMO option is an addition of a benefit package option. Under paragraph (f) of this section, Employee *J* may change his or her salary reduction contributions to reflect the change from indemnity to HMO coverage, and also to reflect the change from employee plus one dependent to family coverage (however, an election of employee-only coverage under the new option would not correspond with the addition of a new option). Employer *P* may not permit *J* to change *J*'s health FSA election.

(g) *Special requirements relating to the Family and Medical Leave Act.* An employee taking leave under the Family and Medical Leave Act (FMLA) (Public Law 103–3 (107 Stat. 6)) may revoke an existing election of accident or health plan coverage and make such other election for the remaining portion of the period of coverage as may be provided for under the FMLA. See §1.125–3 for additional rules.

(h) *Elective contributions under a qualified cash or deferred arrangement.* The provisions of this section do not apply with respect to elective contributions under a qualified cash or deferred arrangement (within the meaning of section 401(k)) or employee contributions subject to section 401(m). Thus, a cafeteria plan may permit an employee to modify or revoke elections in accordance with section 401(k) and (m) and the regulations thereunder.

(i) *Definitions.* Unless otherwise provided, the definitions in paragraphs (i)(1) though (8) of this section apply for purposes of this section.

(1) *Accident or health coverage.* Accident or health coverage means coverage under an accident or health plan as defined in regulations under section 105.

(2) *Benefit package option.* A benefit package option means a qualified benefit under section 125(f) that is offered under a cafeteria plan, or an option for coverage under an underlying accident or health plan (such as an indemnity option, an HMO option, or a PPO option under an accident or health plan).

(3) *Dependent.* A dependent means a dependent as defined in section 152, except that, for purposes of accident or health coverage, any child to whom section 152(e) applies is treated as a dependent of both parents, and, for purposes of dependent care assistance provided through a cafeteria plan, a dependent means a qualifying individual (as defined in section 21(b)(1)) with respect to the employee.

(4) *Disability coverage*. Disability coverage means coverage under an accident or health plan that provides benefits due to personal injury or sickness, but does not reimburse expenses incurred for medical care (as defined in section 213(d)) of the employee or the employee's spouse and dependents. For purposes of this section, disability coverage includes payments described in section 105(c).

(5) *Family member plan*. A family member plan means a cafeteria plan or qualified benefit plan sponsored by the employer of the employee's spouse or the employee's dependent.

(6) *FSA, health FSA*. An FSA means a qualified benefits plan that is a flexible spending arrangement as defined in section 106(c)(2) . A health FSA means a health or accident plan that is an FSA.

(7) *Placement for adoption*. Placement for adoption means placement for adoption as defined in regulations under section 9801.

(8) *Qualified benefits plan*. A qualified benefits plan means an employee benefit plan governing the provision of one or more benefits that are qualified benefits under section 125(f). A plan does not fail to be a qualified benefits plan merely because it includes an FSA, assuming that the FSA meets the requirements of section 125 and the regulations thereunder.

(9) *Similar coverage*. Coverage for the same category of benefits for the same individuals (e.g., family to family or single to single). For example, two plans that provide coverage for major medical are considered to be similar coverage. For purposes of this definition, a health FSA is not similar coverage with respect to an accident or health plan that is not a health FSA. A plan may treat coverage by another employer, such as a spouse's or dependent's employer, as similar coverage.

(j) *Effective date*—(1) *General rule*. Except as provided in paragraph (j)(2) of this section, this section is applicable for cafeteria plan years beginning on or after January 1, 2001.

(2) *Delayed effective date for certain provisions*. The following provisions are applicable for cafeteria plan years beginning on or after January 1, 2002: paragraph (c) of this section to the extent applicable to qualified benefits other than an accident or health plan or a group-term life insurance plan; paragraph (d)(1)(ii)(B) of this section (relating to a spouse, former spouse, or other individual obtaining accident or health coverage for an employee's child in response to a judgment, decree, or order); paragraph (f) of this section (rules for election changes as a result of cost or coverage changes); and paragraph (i)(9) of this section (defining similar coverage).

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§ 1.125–4T Permitted election changes (temporary).

(a) *Election changes*. A cafeteria plan may permit an employee to revoke an election during a period of coverage and to make a new election only as provided in paragraphs (b) through (i) of this section. See paragraph (j) of this section for special provisions relating to qualified cash or deferred arrangements.

(b) *Special enrollment rights*. A cafeteria plan may permit an employee to revoke an election for accident or health coverage during a period of coverage and make a new election that corresponds with the special enrollment rights provided in section 9801(f), whether or not the change in election is permitted under paragraph (c) of this section.

(c) *Changes in status for accident or health coverage and group-term life*—(1) *In general*. A cafeteria plan may permit an employee to revoke an election for accident or health coverage or group-term life insurance coverage during a period of coverage and make a new election for the remaining portion of the period if, under the facts and circumstances—

(i) A change in status occurs; and

(ii) The election change satisfies the consistency requirement in paragraph (c)(3) of this section (consistency rule for accident or health coverage) or (c)(4) of this section (consistency rule for group-term life insurance coverage).

(2) *Change in status events.* The following events are changes in status for purposes of this paragraph (c):

(i) *Legal marital status.* Events that change an employee's legal marital status, including marriage, death of spouse, divorce, legal separation, or annulment;

(ii) *Number of dependents.* Events that change an employee's number of dependents (as defined in section 152), including birth, adoption, placement for adoption (as defined in regulations under section 9801), or death of a dependent;

(iii) *Employment status.* A termination or commencement of employment by the employee, spouse, or dependent;

(iv) *Work schedule.* A reduction or increase in hours of employment by the employee, spouse, or dependent, including a switch between part-time and full-time, a strike or lockout, or commencement or return from an unpaid leave of absence;

(v) *Dependent satisfies or ceases to satisfy the requirements for unmarried dependents.* An event that causes an employee's dependent to satisfy or cease to satisfy the requirements for coverage due to attainment of age, student status, or any similar circumstance as provided in the accident or health plan under which the employee receives coverage; and

(vi) *Residence or Worksite.* A change in the place of residence or work of the employee, spouse, or dependent.

(3) *Consistency rule for accident or health coverage.* (i) *General rule.* (A) An employee's revocation of a cafeteria plan election during a period of coverage and new election for the remaining portion of the period (referred to below as an ''election change'') is consistent with a change in status if, and only if—

(*1*) The change in status results in the employee, spouse, or dependent gaining or losing eligibility for accident or health coverage under either the cafeteria plan or an accident or health plan of the spouse's or dependent's employer; and

(*2*) The election change corresponds with that gain or loss of coverage.

(B) A change in status results in an employee, spouse, or dependent gaining (or losing) eligibility for coverage under a plan only if the individual becomes eligible (or ineligible) to participate in the plan. A cafeteria plan may treat an individual as gaining (or losing) eligibility for coverage if the individual becomes eligible (or ineligible) for a particular benefit package option under a plan (e.g., a change in status results in an individual becoming eligible for a managed care option or an indemnity option). If, as a result of a change in status, the individual gains eligibility for elective coverage under a plan of the spouse's or dependent's employer, the consistency rule of this paragraph (c)(3)(i) is satisfied only if the individual elects the coverage under the spouse's or dependent's employer. See the *Examples* in paragraph (k) of this section for illustrations of the consistency rule.

(ii) *Exception for COBRA.* Notwithstanding paragraph (c)(3)(i) of this section, if the employee, spouse, or dependent becomes eligible for continuation coverage under the employer's group health plan as provided in section 4980B or any similar State law, the employee may elect to increase payments under the employer's cafeteria plan in order to pay for the continuation coverage.

(4) *Consistency rule for group-term life insurance coverage.* Except as provided in this paragraph (c)(4), the provisions of paragraph (c)(3)(i) of this section apply to group-term life insurance coverage. In the case of marriage, birth, adoption, or placement for adoption, a cafeteria plan can allow an election change to increase (but not to reduce) the amount of the employee's life insurance coverage. In the case of divorce, legal separation, annulment, or death of a spouse or dependent, a cafeteria plan may allow an election change to reduce (but not to increase) the amount of the employee's life insurance coverage.

(d) *Judgment, decree, or order.* This paragraph (d) applies to a judgment, decree, or order (''order'') resulting from a divorce, legal separation, annulment, or change in legal custody (including a qualified medical child support order defined in section 609 of the Employee Retirement Income Security Act of 1974) that requires accident or health coverage for an employee's child. Notwithstanding the provisions of paragraph (c) of this section, a cafeteria plan may—

(1) Change the employee's election to provide coverage for the child if the order requires coverage under the employee's plan; or

(2) Permit the employee to make an election change to cancel coverage for the child if the order requires the former spouse to provide coverage.

(e) *Entitlement to Medicare or Medicaid*. If an employee, spouse, or dependent who is enrolled in an accident or health plan of the employer becomes entitled to coverage (*i.e.*, enrolled) under Part A or Part B of title XVIII of the Social Security Act (Medicare) or title XIX of the Social Security Act (Medicaid), other than coverage consisting solely of benefits under section 1928 of the Social Security Act (the program for distribution of pediatric vaccines), a cafeteria plan may permit the employee to make an election change to cancel coverage of that employee, spouse or dependent under the accident or health plan.

(f) *Changes in status for other qualified benefits*. [Reserved]

(g) *Significant coverage or cost changes*. [Reserved]

(1) *Employer's plan*. [Reserved]

(2) *Plan of spouse's or dependent's employer*. [Reserved]

(h) *Cessation of required contributions*. [Reserved]

(i) *Special requirements concerning the Family and Medical Leave Act*. [Reserved]

(j) *Elective contributions under a qualified cash or deferred arrangement*. The provisions of this section do not apply with respect to elective contributions under a qualified cash or deferred arrangement (within the meaning of section 401(k)) or employee contributions subject to section 401(m). Thus, a cafeteria plan may permit an employee to modify or revoke elections in accordance with sections 401(k) and 401(m) and the regulations thereunder.

(k) *Examples*. The following examples illustrate the rules of this section. In each case involving an accident or health plan, assume that the plan is subject to section 9801(f) (providing for special enrollment rights under certain group health plans).

Example 1. (i) Employer M provides health coverage for its employees under which employees may elect either employee-only coverage or family coverage. M also maintains a calendar year cafeteria plan under which qualified benefits, including health coverage, are funded through salary reduction. M's employee, A, elects employee-only health coverage before the beginning of the calendar year. During the year, A adopts a child, C. Within 30 days thereafter, A wants to revoke A's election for employee-only health coverage and obtain family health coverage, as of the date of C's adoption. A satisfies the conditions for special enrollment of an employee with a new dependent under section 9801(f)(2), so that A may enroll in family coverage under M's accident or health plan in order to provide coverage for C, effective as of the date of C's adoption.

(ii) In this *Example 1*, M's cafeteria plan may permit A to change the employee's salary reduction election to family coverage for salary not yet currently available. The increased salary reduction could reflect the cost of family coverage from the date of adoption. (The adoption of C is also a change in status, and the election of family coverage is consistent with that change in status. Thus, under the change in status provisions of paragraph (c) of this section, M's cafeteria plan could permit A to elect family coverage prospectively in order to cover C for the remaining portion of the coverage period.)

Example 2. (i) The employer plans and permissible coverage are the same as in *Example 1*. Before the beginning of the calendar year, Employee A elects employee-only health coverage under M's cafeteria plan. A marries B during the plan year. B's employer, N, offers health coverage to N's employees, and, prior to the marriage, B had elected employee-only coverage. A wants to revoke the election for employee-only coverage, and is considering electing family health coverage under M's plan or obtaining family health coverage under N's plan.

(ii) In this *Example 2*, A's marriage to B is a change in status. Two possible election changes by A would be consistent with the change in status: to cover A and B by electing family health coverage under M's plan, or to cancel coverage under M's plan (with B electing family health coverage under N's plan in order to cover A and B). Thus, M's cafeteria plan may permit A to make either change in election. (M's cafeteria plan could also permit A to change A's salary reduction election to reflect the change to family coverage under M's group health plan in accordance with paragraph (b) of this section because the marriage would also create special enrollment rights under section 9801(f), pursuant to which an election of family coverage under M's plan would be required to be effective no later than the first day of the first calendar month beginning after the completed request for enrollment is received by the plan.)

Example 3. (i) Employee G, a single parent, elects family health coverage under a calendar year cafeteria plan maintained by Employer O. G and G's 21-year old child, H, are covered under O's health plan. During the year, H graduates from college. Under the terms of the health plan, dependents over the age of 19 must be full-time students to receive coverage. G wants to revoke G's election for family health coverage and obtain employee-only coverage under O's cafeteria plan.

(ii) In this *Example 3*, H's loss of eligibility for coverage under the terms of the health plan is a change in status. A revocation of G's election for family coverage and new election of employee-only coverage is consistent with the change in status. Thus, O's cafeteria plan may permit G to elect employee-only coverage.

Example 4. (i) Employee J is married to K and they have one child, S. A calendar year cafeteria plan maintained by Employer P allows employees to elect no health coverage, employee-only coverage, employee-plus-one-dependent coverage, or family coverage. Under the plan, before the beginning of the calendar year, J elects family health coverage for J, K, and S. J and K divorce during the year and, under the terms of P's accident or health plan, K loses eligibility for P's health coverage. S does not lose eligibility for health coverage under P's plan upon the divorce. J now wants to revoke J's election under the cafeteria plan and elect no coverage.

(ii) In this *Example 4*, the divorce is a change in status. A change in the cafeteria plan election to cancel health coverage for K is consistent with that change in status. However, the divorce does not affect J's or S's eligibility for health coverage. Therefore, an election change to cancel J's or S's health coverage is not consistent with the change in status. The cafeteria plan, however, may permit J to elect employee-plus-one-dependent health coverage.

Example 5. (i) The facts are the same as *Example 4*, except that, before the beginning of the year, Employee J elected employee-only health coverage (rather than family coverage). Pursuant to J's divorce agreement with K, P's health plan receives a qualified medical child support order (as defined in section 609 of the Employee Retirement Income Security Act) during the plan year. The order requires P's health plan to cover S.

(ii) In this *Example 5*, P's cafeteria plan may change J's election from employee-only health coverage to employee-plus-one-dependent coverage in order to cover S.

Example 6. (i) Before the beginning of the coverage period, Employee L elects to participate in a cafeteria plan maintained by L's Employer, Q. However, in order to change the election during the coverage period so as to cancel coverage, and by prior understanding with Q, L terminates employment and resumes employment one week later.

(ii) In this *Example 6*, under the facts and circumstances, in which a principal purpose of the termination of employment was to alter the election and reinstatement of employment was understood at the time of termination, L does not have a change in status. However, L's termination of employment would constitute a change in status, permitting a cancellation of coverage during the period of unemployment, if L's original cafeteria plan election was reinstated upon resumption of employment (for example, because of a cafeteria plan provision requiring an employee who resumes employment within 30 days, without any other intervening event that would permit a change in election, to return to the election in effect prior to termination of employment).

Example 7. (i) Employer R maintains a calendar year cafeteria plan under which full-time employees may elect coverage under one of three benefit package options provided under an accident or health plan: an indemnity option or either of two HMO options for employees that work in the respective service areas of the two HMOs. Employee T, who works in the service area of HMO #1, elects the HMO #1 option. During the year, T is transferred to another work location which is outside the HMO #1 service area and inside the HMO #2 service area.

(ii) In this *Example 7*, the transfer is a change in status and, under the consistency rule, the cafeteria plan may permit T to make an election change to either the indemnity option or HMO #2, or to cancel accident or health coverage.

Example 8. (i) A calendar year cafeteria plan maintained by Employer S allows employees to elect coverage under an accident or health plan providing indemnity coverage and under a flexible spending arrangement (FSA). Prior to the beginning of the calendar year, Employee U elects employee-only indemnity coverage, and coverage under the FSA for up to $600 of reimbursements for the year to be funded by salary reduction contributions of $600 during the year. U's spouse, V, has employee-only coverage under an accident or health plan maintained by V's employer. During the year, V terminates employment and loses coverage under that plan. U now wants to elect family coverage under S's accident or health plan and increase U's FSA election.

(ii) In this *Example 8*, V's termination of employment is a change in status. The cafeteria plan may permit U to elect family coverage under S's accident or health plan, and to increase U's FSA coverage.

Example 9. (i) Employer T provides group-term life insurance coverage as described under section 79. Under T's plan, an employee may elect life insurance coverage in an amount up to the lesser of his or her salary or $50,000. T also maintains a calendar year cafeteria plan under which qualified benefits, including the group-term life insurance coverage, are funded through salary reduction. Before the beginning of the calendar year, Employee W elects $10,000 of life insurance coverage, with W's spouse, X, as the beneficiary. During the year, a child is placed for adoption with W and X. W wants to increase W's election for life insurance coverage to $50,000 (without changing the designation of X as the beneficiary).

(ii) In this *Example 9,* the placement of a child for adoption with W is a change in status. The increase in coverage is consistent with the change in status. Thus, W's cafeteria plan may permit W to increase W's life insurance coverage.

(1) *Effective date.* This section is applicable for plan years beginning after December 31, 1998, and on or before November 6, 2000.

[T.D. 8738, 62 FR 60166, Nov. 7, 1997; 63 FR 8528, Feb. 19, 1998; T.D. 8878, 65 FR 15553, Mar. 23, 2000]

§ 1.127–1 Amounts received under a qualified educational assistance program.

(a) *Exclusion from gross income.* The gross income of an employee does not include—

(1) Amounts paid to, or on behalf of the employee under a qualified educational assistance program described in § 1.127–2, or

(2) The value of education provided to the employee under such a program.

(b) *Disallowance of excluded amounts as credit or deduction.* Any amount excluded from the gross income of an employee under paragraph (a) of this section shall not be allowed as a credit or deduction to such employee under any other provision of this part.

(c) *Amounts received under a non-qualified program.* Any amount received under an educational assistance program that is not a ''qualified program'' described in § 1.127–2 will not be excluded from gross income under paragraph (a) of this section. All or part of the amounts received under such a nonqualified program may, however, be excluded under section 117 or deducted under section 162 or section 212 (as the case may be), if the requirements of such section are satisfied.

(d) *Definitions.* For rules relating to the meaning of the terms ''employee'' and ''employer'', see paragraph (h) of § 1.127–2.

(e) *Effective date.* This section is effective for taxable years of the employee beginning after December 31, 1978, and before January 1, 1984.

[T.D. 7898, 48 FR 31017, July 6, 1983]

§ 1.127–2 Qualified educational assistance program.

(a) *In general.* A qualified educational assistance program is a plan established and maintained by an employer under which the employer provides educational assistance to employees. To be a qualified program, the requirements described in paragraphs (b) through (g) of this section must be satisfied. It is not required that a program be funded or that the employer apply to the Internal Revenue Service for a determination that the plan is a qualified program. However, under § 601.201 (relating to rulings and determination letters), an employer may request that the Service determine whether a plan is a qualified program.

(b) *Separate written plan.* The program must be a separate written plan of the employer. This requirement means that the terms of the program must be set forth in a separate document or documents providing only educational assistance within the meaning of paragraph (c) of this section. The requirement for a separate plan does not, however, preclude an educational assistance program from being part of a more comprehensive employer plan that provides a choice of nontaxable benefits to employees.

(c) *Educational assistance*—(1) *In general.* The benefits provided under the program must consist solely of educational assistance. The term ''educational assistance'' means—

(i) The employer's payment of expenses incurred by or on behalf of an employee for education, or

(ii) The employer's provision of education to an employee.

(2) *Alternative benefits.* Benefits will not be considered to consist solely of educational assistance if the program, in form or in actual operation, provides

employees with a choice between educational assistance and other remuneration includible in the employee's gross income.

(3) *Certain benefits not considered educational assistance.* The term ''educational assistance'' does not include the employer's payment for, or provision of—

(i) Tools or supplies (other than textbooks) that the employee may retain after completing a course of instruction,

(ii) Meals, lodging, or transportation, or

(iii) Education involving sports, games, or hobbies, unless such education involves the business of the employer or is required as part of a degree program. The phrase ''sports, games, or hobbies'' does not include education that instructs employees how to maintain and improve health so long as such education does not involve the use of athletic facilities or equipment and is not recreational in nature.

(4) *Education defined.* As used in section 127, §1.127–1, and this section, the term ''education'' includes any form of instruction or training that improves or develops the capabilities of an individual. Education paid for or provided under a qualified program may be furnished directly by the employer, either alone or in conjunction with other employers, or through a third party such as an educational institution. Education is not limited to courses that are job related or part of a degree program.

(d) *Exclusive benefit.* The program may benefit only the employees of the employer, including, at the employer's option, individuals who are employees within the meaning of paragraph (h)(1) of this section. A program that provides benefits to spouses or dependents of employees is not a qualified program within the meaning of this section.

(e) *Prohibited discrimination*—(1) *Eligibility for benefits.* The program must benefit the employer's employees generally. Among those benefited may be employees who are officers, shareholders, self-employed or highly compensated. A program is not for the benefit of employees generally, however, if the program discriminates in favor of employees described in the preceding sentence (or in favor of their spouses and dependents who are themselves employees) in requirements relating to eligibility for benefits. Thus, although a program need not provide benefits for all employees, it must benefit those employees who qualify under a classification of employees that does not discriminate in favor of the employees with respect to whom discrimination is prohibited. The classification of employees to be considered benefited will consist of that group of employees who are actually eligible for educational assistance under the program, taking into account the eligibility requirements set forth in the written plan, the eligibility requirements reflected in the types of educational assistance available under the program, and any other conditions that may affect the availability of benefits under the program. Thus, for example, if an employer's plan provides that all employees are eligible for educational assistance, yet limits that assistance to courses of study leading to postgraduate degrees in fields relating to the employer's business, then only those employees able to pursue such a course of study are considered actually eligible for educational assistance under the program. Whether any classification of employees discriminates in favor of employees with respect to whom discrimination is prohibited will generally be determined by applying the same standards as are applied under section 410(b)(1)(B) (relating to qualified pension, profit-sharing and stock bonus plans), without regard to section 401(a)(5). For purposes of making this determination, there shall be excluded from consideration employees not covered by the program who are included in a unit of employees covered by an agreement which the Secretary of Labor finds to be a collective bargaining agreement between employee representatives and one or more employers, if the Internal Revenue Service finds that educational assistance benefits were the subject of good faith bargaining between the employee representatives and the employer or employers. For purposes of determining whether such bargaining occurred, it is not material that the employees are not covered by another educational assistance program or that the employer's present program was not considered in the bargaining.

(2) *Factors not considered in determining the existence of prohibited discrimination.* A program shall not be considered discriminatory under this paragraph (e) merely because—

(i) Different types of educational assistance available under the program are utilized to a greater degree by employees with respect to whom discrimination is prohibited than by other employees, or

(ii) With respect to a course of study for which benefits are otherwise available, successful completion of the course, attaining a particular course grade, or satisfying a reasonable condition subsequent (such as remaining employed for one year after completing the course) are required or considered in determining the availability of benefits.

(f) *Benefit limitation*—(1) *In general.* Under section 127(b)(3), a program is a qualified program for a program year only if no more than 5% of the amounts paid or incurred by the employer for educational assistance benefits during the year are provided to the limitation class described in subparagraph (2). For purposes of this paragraph (f), the program year must be specified in the written plan as either the calendar year or the taxable year of the employer.

(2) *Limitation class.* The limitation class consists of—

(i) *Shareholders.* Individuals who, on any day of the program year, own more than 5% of the total number of shares of outstanding stock of the employer, or

(ii) *Owners.* In the case of an employer's trade or business which is not incorporated, individuals who, on any day of the program year, own more than 5% of the capital or profits interest in the employer, and

(iii) *Spouses or dependents.* Individuals who are spouses or dependents of shareholders or owners described in subdivision (i) or (ii). For purposes of determining stock ownership, the attribution rules described in paragraph (h)(4) of this section apply. The regulations prescribed under section 414(c) are applicable in determining an individual's interest in the capital or profits of an unincorporated trade or business.

(g) *Notification of employees.* A program is not a qualified program unless employees eligible to participate in the program are given reasonable notice of the terms and availability of the program.

(h) *Definitions.* For purposes of this section and § 1.127–1—

(1) *Employee.* The term ''employee'' includes—

(i) A retired, disabled or laid-off employee,

(ii) A present employee who is on leave, as, for example, in the Armed Forces of the United States, or

(iii) An individual who is self-employed within the meaning of section 401(c)(1).

(2) *Employer.* An individual who owns the entire interest in an unincorporated trade or business shall be treated as his or her own employer. A partnership is treated as the employer of each partner who is an employee within the meaning of section 401(c)(1).

(3) *Officer.* An officer is an individual who is an officer within the meaning of regulations prescribed under section 414(c).

(4) *Shareholder.* The term ''shareholder'' includes an individual who is a shareholder as determined by the attribution rules under section 1563 (d) and (e), without regard to section 1563(e)(3)(C).

(5) *Highly compensated.* The term ''highly compensated'' has the same meaning as it does for purposes of section 410(b)(1)(B).

(i) *Substantiation.* An employee receiving payments under a qualified educational assistance program must be prepared to provide substantiation to the employer such that it is reasonable to believe that payments or reimbursements made under the program constitute educational assistance within the meaning of paragraph (c) of this section.

[T.D. 7898, 48 FR 31017, July 6, 1983]

§ 1.132–0 Outline of regulations under section 132.

The following is an outline of regulations in this section relating to exclusions from gross income for certain fringe benefits:

§ 1.132–0 Outline of regulations under section 132.

§ 1.132–1 Exclusion from gross income for certain fringe benefits.

§ 1.132–1 (a) In general.
§ 1.132–1 (b) Definition of employee.
(1) No-additional-cost services and qualified employee discounts.
(2) Working condition fringes.
(3) On-premises athletic facilities.
(4) De minimis fringes.
(5) Dependent child.
§ 1.132–1 (c) Special rules for employers—Effect of section 414.
§ 1.132–1 (d) Customers not to include employees.
§ 1.132–1 (e) Treatment of on-premises athletic facilities.
(1) In general.
(2) Premises of the employer.
(3) Application of rules to membership in an athletic facility.
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(5) Nonapplicability of nondiscrimination rules.
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§ 1.132–1 (g) Effective date.
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§ 1.132–2 (a) In general.
(1) Definition.
(2) Excess capacity services.
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§ 1.132–2 (b) Reciprocal agreements.
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§ 1.132–3 Qualified employee discounts.
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(2) Qualified property or services.
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(1) General rule.
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§ 1.132–4 (g) Relaxation of line of business requirement.
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§ 1.132–5 Working condition fringes.
§ 1.132–5 (a) In general.
(1) Definition.
(2) Trade or business of the employee.
§ 1.132–5 (b) Vehicle allocation rules.
(1) In general.
(2) Use of different employer-provided vehicles.
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(1) In general.
(2) Section 274(d) requirements.
§ 1.132–5 (d) Safe harbor substantiation rules.
(1) In general.
(2) Period for use of safe harbor rules.
§ 1.132–5 (e) Safe harbor substantiation rule for vehicles not used for personal purposes.
§ 1.132–5 (f) Safe harbor substantiation rule for vehicles not available to employees for personal use other than commuting.
§ 1.132–5 (g) Safe harbor substantiation rule for vehicles used in connection with the business of farming that are available to employees for personal use.
(1) In general.

[T.D. 8256, 54 FR 28600, July 6, 1989, as amended by T.D. 8457, 57 FR 62196, Dec. 30, 1992]

§ 1.132–1 Exclusion from gross income for certain fringe benefits.

(a) *In general.* Gross income does not include any fringe benefit which qualifies as a—

(1) No-additional-cost service,

(2) Qualified employee discount,

(3) Working condition fringe, or

(4) De minimis fringe.

Special rules apply with respect to certain on-premises gyms and other athletic facilities (§ 1.132–1(e)), demonstration use of employer-provided automobiles by full-time automobile salesmen (§ 1.132–5(o)), parking provided to an employee on or near the business premises of the employer (§ 1.132–5(p)), and on-premises eating facilities (§ 1.132–7).

(b) *Definition of employee*—(1) *No-additional-cost services and qualified employee discounts.* For purposes of section 132(a)(1) (relating to no-additonal-cost services) and section 132(a)(2) (relating to qualified employee discounts), the term ''employee'' (with respect to a line of business of an employer means—

(i) Any individual who is currently employed by the employer in the line of business,

(ii) Any individual who was formerly employed by the employer in the line of business and who separated from service with the employer in the line of business by reason of retirement or disability, and

(iii) Any widow or widower of an individual who died while employed by the employer in the line of business or who separated from service with the employer in the line of business by reason of retirement or disability.

For purposes of this paragraph (b)(1), any partner who performs services for a partnership is considered employed by the partnership. In addition, any use by the spouse or dependent child (as defined in paragraph (b)(5) of this section) of the employee will be treated as use by the employee. For purposes of section 132(a)(1) (relating to no-additional-cost services), any use of air transportation by a parent of an employee (determined without regard to section 132(f)(1)(B) and paragraph (b)(1)(iii) of this section) will be treated as use by the employee.

(2) *Working condition fringes.* For purposes of section 132(a)(3) (relating to working condition fringes), the term ''employee'' means—

(i) Any individual who is currently employed by the employer,

(ii) Any partner who performs services for the partnership,

(iii) Any director of the employer, and

(iv) Any independent contractor who performs services for the employer.

Notwithstanding anything in this paragraph (b)(2) to the contrary, an independent contractor who performs services for the employer cannot exclude the value of parking or the use of consumer goods provided pursuant to a product testing program under § 1.132–5(n); in addition, any director of the employer cannot exclude the value of the use of consumer goods provided pursuant to a product testing program under § 1.132–5(n).

(3) *On-premises athletic facilities.* For purposes of section 132(h)(5) (relating to on-premises athletic facilities), the term ''employee'' means—

(i) Any individual who is currently employed by the employer,

(ii) Any individual who was formerly employed by the employer and who separated from service with the employer by reason of retirement or disability, and

(iii) Any widow or widower of an individual who died while employed by the employer or who separated from service with the employer by reason of retirement or disability.

For purposes of this paragraph (b)(3), any partner who performs services for a partnership is considered employed by the partnership. In addition, any use by the spouse or dependent child (as defined in paragraph (b)(5) of this section) of the employee will be treated as use by the employee.

(4) *De minimis fringes.* For purposes of section 132(a)(4) (relating to de minimis fringes), the term ''employee'' means any recipient of a fringe benefit.

(5) *Dependent child.* The term ''dependent child'' means any son, stepson, daughter, or stepdaughter of the employee who is a dependent of the employee, or both of whose parents are deceased and who has not attained age 25. Any child to whom section 152(e) applies will be treated as the dependent of both parents.

(c) *Special rules for employers—Effect of section 414.* All employees treated as employed by a single employer under section 414 (b), (c), (m), or (o) will be treated as employed by a single employer for purposes of this section. Thus, employees of one corporation that is part of a controlled group of corporations may under certain circumstances be eligible to receive section 132 benefits from the other corporations that comprise the controlled group. However, the aggregation of employers described in this paragraph (c) does not change the other requirements for an exclusion, such as the line of business requirement. Thus, for example, if a controlled group of corporations consists of two corporations that operate in different lines of business, the corporations are not treated as operating in the same line of business even though the corporations are treated as one employer.

(d) *Customers not to include employees.* For purposes of section 132 and the regulations thereunder, the term ''customer'' means any customer who is not an employee. However, the preceding sentence does not apply to section 132(c)(2) (relating to the gross profit percentage for determining a qualified employee discount). Thus, an employer that provides employee discounts cannot exclude sales made to employees in determining the aggregate sales to customers.

(e) *Treatment of on-premises athletic facilities*—(1) *In general.* Gross income does not include the value of any on-premises athletic facility provided by an employer to its employees. For purposes of section 132(h)(5) and this paragraph (e), the term ''on-premises athletic facility'' means any gym or other athletic facility (such as a pool, tennis court, or golf course)—

(i) Which is located on the premises of the employer, (ii) Which is operated by the employer, and (iii) Substantially all of the use of which during the calendar year is by employees of the employer, their spouses, and their dependent children.

For purposes of paragraph (e) (1) (iii) of this section, the term ''dependent children'' has the same meaning as the plural of the term ''dependent child'' in paragraph (b)(5) of this section. The exclusion of this paragraph (e) does not apply to any athletic facility if access to the facility is made available to the general public through the sale of memberships, the rental of the facility, or a similar arrangement.

(2) *Premises of the employer.* The athletic facility need not be located on the employer's business premises. However, the athletic facility must be located on premises of the employer. The exclusion provided in this paragraph (e) applies whether the premises are owned or leased by the employer; in addition, the exclusion is available even if the employer is not a named lessee on the lease so long as the employer pays reasonable rent. The exclusion provided in this paragraph (e) does not apply to any athletic facility that is a facility for residential use. Thus, for example, a resort with accompanying athletic facilities (such as tennis courts, pool, and gym) would not qualify for the exclusion provided in this paragraph (e). An athletic facility is considered to be located on the employer's premises if the facility is located on the premises of a voluntary employees' beneficiary association funded by the employer.

(3) *Application of rules to membership in an athletic facility.* The exclusion provided in this paragraph (e) does not apply to any membership in an athletic facility (including health clubs or country clubs) unless the facility is owned (or leased) and operated by the employer and substantially all the use of the facility is by employees of the employer, their spouses, and their dependent children. Therefore, membership in a health club or country club not meeting the rules provided in this paragraph (e) would not qualify for the exclusion.

(4) *Operation by the employer.* An employer is considered to operate the athletic facility if the employer operates the facility through its own employees, or if the employer contracts out to another to operate the athletic facility. For example, if an employer hires an independent contractor to operate the athletic facility for the employer's employees, the facility is considered to be operated by the employer. In addition, if an athletic facility is operated by more than one employer, it is considered to be operated by each employer.

For purposes of paragraph (e) (1) (iii) of this section, substantially all of the use of a facility that is operated by more than one employer must be by employees of the various employers, their spouses, and their dependent children. Where the facility is operated by more than one employer, an employer that pays rent either directly to the owner of the premises or to a sublessor of the premises is eligible for the exclusion. If an athletic facility is operated by a voluntary employees' beneficiary association funded by an employer, the employer is considered to operate the facility.

(5) *Nonapplicability of nondiscrimination rules.* The nondiscrimination rules of section 132 and §1.132–8 do not apply to on-premises athletic facilities.

(f) *Nonapplicability of section 132 in certain cases*—(1) Tax treatment provided for in another section. If the tax treatment or a particular fringe benefit is expressly provided for in another section of Chapter 1 of the Internal Revenue Code of 1986, section 132 and the applicable regulations (except for section 132 (e) and the regulations thereunder) do not apply to such fringe benefit. For example, because section 129 provides an exclusion from gross income for amounts paid or incurred by an employer for dependent care assistance for an employee, the exclusions under section 132 and this section do not apply to the provision by an employer to an employee of dependent care assistance. Similarly, because section 117 (d) applies to tuition reductions, the exclusions under section 132 do not apply to free or discounted tuition provided to an employee by an organization operated by the employer, whether the tuition is for study at or below the graduate level. Of course, if the amounts paid by the employer are for education relating to the employee's trade or business of being an employee of the employer so that, if the employee paid for the education, the amount paid could be deducted under section 162, the costs of the education may be eligible for exclusion as a working condition fringe.

(2) *Limited statutory exclusions.* If another section of Chapter 1 of the Internal Revenue Code of 1986 provides an exclusion from gross income based on the cost of the benefit provided to the employee and such exclusion is a limited amount, section 132 and the regulations thereunder may apply to the extent the cost of the benefit exceeds the statutory exclusion.

(g) *Effective date.* Sections 1.132–0, 1.132–1, 1.132–2, 1.132–3, 1.132–4, 1.132–5, 1.132–6, 1.132–7 and 1.132–8 are effective as of January 1, 1989, except that §§1.132–1(b)(1) with respect to the use of air transportation by a parent of an employee and 1.132–4(d) are effective as of January 1, 1985. Furthermore, in §1.132–5, the eleventh sentence of paragraph (m)(1), *Examples 6* and *7* in paragraph (m)(8), and paragraphs (m)(2)(i), (m)(2)(v), (m)(3)(iv), (m)(6), (m)(7), and (r) are effective December 30, 1992; however, taxpayers may treat the rules as applicable to benefits provided on or after January 1, 1989. For the applicable rules relating to employer-provided transportation for security concerns prior to December 30, 1992, see §1.132–5(m) (as contained in 26 CFR part 1 (§§1.61 to 1.169) revised April 1, 1992). See §§1.132–1T, 1.132–2T, 1.132–3T, 1.132–4T, 1.132–5T, 1.132–6T, 1.132–7T and 1.132–8T for rules in effect for benefits received from January 1, 1985, to December 31, 1988.

[T.D. 8256, 54 FR 28601, July 6, 1989, as amended by T.D. 8457, 57 FR 62196, Dec. 30, 1992; 58 FR 7296, Feb. 5, 1993]

§1.132–1T Exclusion from gross income of certain fringe benefits—1985 through 1988 (temporary).

(a) *In general.* Gross income does not include any fringe benefit which qualifies as a—

(1) No-additional-cost service,

(2) Qualified employee discount,

(3) Working condition fringe, or

(4) De minimis fringe.

Special rules apply with respect to certain on-premises gyms and other athletic facilities (§1.132–1T(e)), demonstration use of employer-provided automobiles by full-time automobile salesmen (§1.132–1T(n)), parking provided to an employee on or near the business premises of the employer (§1.132–5T(o)), and on-premises eating facilities (§1.132–7T).

(b) *Definition of employee*—(1) *No-additional-cost services and qualified employee discounts.* For purposes of section

132(a)(1) (relating to no-additional-cost services) and section 132(a)(2) (relating to qualified employee discounts), the term ''employee'' (with respect to a line of business of an employer) means—

(i) Any individual who is currently employed by the employer in the line of business,

(ii) Any individual who was formerly employed by the employer in the line of business and who separated from service with the employer in the line of business by reason of retirement or disability, and

(iii) Any widow or widower of an individual who died while employed by the employer in the line of business or who separated from service with the employer in the line of business by reason of retirement or disability.

For purposes of this paragraph (b)(1), any partner who performs services for a partnership is considered employed by the partnership. In addition, any use by the spouse or dependent child (as defined in this paragraph (b)) of the employee will be treated as use by the employee.

(2) *Working condition fringes.* For purposes of section 132(a)(2) (relating to working condition fringes), the term ''employee'' means—

(i) Any individual who is currently employed by the employer,

(ii) Any partner who performs services for the partnership,

(iii) Any director of the employer, and

(iv) Any independent contractor who performs services for the employer.

Notwithstanding anything in this paragraph (b)(2) to the contrary, any independent contractor who performs services for the employer cannot exclude the value of parking or the use of consumer goods provided pursuant to a product testing program under §1.132–5T (n); in addition, any director of the employer cannot exclude the value of the use of consumer goods provided pursuant to a product testing program under §1.132–5T (n).

(3) *De minimis fringe.* For purpose of section 132(a)(4) (relating to de minimis fringes), the term ''employee'' means any recipient of a fringe benefit.

(4) *Dependent child.* For purposes of this paragraph (b), the term ''dependent child'' means any son, stepson, daughter or stepdaughter of the employee who is a dependent of the employee, or both of whose parents are deceased. Any child to whom section 152(e) applies will be treated as the dependent of both parents.

(c) *Special rules for employers—Effect of section 414.* All employees treated as employed by a single employer under section 414(b), (c) or (m) will be treated as employed by a single employer for purposes of this section. Thus, employees of one corporation that is part of a controlled group of corporations may under certain circumstances be eligible to receive section 132 benefits from the other corporations that comprise the controlled group. However, the aggregation of employers described in this paragraph (c) does not change the other requirements for an exclusion, such as the line of business requirement. Thus, for example, if a controlled group of corporations consists of two corporations that operate in different lines of business, the corporations are not treated as operating in the same line of business even though the corporations are treated as one employer.

(d) *Customers not to include employees.* For purposes of section 132 and the regulations thereunder, the term ''customer'' means customers who are not employees. However, the preceding sentence does not apply to section 132(c)(2) (relating to the gross profit percentage for determining a qualified employee discount). Thus, an employer that provides employee discounts cannot exclude sales made to employees in determining the aggregate sales to customers.

(e) *Treatment of on-premises athletic facilities*—(1) *In general.* Gross income does not include the value of any on-premises athletic facility provided by the employer to its employees. For purposes of section 132 and this paragraph (e), the term ''on-premises athletic facility'' means any gym or other athletic facility (such as a pool, tennis court, or golf course)—

(i) Which is located on the premises of the employer,

(ii) Which is operated by the employer, and

(iii) Where substantially all of the use of which is, during the calendar year, by employees of the employer, their spouses, and their dependent children.

For purposes of this paragraph (e)(1)(iii), the term ''dependent children'' has the same meaning as the plural of the term ''dependent child'' in paragraph (b)(4) of this section. The exclusion of this paragraph (e) does not apply to any athletic facility if access to the facility is made available to the general public through the sale of memberships, the rental of the facility, etc.

(2) *Premises of the employer.* The athletic facility need not be located on the employer's business premises. However, the athletic facility must be located on premises of the employer. The exclusion provided in this paragraph (e) applies whether the premises are owned or leased by the employer; in addition, the exclusion is available even if the employer is not a named lesse on the lease so long as the employer pays reasonable rent. The exclusion provided in this paragraph (e) does not apply to any athletic facility that is a facility for residential use. Thus, for example, a resort with accompanying athletic facilities (such as tennis courts, pool, and gym) would not qualify for the exclusion provided in this paragraph (e).

(3) *Application of rules to membership in an athletic facility.* The exclusion provided in this paragraph (e) does not apply to any membership in an athletic facility (including health clubs or country clubs) unless the facility is owned (or leased) and operated by the employer and substantially all the use of the facility is by employees of the employer, their spouses, and their dependent children. Therefore, membership in health club or country club not meeting the rules provided in this paragraph (e) would not quality for the exclusion.

(4) *Operation by the employer.* An employer is considered to operate the athletic facility if the employer itself operates the facility through its own employees, or if the employer contracts out to another to operate the athletic facility. For example, if an employer hires an independent contractor to operate the athletic facility for the employer's employees, the facility is considered to be operated by the employer. In addition, if an athletic facility is operated by more than one employer, it is considered to be operated by each employer. For purposes of paragraph (e)(1)(iii) of this section, substantially all the use of a facility operated by more than one employer must be by employees of all of the employers, their spouses, and their dependent children. Where the facility is operated by more than one employer, an employer that either pays rent directly to the owner of the premises or pays rent to a named lessor of the premises is eligible for the exclusion.

(5) *Nonapplicability of nondiscrimination rules.* The nondiscrimination rules of section 132 and §1.132–8T do not apply to on-premises athletic facilities.

(f) *Nonapplicability of section 132.* If the tax treatment of a particular fringe benefit is expresely provided for in another section of Chapter 1, section 132 and the applicable regulations (except for section 132 (e) and the regulations thereunder) do not apply to such fringe benefits. For example, since section 129 provides an exclusion from gross income for amounts paid or incurred by the employer for dependent care assistance for an employee, the exclusions under section 132 and this section do not apply to the provision by an employer to an employee of dependent care assistance.

[T.D. 8063, 50 FR 52297, Dec. 23, 1985, as amended by T.D. 8256, 54 FR 28600, July 6, 1989]

§ 1.132–2 No-additional-cost services.

(a) *In general*—(1) *Definition.* Gross income does not include the value of a no-additional-cost service. A ''no-additional-cost service'' is any service provided by an employer to an employee for the employee's personal use if—

(i) The service is offered for sale by the employer to its customers in the ordinary course of the line of business of the employer in which the employee performs substantial services, and

(ii) The employer incurs no substantial additional cost in providing the service to the employee (including foregone revenue and excluding any amount paid by or on behalf of the employee for the service).

For rules relating to the line of business limitation, see §1.132–4. For purposes of this section, a service will not be considered to be offered for sale by the employer to its customers if that service is primarily provided to employees and not to the employer's customers.

(2) *Excess capacity services*. Services that are eligible for treatment as no-additional-cost services include excess capacity services such as hotel accommodations; transportation by aircraft, train, bus, subway, or cruise line; and telephone services. Services that are not eligible for treatment as no-additional-cost services are non-excess capacity services such as the facilitation by a stock brokerage firm of the purchase of stock. Employees who receive non-excess capacity services may, however, be eligible for a qualified employee discount of up to 20 percent of the value of the service provided. See §1.132–3.

(3) *Cash rebates*. The exclusion for a no-additional-cost service applies whether the service is provided at no charge or at a reduced price. The exclusion also applies if the benefit is provided through a partial or total cash rebate of an amount paid for the service.

(4) *Applicability of nondiscrimination rules*. The exclusion for a no-additional-cost service applies to highly compensated employees only if the service is available on substantially the same terms to each member of a group of employees that is defined under a reasonable classification set up by the employer that does not discriminate in favor of highly compensated employees. See §1.132–8.

(5) *No substantial additional cost*—(i) *In general*. The exclusion for a no-additional-cost service applies only if the employer does not incur substantial additional cost in providing the service to the employee. For purposes of the preceding sentence, the term ''cost'' includes revenue that is forgone because the service is provided to an employee rather than a nonemployee. (For purposes of determining whether any revenue is forgone, it is assumed that the employee would not have purchased the service unless it were available to the employee at the actual price charged to the employee.) Whether an employer incurs substantial additional cost must be determined without regard to any amount paid by the employee for the service. Thus, any reimbursement by the employee for the cost of providing the service does not affect the determination of whether the employer incurs substantial additional cost.

(ii) *Labor intensive services*. An employer must include the cost of labor incurred in providing services to employees when determining whether the employer has incurred substantial additional cost. An employer incurs substantial additional cost, whether nonlabor costs are incurred, if a substantial amount of time is spent by the employer or its employees in providing the service to employees. This would be the result whether the time spent by the employer or its employees in providing the services would have been ''idle,'' or if the services were provided outside normal business hours. An employer generally incurs no substantial additional cost, however, if the services provided to the employee are merely incidental to the primary service being provided by the employer. For example, the in-flight services of a flight attendant and the cost of in-flight meals provided to airline employees traveling on a space-available basis are merely incidental to the primary service being provided (*i.e.*, air transportation). Similarly, maid service provided to hotel employees renting hotel rooms on a space-available basis is merely incidental to the primary service being provided (*i.e.*, hotel accommodations).

(6) *Payments for telephone service*. Payment made by an entity subject to the modified final judgment (as defined in section 559(c)(5) of the Tax Reform Act of 1984) of all or part of the cost of local telephone service provided to an employee by a person other than an entity subject to the modified final judgment shall be treated as telephone service provided to the employee by the entity making the payment for purposes of this section. The preceding sentence also applies to a rebate of the amount paid by the employee for the service and a payment to the person providing the service. This paragraph (a)(6) applies only to services and employees

described in § 1.132–4 (c). For a special line of business rule relating to such services and employees, see § 1.132–4 (c).

(b) *Reciprocal agreements.* For purposes of the exclusion from gross income for a no-additional-cost service, an exclusion is available to an employee of one employer for a no-additional-cost service provided by an unrelated employer only if all of the following requirements are satisfied—

(1) The service provided to such employee by the unrelated employer is the same type of service generally provided to nonemployee customers by both the line of business in which the employee works and the line of business in which the service is provided to such employee (so that the employee would be permitted to exclude from gross income the value of the service if such service were provided directly by the employee's employer);

(2) Both employers are parties to a written reciprocal agreement under which a group of employees of each employer, all of whom perform substantial services in the same line of business, may receive no-additional-cost services from the other employer; and

(3) Neither employer incurs any substantial additional cost (including forgone revenue) in providing such service to the employees of the other employer, or pursuant to such agreement. If one employer receives a substantial payment from the other employer with respect to the reciprocal agreement, the paying employer will be considered to have incurred a substantial additional cost pursuant to the agreement, and consequently services performed under the reciprocal agreement will not qualify for exclusion as no-additional-cost services.

(c) *Example.* The rules of this section are illustrated by the following example:

Example. Assume that a commercial airline permits its employees to take personal flights on the airline at no charge and receive reserved seating. Because the employer forgoes potential revenue by permitting the employees to reserve seats, employees receiving such free flights are not eligible for the no-additional-cost exclusion.

[T.D. 8256, 54 FR 28602, July 6, 1989]

§ 1.132–2T No-additional-cost service—1985 through 1988 (temporary).

(a) *In general*—(1) *Definition.* Gross income does not include the value of a no-additional-cost service. The term ''no-additional-cost service'' means any service provided by an employer to an employee for the employee's personal use if—

(i) The service is offered for sale to customers in the ordinary course of the line of business of the employer in which the employee performs substantial services, and

(ii) The employer incurs no substantial additional cost in providing the service to the employee (including forgone revenue and excluding any amount paid by or on behalf of the employee for the service).

For rules relating to the line of business limitation, see § 1.132–4T.

(2) *Examples.* Services that are eligible for treatment as no-additional-cost services are excess capacity services such as hotel accommodations; transportation by aircraft, train, bus, subway, or cruise line; and telephone services. Services that are not eligible for treatment as no-additonal-cost services are non-excess capacity services such as the facilitation by a stock brokerage firm of the purchase of stock. Employees who receive non-excess capacity services may, however, be eligible for a qualified employee discount of up to 20 percent of the value of the service provided. See § 1.132-3T.

(3) *Cash rebates.* The exclusion for a no-additional-cost service applies whether the service is provided at no charge or at a reduced price. The exclusion also applies if the benefit is provided through a partial or total cash rebate of an amount paid for the service.

(4) *Applicability of nondiscrimination rules.* The exclusion for a no-additional-cost service applies to officers, owners, and highly compensated employees only if the service is available on substantially the same terms to each member of a group of employees that is defined under a reasonable classification set up by the employer that does not discriminate in favor of officers, owners, or highly compensated employees. See § 1.132-8T.

(5) *No substantial additional cost*—(i) *In general.* The exclusion for a non-additional-cost service applies only if the employer does not incur substantial additional cost in providing the service to the employee. For purposes of the preceding sentence, the term ''cost'' includes revenue that is forgone because the service is provided to an employee rather than a nonemployee. (For purposes of determining whether any revenue is forgone, it is assumed that the employee would not have purchased the service unless it were available to the employee at the actual price charged to the employee.) Whether an employer incurs substantial additional cost must be determined without regard to any amount paid by the employee for the service. Thus, any reimbursement by the employee for the cost of providing the service does not affect the determination of whether the employer incurs substantial additional cost.

(ii) *Labor intensive services.* An employer must include the cost of labor incurred in providing services to employees when determining whether the employer has incurred substantial additional cost. An employer has incurred substantial additional cost. An employer incurs substantial additional cost, whether or not non-labor costs are incurred, if a substantial amount of time is spent by the employer or its employees in providing the service to employees. This would be the result whether or not the time spent by the employer or its employees in providing the services would have been ''idle'', or if the services were provided outside normal business hours. An employer generally incurs no substantial additional cost, however, if the employee services provided are merely incidental to the primary service being provided by the employer. For example, the in-flight services of a flight attendant provided to airline employees traveling on a space-available basis are merely incidental to the primary service being provided (*i.e.*, air transportation). In addition, the cost of in-flight meals provided to airline employees is not considered substantial in relation to the air transportation being provided.

(b) *Reciprocal agreements.* For purposes of the exclusion for a no-additional-cost service, any service provided by an employer to an employee of another employer shall be treated as provided by the employer of such employee if all of the following requirements are satisfied:

(1) The service is provided pursuant to a written reciprocal agreement between the employers under which a group of employees of each employer, all of whom perform substantial services in the same line of business, may receive no-additional-cost services from the other employer;

(2) The service provided pursuant to the agreement to the employees of both employers is the same type of service provided by the employers to customers both in the line of business in which the employees perform substantial services and the line of business in which the service is provided to customers; and

(3) Neither employer incurs substantial additional cost (including forgone revenue) in providing the service to the employees of the other employer or pursuant to the agreement.

If one employer receives a substantial payment from the other employer with respect to the reciprocal agreement, the paying employer will be considered to have incurred a substantial additional cost pursuant to the agreement.

[T.D. 8063, 50 FR 52298, Dec. 23, 1985, as amended by T.D. 8256, 54 FR 28600, July 6, 1989]

§ 1.132–3 Qualified employee discounts.

(a) *In general*—(1) *Definition.* Gross income does not include the value of a qualified employee discount. A ''qualified employee discount'' is any employee discount with respect to qualified property or services provided by an employer to an employee for use by the employee to the extent the discount does not exceed—

(i) The gross profit percentage multiplied by the price at which the property is offered to customers in the ordinary course of the employer's line of business, for discounts on property, or

(ii) Twenty percent of the price at which the service is offered to customers, for discounts on services.

(2) *Qualified property or services*—(i) *In general.* The term ''qualified property

or services'' means any property or services that are offered for sale to customers in the ordinary course of the line of business of the employer in which the employee performs substantial services. For rules relating to the line of business limitation, see §1.132–4.

(ii) *Exception for certain property*. The term ''qualified property'' does not include real property and it does not include personal property (whether tangible or intangible) of a kind commonly held for investment. Thus, an employee may not exclude from gross income the amount of an employee discount provided on the purchase of securities, commodities, or currency, or of either residential or commercial real estate, whether or not the particular purchase is made for investment purposes.

(iii) *Property and services not offered in ordinary course of business*. The term ''qualified property or services'' does not include any property or services of a kind that is not offered for sale to customers in the ordinary course of the line of business of the employer. For example, employee discounts provided on property or services that are offered for sale primarily to employees and their families (such as merchandise sold at an employee store or through an employer-provided catalog service) may not be excluded from gross income. For rules relating to employer-operated eating facilities, see §1.132–7, and for rules relating to employer-operated on-premises athletic facilities, see §1.132–1(e).

(3) *No reciprocal agreement exception*. The exclusion for a qualified employee discount does not apply to property or services provided by another employer pursuant to a written reciprocal agreement that exists between employers to provide discounts on property and services to employees of the other employer.

(4) *Property or services provided without charge, at a reduced price, or by rebates*. The exclusion for a qualified employee discount applies whether the property or service is provided at no charge (in which case only part of the discount may be excludable as a qualified employee discount) or at a reduced price. The exclusion also applies if the benefit is provided through a partial or total cash rebate of an amount paid for the property or service.

(5) *Property or services provided directly by the employer or indirectly through a third party*. A qualified employee discount may be provided either directly by the employer or indirectly through a third party. For example, an employee of an appliance manufacturer may receive a qualified employee discount on the manufacturer's appliances purchased at a retail store that offers such appliances for sale to customers. The employee may exclude the amount of the qualified employee discount whether the employee is provided the appliance at no charge or purchases it at a reduced price, or whether the employee receives a partial or total cash rebate from either the employer-manufacturer or the retailer. If an employee receives additional rights associated with the property that are not provided by the employee's employer to customers in the ordinary course of the line of business in which the employee performs substantial services (such as the right to return or exchange the property or special warranty rights), the employee may only receive a qualified employee discount with respect to the property and not the additional rights. Receipt of such additional rights may occur, for example, when an employee of a manufacturer purchases property manufactured by the employee's employer at a retail outlet.

(6) *Applicability of nondiscrimination rules*. The exclusion for a qualified employee discount applies to highly compensated employees only if the discount is available on substantially the same terms to each member of a group of employees that is defined under a reasonable classification set up by the employer that does not discriminate in favor of highly compensated employees. See §1.132–8.

(b) *Employee discount*—(1) *Definition*. The term ''employee discount'' means the excess of—

(i) The price at which the property or service is being offered by the employer for sale to customers, over

(ii) The price at which the property or service is provided by the employer to an employee for use by the employee. A transfer of property by an employee without consideration is treated as use by the employee for purposes of this section. Thus, for example, if an employee receives a discount on property offered for sale by his employer to customers and the employee makes a gift of the property to his parent, the property will be considered to be provided for use by the employee; thus, the discount will be eligible for exclusion as a qualified employee discount.

(2) *Price to customers*—(i) *Determined at time of sale.* In determining the amount of an employee discount, the price at which the property or service is being offered to customers at the time of the employee's purchase is controlling. For example, assume that an employer offers a product to customers for $20 during the first six months of a calendar year, but at the time the employee purchases the product at a discount, the price at which the product is being offered to customers is $25. In this case, the price from which the employee discount is measured is $25. Assume instead that, at the time the employee purchases the product at a discount, the price at which the product is being offered to customers is $15 and the price charged the employee is $12. The employee discount is measured from $15, the price at which the product is offered for sale to customers at the time of the employee purchase. Thus, the employee discount is $15 −$12, or $3.

(ii) *Quantity discount not reflected.* The price at which a property or service is being offered to customers cannot reflect any quantity discount unless the employee actually purchases the requisite quantity of the property or service.

(iii) *Price to employer's customers controls.* In determining the amount of an employee discount, the price at which a property or service is offered to customers of the employee's employer is controlling. Thus, the price at which the property is sold to the wholesale customers of a manufacturer will generally be lower than the price at which the same property is sold to the customers of a retailer. However, see paragraph (a)(5) of this section regarding the effect of a wholesaler providing to its employees additional rights not provided to customers of the wholesaler in the ordinary course of its business.

(iv) *Discounts to discrete customer or consumer groups.* Subject to paragraph (2)(ii) of this section, if an employer offers for sale property or services at one or more discounted prices to discrete customer or consumer groups, and sales at all such discounted prices comprise at least 35 percent of the employer's gross sales for a representative period, then in determining the amount of an employee discount, the price at which such property or service is being offered to customers for purposes of this section is a discounted price. The applicable discounted price is the current undiscounted price, reduced by the percentage discount at which the greatest percentage of the employer's discounted gross sales are made for such representative period. If sales at different percentage discounts equal the same percentage of the employer's gross sales, the price at which the property or service is being provided to customers may be reduced by the average of the discounts offered to each of the two groups. For purposes of this section, a representative period is the taxable year of the employer immediately preceding the taxable year in which the property or service is provided to the employee at a discount. If more than one employer would be aggregated under section 414 (b), (c), (m), or (o), and not all of the employers have the same taxable year, the employers required to be aggregated must designate the 12-month period to be used in determining gross sales for a representative period. The 12-month period designated, however, must be used on a consistent basis.

(v) *Examples.* The rules provided in this paragraph (b)(2) are illustrated by the following examples:

Example 1. Assume that a wholesale employer offers property for sale to two discrete customer groups at differing prices. Assume further that during the prior taxable year of the employer, 70 percent of the employer's gross sales are made at a 15 percent discount and 30 percent at no discount. For purposes of this paragraph (b)(2), the current undiscounted price at which the property or service is being offered by the employer for sale to customers may be reduced by the 15 percent discount.

Example 2. Assume that a retail employer offers a 20 percent discount to members of the American Bar Association, a 15 percent discount to members of the American Medical Association, and a ten percent discount to employees of the Federal Government. Assume further that during the prior taxable year of the employer, sales to American Bar Association members equal 15 percent of the employer's gross sales, sales to American Medical Association members equal 20 percent of the employer's gross sales, and sales to Federal Government employees equal 25 percent of the employer's gross sales. For purposes of this paragraph (b)(2), the current undiscounted price at which the property or service is being offered by the employer for sale to customers may be reduced by the ten percent Federal Government discount.

(3) *Damaged, distressed, or returned goods.* If an employee pays at least fair market value for damaged, distressed, or returned property, such employee will not have income attributable to such purchase.

(c) *Gross profit percentage*—(1) *In general*—(i) *General rule.* An exclusion from gross income for an employee discount on qualified property is limited to the price at which the property is being offered to customers in the ordinary course of the employer's line of business, multiplied by the employer's gross profit percentage. The term ''gross profit percentage'' means the excess of the aggregate sales price of the property sold by the employer to customers (including employees) over the employer's aggregate cost of the property, then divided by the aggregate sales price.

(ii) *Calculation of gross profit percentage.* The gross profit percentage must be calculated separately for each line of business based on the aggregate sales price and aggregate cost of property in that line of business for a representative period. For purposes of this section, a representative period is the taxable year of the employer immediately preceding the taxable year in which the discount is available. For example, if the aggregate amount of sales of property in an employer's line of business for the prior taxable year was $800,000, and the aggregate cost of the property for the year was $600,000, the gross profit percentage would be 25 percent ($800,000 minus $600,000, then divided by $800,000). If two or more employers are required to aggregate under section 414 (b), (c), (m), or (o) (aggregated employer), and if all of the aggregated employers do not share the same taxable year, then the aggregated employers must designate the 12-month period to be used in determining the gross profit percentage. The 12-month period designated, however, must be used on a consistent basis. If an employee performs substantial services in more than one line of business, the gross profit percentage of the line of business in which the property is sold determines the amount of the excludable employee discount.

(iii) *Special rule for employers in their first year of existence.* An employer in its first year of existence may estimate the gross profit percentage of a line of business based on its mark-up from cost. Alternatively, an employer in its first year of existence may determine the gross profit percentage by reference to an appropriate industry average.

(iv) *Redetermination of gross profit percentage.* If substantial changes in an employer's business indicate at any time that it is inappropriate for the prior year's gross profit percentage to be used for the current year, the employer must, within a reasonable period, redetermine the gross profit percentage for the remaining portion of the current year as if such portion of the year were the first year of the employer's existence.

(2) *Line of business.* In general, an employer must determine the gross profit percentage on the basis of all property offered to customers (including employees) in each separate line of business. An employer may instead select a classification of property that is narrower than the applicable line of business. However, the classification must be reasonable. For example, if an employer computes gross profit percentage according to the department in which products are sold, such classification is reasonable. Similarly, it is reasonable to compute gross profit percentage on the basis of the type of merchandise sold (such as high mark-up and low mark-up classifications). It is not reasonable, however, for an employer to classify certain low mark-up

products preferred by certain employees (such as highly compensated employees) with high mark-up products or to classify certain high mark-up products preferred by other employees with low mark-up products.

(3) *Generally accepted accounting principles.* In general, the aggregate sales price of property must be determined in accordance with generally accepted accounting principles. An employer must compute the aggregate cost of property in the same manner in which it is computed for the employer's Federal income tax liability; thus, for example, section 263A and the regulations thereunder apply in determining the cost of property.

(d) *Treatment of leased sections of department stores*—(1) *In general*—(i) *General rule.* For purposes of determining whether employees of a leased section of a department store may receive qualified employee discounts at the department store and whether employees of the department store may receive qualified employee discounts at the leased section of the department store, the leased section is treated as part of the line of business of the person operating the department store, and employees of the leased section are treated as employees of the person operating the department store as well as employees of their employer. The term "leased section of a department store" means a section of a department store where substantially all of the gross receipts of the leased section are from over-the-counter sales of property made under a lease, license, or similar arrangement where it appears to the general public that individuals making such sales are employed by the department store. A leased section of a department store which, in connection with the offering of beautician services, customarily makes sales of beauty aids in the ordinary course of business is deemed to derive substantially all of its gross receipts from over-the-counter sales of property.

(ii) *Calculation of gross profit percentage.* For purposes of paragraph (d) of this section, when calculating the gross profit percentage of property and services sold at a department store, sales of property and services sold at the department store, as well as sales of property and services sold at the leased section, are considered. The rule provided in the preceding sentence does not apply, however, if it is more reasonable to calculate the gross profit percentage for the department store and leased section separately, or if it would be inappropriate to combine them (such as where either the department store or the leased section but not both provides employee discounts).

(2) *Employees of the leased section*—(i) *Definition.* For purposes of this paragraph (d), "employees of the leased section" means all employees who perform substantial services at the leased section of the department store regardless of whether the employees engage in over-the-counter sales of property or services. The term "employee" has the same meaning as in section 132(f) and § 1.132–1(b)(1).

(ii) *Discounts offered to either department store employees or employees of the leased section.* If the requrements of this paragraph (d) are satisfied, employees of the leased section may receive qualified employee discounts at the department store whether or not employees of the department store are offered discounts at the leased section. Similarly, employees of the department store may receive a qualified employee discount at the leased section whether or not employees of the leased section are offered discounts at the department store.

(e) *Excess discounts.* Unless excludable under a provision of the Internal Revenue Code of 1986 other than section 132(a)(2), an employee discount provided on property is excludable to the extent of the gross profit percentage multiplied by the price at which the property is being offered for sale to customers. If an employee discount exceeds the gross profit percentage, the excess discount is includible in the employee's income. For example, if the discount on employer-purchased property is 30 percent and the employer's gross profit percentage for the period in the relevant line of business is 25 percent, then 5 percent of the price at which the property is being offered for sale to customers is includible in the empoyee's income. With respect to services, an employee discount of up to

20 percent may be excludable. If an employee discount exceeds 20 percent, the excess discount is includible in the employee's income. For example, assume that a commercial airline provides a pass to each of its employees permitting the employees to obtain a free round-trip coach ticket with a confirmed seat to any destination the airline services. Neither the exclusion of section 132(a)(1) (relating to no-additional-cost services) nor any other statutory exclusion applies to a flight taken primarily for personal purposes by an employee under this program. However, an employee discount of up to 20 percent may be excluded as a qualified employee discount. Thus, if the price charged to customers for the flight taken is $300 (under restrictions comparable to those actually placed on travel associated with the employee airline ticket), $60 is excludible from gross income as a qualified employee discount and $240 is includible in gross income.

[T.D. 8256, 54 FR 28603, July 6, 1989]

§ 1.132–3T Qualified employee discount—1985 through 1988 (temporary).

(a) *In general*—(1) *Definition.* Gross income does not include the value of a qualified employee discount. The term ''qualified employee discount'' means any employee discount with respect to qualified property or services provided by an employer to an employee for the employee's personal use to the extent the discount does not exceed—

(i) The gross profit percentage of the price at which the property is offered to customers, for discounts on property, or

(ii) 20 percent of the price at which the services are offered to customers, for discounts on services.

(2) *Qualified property or services*—(i) *In general.* The term ''qualified property or services'' means any property or services that are offered for sale to customers in the ordinary course of the line of business of the employer in which the employee performs substantial services. For rules relating to the line of business limitation, see § 1.132–4T.

(ii) *Exception for certain property.* The term ''qualified property'' does not include real property and it does not include personal property (whether tangible or intangible) of a kind commonly held for investment. Thus, an employee may not exclude from gross income the amount of an employee discount provided on the purchase of either residential or commercial real estate, securities, commodities, or currency, whether or not the particular purchase is made for investment purposes.

(iii) *Property and services not offered in ordinary course of business.* The term ''qualified property or services'' does not include any property or services of a kind that is not offered for sale to customers in the ordinary course of the line of business of the employer. For example, employee discounts provided on property or services that are offered for sale only to employees and their families (such as merchandise sold at an employee store or through an employer-provided catalog service) may not be excluded from gross income.

(3) *No reciprocal agreement exception.* The exclusion for a qualified employee discount does not apply to property or services provided by another employer pursuant to a written reciprocal agreement that exists between employers to provide discounts on property and services to employees of the other employer.

(4) *Cash or third-party rebates*—(i) *Property or services provided without charge or at a reduced price.* The exclusion for a qualified employee discount applies whether the property or service is provided at no charge (in which case only part of the discount may be excludable as a qualified employee discount) or at a reduced price. The exclusion also applies if the benefit is provided through a partial or total cash rebate of an amount paid for the property or service.

(ii) *Property or services provided directly by the employer or indirectly through a third party.* A qualified employee discount may be provided either directly by the employer or indirectly through a third party. For example, an employee of an appliance manufacturer may receive a qualified employee discount on the manufacturer's appliances purchased at a retail store that offers such appliances for sale to customers.

The employee may exclude the amount of the qualified employee discount whether the employee is provided the appliance at no charge or purchases it at a reduced price, or whether the employee receives a partial or total cash rebate from either the employer-manufacturer or the retailer. If an employee receives additional rights associated with the property that are not provided by the employee's employer to customers in the ordinary course of the line of business in which the employee performs substantial services (such as the right to return or exchange the property or special warranty rights), the employee may only receive a qualified employee discount with respect to the property and not the additional rights. Receipt of such additional rights may occur, for example, when an employee of a manufacturer purchases property manufactured by the employee's employer at a retail outlet.

(5) *Applicability of nondiscrimination rules.* The exclusion for a qualified employee discount applies to officers, owners, and highly compensated employees only if the discount is available on substantially the same terms to each member of a group of employees that is defined under a reasonable classification set up by the employer that does not discriminate in favor of officers, owners, or highly compensated employees. See §1.132–8T.

(b) *Employee discount*—(1) *Definition.* The term ''employee discount'' means the excess of—

(i) The price at which the property or service is being offered by the employer for sale to customers, over

(ii) The price at which the property or service is provided by the employer to an employee for use by the employee.

A transfer of property by an employee without consideration is considered use by the employee for purposes of this section. Thus, for example, if an employee receives a discount on property offered for sale by his employer to customers and the employee makes a gift of the property to his parent, the property will be considered to be provided for use by the employee, thus enabling the discount to be eligible for exclusion as a qualified employee discount.

(2) *Price to customers*—(i) *Determined at time of sale.* In determining the amount of an employee discount, the price at which the property or service is being offered to customers at the time of the employee's purchase is controlling. For example, assume that an employer offers a product to customers for $20 during the first six months of a calendar year, but at the time the employee purchases the product at a discount, the price at which the product is being offered to customers is $25. In this case, the price from which the employee discount is measured is $25.

(ii) *Quantity discount not reflected.* The price referred to in paragraph (b)(2)(i) of this section cannot reflect any quantity discount unless the employee actually purchases the requisite quantity of the property or service.

(iii) *Customers of employee's employer controls.* In determining the amount of an employee discount, the price at which the property or service is offered to customers of the employee's employer is controlling. Thus, the price at which property is sold to the wholesale customers of a manufacturer will generally be lower than the price at which the same property is sold to the customers of a retailer. However, see paragraph (a)(4)(ii) of this section regarding the effect of a wholesaler providing to its employees additional rights not provided to customers of the wholesaler in the ordinary course of its business.

(iv) *Discounts to discrete customer or consumer groups.* In determining the amount of an employee discount, if an employer offers for sale property or services at one or more discounted prices to discrete customer or consumer groups, and sales at all such discounted prices comprise at least 35 percent of the employer's gross sales for a representative period, then the price at which property or service is being offered to customers is a discounted price. The applicable discounted price is the current undiscounted price, reduced by the percentage discount at which the greatest percentage of the employer's gross sales are made for such representative period. If sales at different percentage discounts equal the same percentage of the employer's gross sales, the price at which the property or service is being provided to customers may be reduced by the average of the two group discounts. For purposes of this section, a representative period is the taxable year of the employer immediately preceding the taxable year in which the property or service is provided to the employee at a discount. If more than one employer would be aggregated under section 414 (b), (c), or (m), and all of the employers do not have the same taxable year, the employers required to be aggregated must designate the 12-month period to be used in determining gross sales for a representative period.

(v) *Examples.* The rules provided in this paragraph (b)(2) are illustrated by the following examples:

Example 1. Assume that a wholesale employer offers property for sale to two discrete customer groups at differing prices. Assume further that during the prior taxable year of the employer, 70 percent of the employer's gross sales are made at a 15-percent discount and 30 percent at no discount. The current undiscounted price at which the property or service is being offered by the employer for sale to customers may be reduced by the 15-percent discount.

Example 2. Assume that a retail employer offers a 20 percent discount to members of the American Bar Association, a 15 percent discount to members of the American Medical Association, and a ten percent discount to employees of the Federal Government. Assume further that during the prior taxable year of the employer, sales to American Bar Association members equal 15 percent of the employer's gross sales, sales to American Medical Association members equal 20 percent of the employer's gross sales, and sales to Federal Government employees equal 25 percent of the employer's gross sales. The current undiscounted price at which the property or service is being offered by the employer for sale to customers may be reduced by the ten percent Federal Government discount.

(3) *Damaged, distressed, or returned goods.* If an employee pays at least fair market value for damaged, distressed, or returned property, such employee will not have income attributable to such purchase.

(c) *Gross profit percentage*—(1) *In general*—(i) *General rule.* An exclusion from gross income for an employee discount on qualified property is limited to the price at which the property is being offered to customers in the ordinary course of the employer's line of business, multiplied by the employer's gross profit percentage. The term ''gross profit percentage'' means the excess of the aggregate sales price of the property sold by the employer to customers (including employees) over the employer's aggregate cost of the property, then divided by the aggregate sales price.

(ii) *Calculation of gross profit percentage.* The gross profit percentage must be calculated separately for each line of business based on the aggregate sales price and aggregate cost of property in that line of business for a representative period. For purposes of this section, a representative period is the taxable year of the employer immediately preceding the taxable year in which the discount is available. For example, if the aggregate sales of property in an employer's line of business for the prior taxable year were $800,000, and the aggregate cost of the property for the year were $600,000, the gross profit percentage would be 25 percent ($800,000 minus $600,000, then divided by $800,000). If more than one employer would be aggregated under section 414 (b), (c), or (m), and all of the employers do not have the same taxable year, the employers required to be aggregated must designate the 12-month period to be used in determining the gross profit percentage. If an employee performs substantial services in more than one line of business, the gross profit percentage of the line of business in which the property is sold determines the amount of the excludable employee discount.

(iii) *Special rule for employers in their first year of existence.* An employer in its first year of existence may estimate the gross profit percentage of a line of business based on its mark-up from the cost. Alternatively, an employer in its first year of existence may determine the gross profit percentage by reference to an appropriate industry average.

(iv) *Redetermination of gross profit percentage.* If substantial changes in an employer's business indicate at any time that it is inappropriate for the prior years' gross profit percentage to be used for the current year, the employer must, within a reasonable period, redetermine the gross profit percentage for the remaining portion of the current year as if such portion of the year were the first year of the employer's existence.

(2) *Line of business.* In general, an employer must determine the gross profit percentage on the basis of all property offered to customers (including employees) in each separate line of business. An employer may instead select a classification of property that is narrower than the applicable line of business. However, such classification must be reasonable. For example, if an employer computes gross profit percentage according to the department in which products are sold, such classification is reasonable. Similarly, it is reasonable to compute gross profit percentage on the basis of the type of merchandise sold (such as high mark-up and low mark-up classifications). It is not reasonable, however, for an employer to classify certain low mark-up products preferred by certain employees (such as officers, owners, and highly compensated employees) with high mark-up products or to classify certain high mark-up products preferred by other employees with low mark-up products.

(3) *Generally accepted accounting principles.* In general, the aggregate sales price of property must be determined in accordance with generally accepted accounting principles. An employer must compute the aggregate cost of property in the same manner in which it is computed for the employer's Federal income tax liability, pursuant to the inventory rules in section 471 and the regulations thereunder.

(d) *Treatment of leased sections of department stores*—(1) *In general*—(i) *General rule.* For purposes of determining whether employees of a leased section of a department store may receive qualified employees discounts at the department store and whether employees of the department store may receive qualified employee discounts at the leased section of the department store, the leased section is treated as part of the line of business of the person operating the department store, and employees of the leased section are treated as employees of the person operating the department store as well as employees of their employer. The term ''leased section of a department store'' means a section of a department store where substantially all of the gross receipts of the leased section are over-the-counter sales of property made under a lease, license, or similar arrangement where it appears to the general public that individuals making such sales are employed by the department store. An example of a leased section of a department store is a cosmetics firm that leases floor space from a department store.

(ii) *Calculation of gross profit percentage.* When calculating the gross profit percentage of property and services sold at the department store under paragraph (c) of this section, sales of property and services sold at the department store, as well as sales of property and services sold at the leased section, are considered. The rule provided in the preceding sentence does not apply, however, if it is reasonable to calculate the gross profit percentage for the department store and leased section separately, or if it would be inappropriate to combine them (such as where either the department store or the leased section, but not both, provides employee discounts).

(2) *Employees of the leased section*—(i) *Definition.* For purposes of this paragraph (d), ''employees of the leased section'' means all employees who perform substantial services at the leased section regardless of whether the employees engage in over-the-counter sales of property or services. The term ''employee'' has the same meaning as in section 133(f).

(ii) *Discounts offered to either department store employees or employees of the leased section.* If the requirements of this paragraph (d) are satisfied, employees of the leased section may receive qualified employee discounts at the department store regardless of whether employees of the department store are offered discounts at the leased section. Similarly, regardless of whether employees of the leased section are offered discounts at the department store, employees of the department store may receive qualified employee discounts at the leased section.

(e) *Excess discounts.* Unless excludable under a statutory provision other than section 132(a)(2), an employee discount provided on property is excludable to the extent of the gross profit percentage multiplied by the price at which the property is being offered for sale to customers. If an employee discount exceeds the gross profit percentage, the excess discount is includible in the employee's income. For example, if the discount on property is 30 percent and the employer's gross profit percentage for the period in the relevant line of business is 25 percent, then 5 percent of the price at which the property is being offered for sale to customers is includible in the emloyee's income. With respect to services, an employee discount of up to 20 percent may be excludable. If an employee discount exceeds 20 percent, the excess discount is includible in the employee's income.

[T.D. 8063, 50 FR 52299, Dec. 23, 1985, as amended by T.D. 8256, 54 FR 28600, July 6, 1989]

§ 1.132–4 Line of business limitation.

(a) *In general*—(1) *Applicability*—(i) *General rule.* A no-additional-cost service or a qualified employee discount provided to an employee is only available with respect to property or services that are offered for sale to customers in the ordinary course of the same line of business in which the employee receiving the property or service performs substantial services. Thus, an employee who does not perform substantial services in a particular line of business of the employer may not exclude from income under section 132 (a)(1) or (a)(2) the value of services or employee discounts received on property or services in that line of business. For rules that relax the line of business requirement, see paragraphs (b) through (g) of this section.

(ii) *Property and services sold to employees rather than customers.* Because the property or services must be offered for sale to customers in the ordinary course of the same line of business in which the employee performs substantial services, the line of business limitation is not satisfied if the employer's products or services are sold primarily to employees of the employer, rather than to customers. Thus, for example, an employer in the banking line of business is not considered in the variety store line of business if the employer establishes an employee store that offers variety store items for sale to the employer's employees. See §1.132–7 for rules relating to employer-operated eating facilities, and see §1.132–1(e) for rules relating to employer-operated on-premises athletic facilities.

(iii) *Performance of substantial services in more than one line of business.* An employee who performs services in more than one of the employer's lines of business may only exclude no-additional-cost services and qualified employee discounts in the lines of business in which the employee performs substantial services.

(iv) *Performance of services that directly benefit more than one line of business*—(A) *In general.* An employee who performs substantial services that directly benefit more than one line of business of an employer is treated as performing substantial services in all such line of business. For example, an employee who maintains accounting records for an employer's three lines of business may receive qualified employee discounts in all three lines of business. Similarly, if an employee of a minor line of business of an employer that is significantly interrelated with a major line of business of the employer performs substantial services that directly benefit both the major and the minor lines of business, the employee is treated as performing substantial services for both the major and the minor lines of business.

(B) *Examples.* The rules provided in this paragraph (a)(1)(iv) are illustrated by the following examples:

Example 1. Assume that employees of units of an employer provide repair or financing services, or sell by catalog, with respect to retail merchandise sold by the employer. Such employees may be considered to perform substantial services for the retail merchandise line of business under paragraph (a)(1)(iv)(A) of this section.

Example 2. Assume that an employer operates a hospital and a laundry service. Assume further that some of the gross receipts of the laundry service line of business are from laundry services sold to customers other than the hospital employer. Only the employees of the laundry service who perform substantial services which directly benefit the hospital line of business (through the provision of laundry services to the hospital) will be treated as performing substantial services for the hospital line of business. Other employees of the laundry service line of business will not be treated as employees of the hospital line of business.

Example 3. Assume the same facts as in example (2), except that the employer also operates a chain of dry cleaning stores. Employees who perform substantial services which directly benefit the dry cleaning stores but who do not perform substantial services that directly benefit the hospital line of business will not be treated as performing substantial services for the hospital line of business.

(2) *Definition*—(i) *In general.* An employer's line of business is determined by reference to the Enterprise Standard Industrial Classification Manual (ESIC Manual) prepared by the Statistical Policy Division of the U.S. Office of Management and Budget. An employer is considered to have more than one line of business if the employer offers for sale to customers property or services in more than one two-digit code classification referred to in the ESIC Manual.

(ii) *Examples.* Examples of two-digit classifications are general retail merchandise stores; hotels and other lodging places; auto repair, services, and garages; and food stores.

(3) *Aggregation of two-digit classifications.* If, pursuant to paragraph (a)(2) of this section, an employer has more than one line of business, such lines of business will be treated as a single line of business where and to the extent that one or more of the following aggregation rules apply:

(i) If it is uncommon in the industry of the employer for any of the separate lines of business of the employer to be operated without the others, the separate lines of business are treated as one line of business.

(ii) If it is common for a substantial number of employees (other than those employees who work at the headquarters or main office of the employer) to perform substantial services for more than one line of business of the employer, so that determination of which employees perform substantial services for which line or lines of business would be difficult, then the separate lines of business of the employer in which such employees perform substantial services are treated as one line of business. For example, assume that an employer operates a delicatessen with an attached service counter at which food is sold for consumption on the premises. Assume further that most but not all employees work both at the delicatessen and at the service counter. Under the aggregation rule of this paragraph (a)(3)(ii), the delicatessen and the service counter are treated as one line of business.

(iii) If the retail operations of an employer that are located on the same premises are in separate lines of business but would be considered to be within one line of business under paragraph (a)(2) of this section if the merchandise offered for sale in such lines of business were offered for sale at a department store, then the operations are treated as one line of business. For example, assume that on the same premises an employer sells both women's apparel and jewelry. Because, if sold together at a department store, the operations would be part of the same line of business, the operations are treated as one line of business.

(b) *Grandfather rule for certain retail stores*—(1) *In general.* The line of business limitation may be relaxed under the special grandfather rule of this paragraph (b). Under this special grandfather rule, if—

(i) On October 5, 1983, at least 85 percent of the employees of one member of an affiliated group (as defined in section 1504 without regard to subsections (b)(2) and (b)(4) thereof) (''first member'') were entitled to receive employee discounts at retail department stores operated by another member of the affiliated group (''second member''), and

(ii) More than 50 percent of the previous year's sales of the affiliated group are attributable to the operation of retail department stores, then, for purposes of the exclusion from gross income of a qualified employee discount, the first member is treated as engaged in the same line of business as the second member (the opeator of the retail department stores). Therefore, employees of the first member of the affiliated group may exclude from income qualified employee discounts received at the retail department stores operated by the second member. However, employees of the second member of the affiliated group may not under this paragraph (b)(1) exclude any discounts received on property or services offered for sale to customers by the first member of the affiliated group.

(2) *Taxable year of affiliated group.* If not all of the members of an affiliated group have the same taxable year, the affiliated group must designate the 12-month period to be used in determining the ''previous year's sales'' (as referred to in the grandfather rule of this paragraph (b)). The 12-month period designated, however, must be used on a consistent basis.

(3) *Definition of ''sales.''* For purposes of this paragraph (b), the term ''sales'' means the gross receipts of an affiliated group, based upon the accounting methods used by its members.

(4) *Retired and disabled employees.* For purposes of this paragraph (b), an employee includes any individual who was, or whose spouse was, formerly employed by the first member of an affiliated group and who separated from service with the member by reason of retirement or disability if the second member of the group provided employee discounts to that individual on October 5, 1983.

(5) *Increase of employee discount.* If, after October 5, 1983, the employee discount described in this paragraph (b) is increased, the grandfather rule of this paragraph (b) does not apply to the amount of the increase. For example, if on January 1, 1989, the employee discount is increased from 10 percent to 15 percent, the grandfather rule will not apply to the additional 5 percent discount.

(c) *Grandfather rule for telephone service provided to predivestiture retirees.* All entities subject to the modified final judgment (as defined in section 559(c)(5) of the Tax Reform Act of 1984) shall be treated as a single employer engaged in the same line of business for purposes of determining whether telephone service provided to certain employees is a no-additional-cost service. The preceding sentence applies only in the case of an employee who by reason of retirement or disability separated before January 1, 1984, from the service of an entity subject to the modified final judgment. This paragraph (c) only applies to services provided to such employees as of January 1, 1984. For a special no-additional-cost service rule relating to such employees and such services, see §1.132–2(a)(6).

(d) *Special rule for certain affiliates of commercial airlines*—(1) *General rule.* If a qualified affiliate is a member of an airline affiliated group and employees of the qualified affiliate who are directly engaged in providing airline-related services are entitled to no-additional-cost service with respect to air transportation provided by such other member, then, for purposes of applying §1.132–2 (relating to no-additional-cost services with respect to such air transportation), such qualified affiliate shall be treated as engaged in the same line of business as such other member.

(2) *''Airline affiliated group'' defined.* An ''airline affiliated group'' is an affiliated group (as defined in section 1504 (a)) one of whose members operates a commercial airline that provides air transportation to customers on a per-seat basis.

(3) *''Qualified affiliate'' defined.* A ''qualified affiliate'' is any corporation that is predominantly engaged in providing airline-related services. The term ''airline-related services'' means any of the following services provided in connection with air transportation:

(i) Catering,

(ii) Baggage handling,

(iii) Ticketing and reservations,

(iv) Flight planning and weather analysis, and

(v) Restaurants and gift shops located at an airport.

(e) *Grandfather rule for affiliated groups operating airlines.* The line of business limitation may be relaxed under the special grandfather rule of this paragraph (e). Under this special grandfather rule, if, as of September 12, 1984—

(1) An individual—

(i) Was an employee (within the meaning of §1.132–1 (b)) of one member of an affiliated group (as defined in section 1504(a)) (''first corporation''), and

(ii) Was eligible for no-additional-cost services in the form of air transportation provided by another member of such affiliated group (''second corporation''),

(2) At least 50 percent of the individuals performing services for the first corporation were, or had been employees of, or had previously performed services for, the second corporation, and

(3) The primary business of the affiliated group was air transportation of passengers, then, for purposes of applying sections 132(a) (1) and (2), with respect to no-additional-cost services and qualified employee discounts provided after December 31, 1984, for that individual by the second corporation, the first corporation is treated as engaged in the same air transporation line of business as the second corporation. For purposes of the preceding sentence, an employee of the second corporation who is performing services for the first corporation is also treated as an employee of the first corporation.

(f) *Special rule for qualified air transportation organizations.* A qualified air transportation organization is treated as engaged in the line of business of providing air transportation with respect to any individual who performs services for the organization if those services are peformed primarily for persons engaged in providing air transportation, and are of a kind which (if performed on September 12, 1984) would qualify the individual for no-additional-cost services in the form of air transportation. The term ''qualified air transportation organization'' means any organization—

(1) If such organization (or a predecessor) was in existence on September 12, 1984,

(2) If such organization is—

(i) A tax-exempt organization under section(c)(6) whose membership is limited to entities engaged in the transportation by air of individuals or property for compensation or hire, or

(ii) Is a corporation all the stock of which is owned entirely by entities described in paragraph (f)(2)(i) of this section, and

(3) If such organization is operated in furtherance of the activities of its members or owners.

(g) *Relaxation of line of business requirement.* The line of business requirement may be relaxed under an elective grandfather rule provided in section 4977. For rules relating to the section 4977 election, see §54.4977–1T.

(h) *Line of business requirement does not expand benefits eligible for exclusion.* The line of business requirement limits the benefits eligible for the no-additional-cost service and qualified employee discount exclusions to property or services provided by an employer to its customers in the ordinary course of the line of business of the employer in which the employee performs substantial services. The requirement is intended to ensure that employers do not offer, on a tax-free or reduced basis, property or services to employees that are not offered to the employer's customers, even if the property or services offered to the customers and the employees are within the same line of business (as defined in this section).

[T.D. 8256, 54 FR 28606, July 6, 1989]

§ 1.132–4T Line of business limitation—1985 through 1988 (temporary).

(a) *In general*—(1) *Applicability*—(i) *General rule.* A no-additional-cost service or qualified employee discount provided to an employee must be for property or services that are offered for sale to customers in the ordinary course of the same line of business in which the employee receiving the property or service performs substantial services. Thus, an employee who does not perform substantial services in a particular line of business of the employer may not exclude the value of services or employee discounts received on property or services in that line of business.

(ii) *Property and services sold to employees rather than customers.* Since the property or services must be offered for sale to customers in the ordinary course of the same line of business in which the employee performs substantial services, the line of business limitation is not satisfied if the employer's products or services are sold to employees of the employer, rather than to customers. Thus, for example, an employer in the banking line of business is not considered in the variety store line of business if the employer establishes an employee store that offers variety store items for sale to the employer's employees.

(iii) *Performance of substantial services in more than one line of business.* An employee who performs services in more than one of the employer's lines of business may only exclude no-additional-cost services and qualified employee discounts in the lines of business in which the employee performs substantial services.

(iv) *Performance of services that directly benefit more than one line of business*—(A) *In general.* An employee who performs substantial services that directly benefit more than one line of business of an employer is treated as performing substantial services in all such lines of business. For example, an employee who maintains accounting records for an employer's three lines of business may receive qualified employee discounts in all three lines of business.

(B) *Significantly interrelated minor line of business.* The employees of a minor line of business of an employer that is significantly interrelated with a major line of business of the employer who perform substantial services that directly benefit both the major and the minor lines of business are treated as employees of both the major and the minor lines of business. Employees of the minor line of business who do not perform substantial services which directly benefit the major line of business are not treated as employees of the major line of business. A minor line of business is significantly interrelated with a major line of business when, for example, the activity of the minor line of business is directly related to but is a minor part of the major line of business (such as laundry services provided at a hospital).

(C) *Examples.* The rules provided in this paragraph are illustrated in the following examples:

Example 1. Assume that employees of units of an employer provide repair or financing services, or sell by catalog, with respect to retail merchandise sold by the employer. Such employees may be considered as employees of the retail merchandise line of business under this paragraph (a)(1)(iv).

Example 2. Assume that an employer operates a hospital and a laundry service. Assume further that some of the gross receipts of the laundry service line of business are from laundry services sold to customers other than the hospital employer. Only the employees of the laundry service who perform substantial services which directly benefit the hospital line of business (through the provision of laundry services to the hospital) will be treated as employees of the hospital line of business. Other employees of the laundry service line of business will not be treated as employees of the hospital line of business.

Example 3. Assume the same facts as in example (2), except that the minor line of business also operates a chain of dry cleaning stores. Employees who perform substantial services which directly benefit the dry cleaning stores but who do not perform substantial services that directly benefit the hospital line of business will not be treated as employees of the hospital line of business.

(2) *Definition*—(i) *In general.* An employer's line of business is determined by reference to the Enterprise Standard Industrial Classification Manual (ESIC Manual) prepared by the Statistical Policy Division of the U.S. Office of Management and Budget. An employer is considered to have more than one line of business if the employer offers for sale to customers property or services in more than one two-digit code classification referred to in the ESIC Manual.

(ii) *Examples.* Examples of two-digit classifications are general retail merchandise stores; hotels and other lodging places; auto repair, services, and garages; and food stores.

(3) *Aggregation of two-digit classifications.* If, pursuant to paragraph (a)(2) of this section, an employer has more than one line of business, such lines of business will be treated as a single line of business where and to the extent that one or more of the following aggregation rules apply:

(i) If it is uncommon in the industry of the employer for any of the separate lines of business of the employer to be operated without the others, the separate lines of business are treated as one line of business.

(ii) If it is common for a substantial number of employees (other than those employees who work at the headquarters or main office of the employer) to perform substantial services for more than one line of business of the employer, so that determination of which employees perform substantial services for which line of business would be difficult, then the separate lines of business of the employer in which such employees perform substantial services are treated as one line of business. For example, assume that an employer operates a delicatessen with an attached service counter at which food is sold for consumption on the premises. Assume further that most but not all employees work both at the delicatessen and at the service counter. The delicatessen and the service counter are treated as one line of business.

(iii) If the retail operations of an employer that are located on the same premises are in separate lines of business but would be considered to be within one line of business under paragraph (a)(2) of this section if the merchandise offered for sale in such lines of business were offered for sale at a department store, then the operations are treated as one line of business. For example, assume that on the same premises an employer sells both women's apparel and jewelry. Since, if sold together at a department store, the operations would be part of the same line of business, the operations are treated as one line of business.

(b) *Grandfather rule for certain retail stores*—(1) *In general.* The line of business limitation may be relaxed under a special grandfather rule. If—

(i) On October 5, 1983, 85 percent of the employees of one member of an affiliated group (as defined in section 1504 without regard to subsections (b)(2) and (b)(4) thereof) were entitled to employee discounts at retail department stores operated by another member of the affiliated group, and

(ii) More than 50 percent of the current year's sales of the affiliated group are attributable to the operation of retail department stores,

then for purposes of the exclusion from gross income of a qualified employee discount, the first member is treated as engaged in the same line of business as the second member (the operator of the retail department stores). Therefore, employees of the first member of the affiliated group may exclude qualified employee discounts received at the retail department stores operated by the second member. However, employees of the second member of the affiliated group may not exclude any discounts received on property or services offered for sale to customers by the first member of the affiliated group.

(2) *Taxable year of affiliated group.* If all of the members do not have the same taxable year, the affiliated group must designate the 12-month period to be used in determining the ''current year's sales'' (as referred to in this paragraph (b)). The 12-month period designated, however, must be used consistently.

(3) *Definition of ''sales''.* For purposes of this paragraph (b), the term ''sales'' means the gross receipts of the affiliated group, based upon the accounting methods used by its members.

(4) *Retired and disabled employees.* For purposes of this paragraph (b), an employee includes any individual who was, or whose spouse was, formerly employed by the first member of the affiliated group and who separated from service with the member by reason of retirement or disability if the second member of the group provided employee discounts to such individuals on October 5, 1983.

(5) *Increase of employee discount.* If, after October 5, 1983, the employee discount described in this paragraph (b) is increased, the grandfather rule of this paragraph (b) does not apply to the amount of the increase. For example, if on January 1, 1985, the employee discount is increased from 10 percent to 15 percent, the grandfather rule will not apply to the additional five percent discount.

(c) *Relaxation of line of business requirement.* The line of business requirement may be relaxed under an elective grandfather rule provided in section 4977. For rules relating to the section 4977 election, see §54.4977–1.

[T.D. 8063, 50 FR 52301, Dec. 23, 1985, as amended by T.D. 8256, 54 FR 28600, July 6, 1989]

§ 1.132–5 Working condition fringes.

(a) *In general*—(1) *Definition.* Gross income does not include the value of a working condition fringe. A ''working condition fringe'' is any property or service provided to an employee of an employer to the extent that, if the employee paid for the property or service, the amount paid would be allowable as a deduction under section 162 or 167.

(i) A service or property offered by an employer in connection with a flexible spending account is not excludable from gross income as a working condition fringe. For purposes of the preceding sentence, a flexible spending account is an agreement (whether or not written) entered into between an employer and an employee that makes available to the employee over a time period a certain level of unspecified non-cash benefits with a pre-determined cash value.

(ii) If, under section 274 or any other section, certain substantiation requirements must be met in order for a deduction under section 162 or 167 to be allowable, then those substantiation requirements apply when determining whether a property or service is excludable as a working condition fringe.

(iii) An amount that would be deductible by the employee under a section other than section 162 or 167, such as section 212, is not a working condition fringe.

(iv) A physical examination program provided by the employer is not excludable as a working condition fringe even if the value of such program might be deductible to the employee under section 213. The previous sentence applies without regard to whether the employer makes the program mandatory to some or all employees.

(v) A cash payment made by an employer to an employee will not qualify as a working condition fringe unless the employer requires the employee to—

(A) Use the payment for expenses in connection with a specific or pre-arranged activity or undertaking for which a deduction is allowable under section 162 or 167,

(B) Verify that the payment is actually used for such expenses, and

(C) Return to the employer any part of the payment not so used.

(vi) The limitation of section 67(a) (relating to the two-percent floor on miscellaneous itemized deductions) is not considered when determining the amount of a working condition fringe. For example, assume that an employer provides a $1,000 cash advance to Employee A and that the conditions of paragraph (a)(1)(v) of this section are not satisfied. Even to the extent A uses the allowance for expenses for which a deduction is allowable under section 162 and 167, because such cash payment is not a working condition fringe, section 67(a) applies. The $1,000 payment is includible in A's gross income and subject to income and employment tax withholding. If, however, the conditions of paragraph (a)(1)(v) of this section are satisfied with respect to the payment, then the amount of A's working condition fringe is determined without regard to section 67(a). The $1,000 payment is excludible from A's gross income and not subject to income and employment tax reporting and withholding.

(2) *Trade or business of the employee*—(i) *General*. If the hypothetical payment for a property or service would be allowable as a deduction with respect to a trade or business of an employee other than the employee's trade or business of being an employee of the employer, it cannot be taken into account for purposes of determining the amount, if any, of the working condition fringe.

(ii) *Examples*. The rule of paragraph (a)(2)(i) of this section may be illustrated by the following examples:

Example 1. Assume that, unrelated to company X's trade or business and unrelated to employee A's trade or business of being an employee of company X, A is a member of the board of directors of company Y. Assume further that company X provides A with air transportation to a company Y board of director's meeting. A may not exclude from gross income the value of the air transportation to the meeting as a working condition fringe. A may, however, deduct such amount under section 162 if the section 162 requirements are satisfied. The result would be the same whether the air transportation was provided in the form of a flight on a commercial airline or a seat on a company X airplane.

Example 2. Assume the same facts as in example (1) except that A serves on the board of directors of company Z and company Z regularly purchases a significant amount of goods and services from company X. Because of the relationship between Company Z and A's employer, A's membership on Company Z's board of directors is related to A's trade or business of being an employee of Company X. Thus, A may exclude from gross income the value of air transportation to board meetings as a working condition fringe.

Example 3. Assume the same facts as in example (1) except that A serves on the board of directors of a charitable organization. Assume further that the service by A on the charity's board is substantially related to company X's trade or business. In this case, A may exclude from gross income the value of air transportation to board meetings as a working condition fringe.

Example 4. Assume the same facts as in example (3) except that company X also provides A with the use of a company X conference room which A uses for monthly meetings relating to the charitable organization. Also assume that A uses company X's copy machine and word processor each month in connection with functions of the charitable organization. Because of the substantial business benefit that company X derives from A's service on the board of the charity, A may exclude as a working condition fringe the value of the use of company X property in connection with the charitable organization.

(b) *Vehicle allocation rules*—(1) *In general*—(i) *General rule.* In general, with respect to an employer-provided vehicle, the amount excludable as a working condition fringe is the amount that would be allowable as a deduction under section 162 or 167 if the employee paid for the availability of the vehicle. For example, assume that the value of the availability of an employer-provided vehicle for a full year is $2,000, without regard to any working condition fringe (*i.e.*, assuming all personal use). Assume Further that the employee drives the vehicle 6,000 miles for his employer's business and 2,000 miles for reasons other than the employer's business. In this situation, the value of the working condition fringe is $2,000 multiplied by a fraction, the numerator of which is the business-use mileage (6,000 miles) and the denominator of which is the total mileage (8,000 miles). Thus, the value of the working condition fringe is $1,500. The total amount includible in the employee's gross income on account of the availability of the vehicle is $500 ($2,000 − $1,500). For purposes of this section, the term ''vehicle'' has the meaning given the term in §1.61–21(e)(2). Generally, when determining the amount of an employee's working condition fringe, miles accumulated on the vehicle by all employees of the employer during the period in which the vehicle is available to the employee are considered. For example, assume that during the year in which the vehicle is available to the employee in the above example, other employees accumulate 2,000 additional miles on the vehicle (while the employee is not in the automobile). In this case, the value of the working condition fringe is $2,000 multiplied by a fraction, the numerator of which is the business-use mileage by the employee (including all mileage (business and personal) accumulated by other employees) (8,000 miles) and the denominator of which is the total mileage (including all mileage accumulated by other employees) (10,000 miles). Thus, the value of the working condition fringe is $1,600; the total amount includible in the employee's gross income on account of the availability of the vehicle is $400 ($2,000 − $1,600). If, however, substantially all of the use of the automobile by other employees in the employer's business is limited to a certain period, such as the last three months of the year, the miles driven by the other employees during that period would not be considered when determining the employee's working condition fringe exclusion. Similarly, miles driven by other employees are not considered if the pattern of use of the employer-provided automobiles is designed to reduce Federal taxes. For example, assume that an employer provides employees A and B each with the availability of an employer-provided automobile and that A uses the automobile assigned to him 80 percent for the employer's business and that B uses the automobile assigned to him 30 percent for the employer's business. If A and B alternate the use of their assigned automobiles each week in such a way as to achieve a reduction in federal taxes, then the employer may count only miles placed on the automobile by the employee to whom the automobile is assigned when determining each employee's working condition fringe.

(ii) *Use by an individual other than the employee.* For purposes of this section, if the availability of a vehicle to an individual would be taxed to an employee, use of the vehicle by the individual is included in references to use by the employee.

(iii) *Provision of an expensive vehicle for personal use.* If an employer provides an employee with a vehicle that an employee may use in part for personal purposes, there is no working condition fringe exclusion with respect to the personal miles driven by the employee; if the employee paid for the availability of the vehicle, he would not be entitled to deduct under section 162 or 167 any part of the payment attributable to personal miles. The amount of the inclusion is not affected by the fact that the employee would have chosen the availability of a less expensive vehicle. Moreover, the result is the same even though the decision to provide an expensive rather than an inexpensive vehicle is made by the employer for bona fide noncompensatory business reasons.

(iv) *Total value inclusion.* In lieu of excluding the value of a working condition fringe with respect of an automobile, an employer using the automobile lease valuation rule of §1.61–21(d) may include in an employee's gross income the entire Annual Lease Value of the automobile. Any deduction allowable to the employee under section 162 or 167 with respect to the automobile may be taken on the employee's income tax return. The total inclusion rule of this paragraph (b)(1)(iv) is not available if the employer is valuing the use or availability of a vehicle under general valuation principles or a special valuation rule other than the automobile lease valuation rule. See §§1.162–25 and 1.162–25T for rules relating to the employee's deduction.

(v) *Shared usage.* In calculating the working condition fringe benefit exclusion with respect to a vehicle provided for use by more than one employee, an employer shall compute the working condition fringe in a manner consistent with the allocation of the value of the vehicle under section 1.61–21(c)(2)(ii)(B).

(2) *Use of different employer-provided vehicles.* The working condition fringe exclusion must be applied on a vehicle-by-vehicle basis. For example, assume that automobile Y is available to employee D for 3 days in January and for 5 days in March, and automobile Z is available to D for a week in July. Assume further that the Daily Lease Value, as defined in §1.61–21(d)(4)(ii), of each automobile is $50. For the eight days of availability of Y in January and March, D uses Y 90 percent for business (by mileage). During July, D uses Z 60 percent for business (by mileage). The value of the working condition fringe is determined separately for each automobile. Therefore, the working condition fringe for Y is $360 ($400×.90) leaving an income inclusion of $40. The working condition fringe for Z is $210 ($350×.60), leaving an income inclusion of $140. If the value of the availability of an automobile is determined under the Annual Lease Value rule for one period and Daily Lease Value rule for a second period (see §1.61–21(d)), the working condition fringe exclusion must be calculated separately for the two periods.

(3) *Provision of a vehicle and chauffeur services*—(i) *General rule.* In general, with respect to the value of chauffeur services provided by an employer, the amount excludable as a working condition fringe is the amount that would be allowable as a deduction under section 162 and 167 if the employee paid for the chauffeur services. The working condition fringe with respect to a chauffeur is determined separately from the working condition fringe with respect to the vehicle. An employee may exclude from gross income the excess of the value of the chauffeur services over the value of the chauffeur services for personal purposes (such as commuting) as determined under §1.61–21(b)(5). See §1.61–21(b)(5) for additional rules and examples concerning the valuation of chauffeur services. See §1.132–5(m)(5) for rules relating to an exclusion from gross income for the value of bodyguard/chauffeur services. When determining whether miles placed on the vehicle are for the employer's business, miles placed on the vehicle by a chauffeur between the chauffeur's residence and the place at which the chauffeur picks up (or drops off) the employee are with respect to the employee (but not the chauffeur) considered to be miles placed on the vehicle for the employer's business and thus eligible for the working condition fringe exclusion.

Thus, because miles placed on the vehicle by a chauffeur between the chauffeur's residence and the place at which the chauffeur picks up (or drops off) the employee are not considered business miles with respect to the chauffeur, the value of the availability of the vehicle for commuting is includible in the gross income of the chauffeur. For general and special rules concerning the valuation of the use of employer-provided vehicles, see paragraphs (b) through (f) of §1.61–21.

(ii) *Examples.* The rules of paragraph (b)(3)(i) of this section are illustrated by the following examples:

Example 1. Assume that an employer makes available to an employee an automobile and a chauffeur. Assume further that the value of the chauffeur services determined in accordance with §1.61–21 is $30,000 and that the chauffeur spends 30 percent of each workday driving the employee for personal purposes. There may be excluded from the employee's income 70 percent of $30,000, or $21,000, leaving an income inclusion with respect to the chauffeur services of $9,000.

Example 2. Assume that the value of the availability of an employer-provided vehicle for a year is $4,850 and that the value of employer-provided chauffeur services with respect to the vehicle for the year is $20,000. Assume further that 40 percent of the miles placed on the vehicle are for the employer's business and that 60 percent are for other purposes. In addition, assume that the chauffeur spends 25 percent of each workday driving the employee for personal purposes (*i.e.*, 2 hours). The value of the chauffeur services includible in the employee's income is 25 percent of $20,000, or $5,000. The excess of $20,000 over $5,000 or $15,000 is excluded from the employee's income as a working condition fringe. The amount excludable as a working condition fringe with respect to the vehicle is 40 percent of $4,850, or $1,940 and the amount includible is $4,850 − $1,940, or $2,910.

(c) *Applicability of substantiation requirements of sections 162 and 274*(d)—(1) *In general.* The value of property or services provided to an employee may not be excluded from the employee's gross income as a working condition fringe, by either the employer or the employee, unless the applicable substantiation requirements of either section 274(d) or section 162 (whichever is applicable) and the regulations thereunder are satisfied. The substantiation requirements of section 274(d) apply to an employee even if the requirements of section 274 do not apply to the employee's employer for deduction purposes (such as when the employer is a tax-exempt organization or a governmental unit).

(2) *Section 274(d) requirements.* The substantiation requirements of section 274(d) are satisfied by ''adequate records or sufficient evidence corroborating the [employee's] own statement''. Therefore, such records or evidence provided by the employee, and relied upon by the employer to the extent permitted by the regulations promulgated under section 274(d), will be sufficient to substantiate a working condition fringe exclusion.

(d) *Safe harbor substantiation rules*—(1) *In general.* Section 1.274–6T provides that the substantiation requirements of section 274(d) and the regulations thereunder may be satisfied, in certain circumstances, by using one or more of the safe harbor rules prescribed in §1.274–6T. If the employer uses one of the safe harbor rules prescribed in §1.274–6T during a period with respect to a vehicle (as defined in §1.61–21(e)(2)), that rule must be used by the employer to substantiate a working condition fringe exclusion with respect to that vehicle during the period. An employer that is exempt from Federal income tax may still use one of the safe harbor rules (if the requirements of that section are otherwise met during a period) to substantiate a working condition fringe exclusion with respect to a vehicle during the period. If the employer uses one of the methods prescribed in §1.274–6T during a period with respect to an employer-provided vehicle, that method may be used by an employee to substantiate a working condition fringe exclusion with respect to the same vehicle during the period, as long as the employee includes in gross income the amount allocated to the employee pursuant to §1.274–6T and this section. (See §1.61–21(c)(2) for other rules concerning when an employee must include in income the amount determined by the employer.) If, however, the employer uses the safe harbor rule prescribed in §1.274–6T(a)(2) or (3) and the employee without the employer's knowledge uses the vehicle for purposes other than de minimis personal use (in the case of the rule prescribed in §1.274–6T(a)(2)), or for purposes other than de minimis personal use and commuting (in the case of the rule prescribed in §1.274–6T(a)(3)), then the employees must include an additional amount in income for the unauthorized use of the vehicle.

(2) *Period for use of safe harbor rules.* The rules prescribed in this paragraph (d) assume that the safe harbor rules prescribed in §1.274–6T are used for a one-year period. Accordingly, references to the value of the availability of a vehicle, amounts excluded as a working condition fringe, etc., are based on a one-year period. If the safe harbor rules prescribed in §1.274–6T are used for a period of less than a year, the amounts referred to in the previous sentence must be adjusted accordingly. For purposes of this section, the term ''personal use'' has the same meaning as prescribed in §1.274–6T (e)(5).

(e) *Safe harbor substantiation rule for vehicles not used for personal purposes.* For a vehicle described in §1.274–6T(a)(2) (relating to certain vehicles not used for personal purposes), the working condition fringe exclusion is equal to the value of the availability of the vehicle if the employer uses the method prescribed in §1.274–6T(a)(2).

(f) *Safe harbor substantiation rule for vehicles not available to employees for personal use other than commuting.* For a vehicle described in §1.274–6T(a)(3) (relating to certain vehicles not used for personal purposes other than commuting), the working condition fringe exclusion is equal to the value of the availability of the vehicle for purposes other than commuting if the employer uses the method prescribed in §1.274–6T(a)(3). This rule applies only if the special rule for valuing commuting use, as prescribed in §1.61–21(f), is used and the amount determined under the special rule is either included in the employee's income or reimbursed by the employee.

(g) *Safe harbor substantiation rule for vehicles used in connection with the business of farming that are available to employees for personal use*—(1) *In general.* For a vehicle described in §1.274–6T(b) (relating to certain vehicles used in connection with the business of farming), the working condition fringe exclusion is calculated by multiplying the value of the availability of the vehicle by 75 percent.

(2) *Vehicles available to more than one individual.* If the vehicle is available to more than one individual, the employer must allocate the gross income inclusion attributable to the vehicle (25 percent of the value of the availability of the vehicle) among the employees (and other individuals whose use would not be attributed to an employee) to whom the vehicle was available. This allocation must be done in a reasonable manner to reflect the personal use of the vehicle by the individuals. An amount that would be allocated to a sole proprietor reduces the amounts that may be allocated to employees but is otherwise to be disregarded for purposes of this paragraph (g). For purposes of this paragraph (g), the value of the availability of a vehicle may be calculated as if the vehicle were available to only one employee continuously and without regard to any working condition fringe exclusion.

(3) *Examples.* The following examples illustrate a reasonable allocation of gross income with respect to an employer-provided vehicle between two employees:

Example 1. Assume that two farm employees share the use of a vehicle that for a calendar year is regularly used directly in connection with the business of farming and qualifies for use of the rule in §1.274–6T(b). Employee A uses the vehicle in the morning directly in connection with the business of farming and employee B uses the vehicle in the afternoon directly in connection with the business of farming. Assume further that employee B takes the vehicle home in the evenings and on weekends. The employer should allocate all the income attributable to the availability of the vehicle to employee B.

Example 2. Assume that for a calendar year, farm employees C and D share the use of a vehicle that is regularly used directly in connection with the business of farming and qualifies for use of the rule in §1.2.4–6T(b). Assume further that the employees alternate taking the vehicle home in the evening and alternate the availability of the vehicle for personal purposes on weekends. The employer should allocate the income attributable to the availability of the vehicle for personal use (25 percent of the value of the availability of the vehicle) equally between the two employees.

Example 3. Assume the same facts as in example (2) except that C is the sole proprietor of the farm. Based on these facts, C should allocate the same amount of income to D as was allocated to D in example (2). No other income attributable to the availability of the vehicle for personal use should be allocated.

(h) *Qualified nonpersonal use vehicles*—(1) *In general.* Except as provided in paragraph (h)(2) of this section, 100 percent of the value of the use of a qualified nonpersonal use vehicle (as described in §1.274–5(k)) is excluded from gross income as a working condition fringe, provided that, in the case of a vehicle described in §1.274–5(k)(3) through (8), the use of the vehicle conforms to the requirements of paragraphs (k)(3) through (8).

(2) *Shared usage of qualified nonpersonal use vehicles.* In general, a working condition fringe under this paragraph (h) is available to the driver and all passengers of a qualified nonpersonal use vehicle. However, a working condition fringe under this paragraph (h) is available only with respect to the driver and not with respect to any passengers of a qualified nonpersonal use vehicle described in §1.274–5(k)(2)(ii)(L) or (P).

(i) [Reserved]

(j) *Application of section 280F.* In determining the amount, if any, of an employee's working condition fringe, section 280F and the regulations thereunder do not apply. For example, assume that an employee has available for a calendar year an employer-provided automobile with a fair market value of $28,000. Assume further that the special rule provided in §1.61–21(d) is used yielding an Annual Lease Value, as defined in §1.61–21(d), of $7,750, and that all of the employee's use of the automobile is for the employer's business. The employee would be entitled to exclude as a working condition fringe the entire Annual Lease Value, despite the fact that if the employee paid for the availability of the automobile, an income inclusion would be required under §1.280F–6(d)(1). This paragraph (j) does not affect the applicability of section 280F to the employer with respect to such employer-provided automobile, nor does it affect the applicability of section 274 to either the employer or the employee. For rules concerning substantiation of an employee's working condition fringe, see paragraph (c) of this section.

(k) *Aircraft allocation rule.* In general, with respect to a flight on an employer-provided aircraft, the amount excludable as a working condition fringe is the amount that would be allowable as a deduction under section 162 or 167 if the employee paid for the flight on the aircraft. For example, if employee P and P's spouse fly on P's employer's airplane primarily for business reasons of P's employer so that P could deduct the expenses relating to the trip to the extent of P's payments, the value of the flights is excludable from gross income as a working condition fringe. However, if P's children accompany P on the trip primarily for personal reasons, the value of the flights by P's children are includible in P's gross income. See §1.61–21 (g) for special rules for valuing personal flights on employer-provided aircraft.

(l) [Reserved]

(m) *Employer-provided transportation for security concerns*—(1) *In general.* The amount of a working condition fringe exclusion with respect to employer-provided transportation is the amount that would be allowable as a deduction under section 162 or 167 if the employee paid for the transportation. Generally, if an employee pays for transportation taken for primarily personal purposes, the employee may not deduct any part of the amount paid. Thus, the employee may not generally exclude the value of employer-provided transportation as a working condition fringe if such transportation is primarily personal. If, however, for bona fide business-oriented security concerns, the employee purchases transportation that provides him or her with additional security, the employee may generally deduct the excess of the amount actually paid for the transportation over the amount the employee would have paid for the same mode of transportation absent the bona fide business-oriented security concerns. This is the case whether or not the employee would have taken the same mode of transportation absent the bona fide business-oriented security concerns. With respect to a vehicle, the phrase "the same mode of transportation" means use of the same vehicle without the additional security aspects, such as bulletproof glass. With respect to air transportation, the phrase ''the same mode of transportation'' means comparable air transportation. These same rules apply to the determination of an employee's working condition fringe exclusion. For example, if an employer provides an employee with a vehicle for commuting and, because of bona fide business-oriented security concerns, the vehicle is specially designed for security, then the employee may exclude from gross income the value of the special security design as a working condition fringe. The employee may not exclude the value of the commuting from income as a working condition fringe because commuting is a nondeductible personal expense. However, if an independent security study meeting the requirements of paragraph (m)(2)(v) of this section has been performed with respect to a government employee, the government employee may exclude the value of the personal use (other than commuting) of the employer-provided vehicle that the security study determines to be reasonable and necessary for local transportation. Similarly, if an employee travels on a personal trip in an employer-provided aircraft for bona fide business-oriented security concerns, the employee may exclude the excess, if any, of the value of the flight over the amount the employee would have paid for the same mode of transportation, but for the bona fide business-oriented security concerns. Because personal travel is a nondeductible expense, the employee may not exclude the total value of the trip as a working condition fringe.

(2) *Demonstration of bona fide business-oriented security concerns*—(i) *In general.* For purposes of this paragraph (m), a bona fide business-oriented security concern exists only if the facts and circumstances establish a specific basis for concern regarding the safety of the employee. A generalized concern for an employee's safety is not a bona fide business-oriented security concern. Once a bona fide business-oriented security concern is determined to exist with respect to a particular employee, the employer must periodically evaluate the situation for purposes of determining whether the bona fide business-oriented security concern still exists. Example of factors indicating a specific basis for concern regarding the safety of an employee are—

(A) A threat of death or kidnapping of, or serious bodily harm to, the employee or a similarly situated employee because of either employee's status as an employee of the employer; or

(B) A recent history of violent terrorist activity (such as bombings) in the geographic area in which the transportation is provided, unless that activity is focused on a group of individuals which does not include the employee (or a similarly situated employee of an employer), or occurs to a significant degree only in a location within the geographic area where the employee does not travel.

(ii) *Establishment of overall security program.* Notwithstanding anything in paragraph (m)(2)(i) of this section to the contrary, no bona fide business-oriented security concern will be deemed to exist unless the employee's employer establishes to the satisfaction of the Commissioner that an overall security program has been provided with respect to the employee involved. An overall security program is deemed to exist if the requirements of paragraph (m)(2)(iv) of this section are satisfied (relating to an independent security study).

(iii) *Overall security program*—(A) *Defined.* An overall security program is one in which security is provided to protect the employee on a 24-hour basis. The employee must be protected while at the employee's residence, while commuting to and from the employee's workplace, and while at the employee's workplace. In addition, the employee must be protected while traveling both at home and away from home, whether for business or personal purposes. An overall security program must include the provision of a bodyguard/chauffeur who is trained in evasive driving techniques; an automobile specially equipped for security; guards, metal detectors, alarms, or similar methods of controlling access to the employee's workplace and residence; and, in appropriate cases, flights on the employer's aircraft for business and personal reasons.

(B) *Application.* There is no overall security program when, for example, security is provided at the employee's workplace but not at the employee's residence. In addition, the fact that an employer requires an employee to travel on the employer's aircraft, or in an employer-provided vehicle that contains special security features, does not alone constitute an overall security program. The preceding sentence applies regardless of the existence of a corporate or other resolution requiring the employee to travel in the employer's aircraft or vehicle for personal as well as business reasons.

(iv) *Effect of an independent security study.* An overall security program with respect to an employee is deemed to exist if the conditions of this paragraph (m)(2)(iv) are satisfied:

(A) A security study is performed with respect to the employer and the employee (or a similarly situated employee of the employer) by an independent security consultant;

(B) The security study is based on an objective assessment of all facts and circumstances;

(C) The recommendation of the security study is that an overall security program (as defined in paragraph (m)(2)(iii) of this section) is not necessary and the recommendation is reasonable under the circumstances; and

(D) The employer applies the specific security recommendations contained in the security study to the employee on a consistent basis.

The value of transportation-related security provided pursuant to a security study that meets the requirements of this paragraph (m)(2)(iv) may be excluded from income if the security study conclusions are reasonable and, but for the bona fide business-oriented security concerns, the employee would not have had such security. No exclusion from income applies to security provided by the employer that is not recommended in the security study. Security study conclusions may be reasonable even if, for example, it is recommended that security be limited to certain geographic areas, as in the case in which air travel security is provided only in certain foreign countries.

(v) *Independent security study with respect to government employees.* For purposes of establishing the existence of an overall security program under paragraph (m)(2)(ii) of this section with respect to a particular government employee, a security study conducted by the government employer (including an agency or instrumentality thereof) will be treated as a security study pursuant to paragraph (m)(2)(iv) of this section if, in lieu of the conditions of paragraphs (m)(2)(iv)(A) through (D) of this section, the following conditions are satisfied:

(A) The security study is conducted by a person expressly designated by the government employer as having the responsibility and independent authority to determine both the need for employer-provided security and the appropriate protective services in response to that determination;

(B) The security study is conducted in accordance with written internal procedures that require an independent and objective assessment of the facts and circumstances, such as the nature of the threat to the employee, the appropriate security response to that threat, an estimate of the length of time protective services will be necessary, and the extent to which employer-provided transportation may be necessary during the period of protection;

(C) With respect to employer-provided transportation, the security study evaluates the extent to which personal use, including commuting, by the employee and the employee's spouse and dependents may be necessary during the period of protection and makes a recommendation as to what would be considered reasonable personal use during that period; and

(D) The employer applies the specific security recommendations contained in the study to the employee on a consistent basis.

(3) *Application of security rules to spouses and dependents*—(i) *In general.* If a bona fide business-oriented security concern exists with respect to an employee (because, for example, threats are made on the life of an employee),

the bona fide business-oriented security concern is deemed to exist with respect to the employee's spouse and dependents to the extent provided in this paragraph (m)(3).

(ii) *Certain transportation.* If a working condition fringe exclusion is available under this paragraph (m) for transportation in a vehicle or aircraft provided for a bona fide business-oriented security concern with respect to an employee, the requirements of this paragraph (m) are deemed to be satisfied with respect to transportation in the same vehicle or aircraft provided at the same time to the employee's spouse and dependent children.

(iii) *Other.* Except as provided in paragraph (m)(3)(ii) of this section, a bona fide business oriented security concern is deemed to exist for the spouse and dependent children of the employer only if the requirements of paragraph (m)(2) (iii) or (iv) of this section are applied independently to such spouse and dependent children.

(iv) *Spouses and dependents of government employees.* The security rules of this paragraph (m)(3) apply to the spouse and dependents of a government employee. However, the value of local vehicle transportation provided to the government employee's spouse and dependents for personal purposes, other than commuting, during the period that a bona fide business-oriented security concern exists with respect to the government employee will not be included in the government employee's gross income if the personal use is determined to be reasonable and necessary by the security study described in paragraph (m)(2)(v) of this section.

(4) *Working condition safe harbor for travel on employer-provided aircraft.* Under the safe harbor rule of this paragraph (m)(4), if, for a bona fide business-oriented security concern, the employer requires that an employee travel on an employer-provided aircraft for a personal trip, the employer and the employee may exclude from the employee's gross income, as a working condition fringe, the excess value of the aircraft trip over the safe harbor airfare without having to show what method of transportation the employee would have flown but for the bona fide business-oriented security concern. For purposes of the safe harbor rule of this paragraph (m)(4), the value of the safe harbor airfare is determined under the non-commercial flight valuation rule of §1.61–21(g) (regardless of whether the employer or employee elects to use such valuation rule) by multiplying an aircraft multiple of 200-percent by the applicable cents-per-mile rates and the number of miles in the flight and then adding the applicable terminal charge. The value of the safe harbor airfare determined under this paragraph (m)(4) must be included in the employee's income (to the extent not reimbursed by the employee) regardless of whether the employee or the employer uses the special valuation rule of §1.61–21(g). The excess of the value of the aircraft trip over this amount may be excluded from gross income as a working condition fringe. If, for a bona fide business-oriented security concern, the employer requires that an employee's spouse and dependents travel on an employer-provided aircraft for a personal trip, the special rule of this paragraph (m)(4) is available to exclude the excess value of the aircraft trips over the safe harbor airfares.

(5) *Bodyguard/chauffeur provided for a bona fide business-oriented security concern.* If an employer provides an employee with vehicle transportation and a bodyguard/chauffeur for a bona fide business-oriented security concern, and but for the bona fide business-oriented security concern the employee would not have had a bodyguard or a chauffeur, then the entire value of the services of the bodyguard/chauffeur is excludable from gross income as a working condition fringe. For purposes of this section, a bodyguard/chauffeur must be trained in evasive driving techniques. An individual who performs services as a driver for an employee is not a bodyguard/chauffeur if the individual is not trained in evasive driving techniques. Thus, no part of the value of the services of such an individual is excludable from gross income under this paragraph (m)(5). (See paragraph (b)(3) of this section for rules relating to the determination of the working condition fringe exclusion for chauffeur services.)

(6) *Special valuation rule for government employees.* If transportation is provided to a government employee for commuting during the period that a bona fide business-oriented security concern under § 1.132–5(m) exists, the commuting use may be valued by reference to the values set forth in § 1.61–21(e)(1)(i) or (f)(3) (vehicle cents-per-mile or commuting valuation of $1.50 per one-way commute, respectively) without regard to the additional requirements contained in § 1.61–21 (e) or (f) and is deemed to have met the requirements of § 1.61–21(c).

(7) *Government employer and employee defined.* For purposes of this paragraph (m), ''government employer'' includes any Federal, State, or local government unit, and any agency or instrumentality thereof. A ''government employee'' is any individual who is employed by the government employer.

(8) *Examples.* The provisions of this paragraph (m) may be illustrated by the following examples:

Example 1. Assume that in response to several death threats on the life of A, the president of X a multinational company, X establishes an overall security program for A, including an alarm system at A's home and guards at A's workplace, the use of a vehicle that is specially equipped with alarms, bulletproof glass, and armor plating, and a bodyguard/chauffeur. Assume further that A is driven for both personal and business reasons in the vehicle. Also, assume that but for the bona fide business-oriented security concerns, no part of the overall security program would have been provided to A. With respect to the transportation provided for security reasons, A may exclude as a working condition fringe the value of the special security features of the vehicle and the value attributable to the bodyguard/chauffeur. Thus, if the value of the specially equipped vehicle is $40,000, and the value of the vehicle without the security features is $25,000, A may determine A's inclusion in income attributable to the vehicle as if the vehicle were worth $25,000. A must include in income the value of the availability of the vehicle for personal use.

Example 2. Assume that B is the chief executive officer of Y, a multinational corporation. Assume further that there have been kidnapping attempts and other terrorist activities in the foreign countries in which B performs services and that at least some of such activities have been directed against B or similarly situated employees. In response to these activities, Y provides B with an overall security program, including an alarm system at B's home and bodyguards at B's workplace, a bodyguard/chauffeur, and a vehicle specially designed for security during B's overseas travels. In addition, assume that Y requires B to travel in Y's airplane for business and personal trips taken to, from, and within these foreign countries. Also, assume that but for bona fide business-oriented security concerns, no part of the overall security program would have been provided to B. B may exclude as a working condition fringe the value of the special security features of the automobile and the value attributable to the bodyguards and the bodyguard/chauffeur. B may also exclude the excess, if any, of the value of the flights over the amount A would have paid for the same mode of transportation but for the security concerns. As an alternative to the preceding sentence, B may use the working condition safe harbor described in paragraph (m)(4) of this section and exclude as a working condition fringe the excess, if any, of the value of personal flights in the Y airplane over the safe harbor airfare determined under the method described in paragraph (m)(4) of this section. If this alternative is used, B must include in income the value of the availability of the vehicle for personal use and the value of the safe harbor.

Example 3. Assume the same facts as in example (2) except that Y also requires B to travel in Y's airplane within the United States, and provides B with a chauffeur-driven limousine for business and personal travel in the United States. Assume further that Y also requires B's spouse and dependents to travel in Y's airplane for personal flights in the United States. If no bona fide business-oriented security concern exists with respect to travel in the United States, B may not exclude from income any portion of the value of the availability of the chauffeur or limousine for personal use in the United States. Thus, B must include in income the value of the availability of the vehicle and chauffeur for personal use. In addition, B may not exclude any portion of the value attributable to personal flights by B or B's spouse and dependents on Y's airplane. Thus, B must include in income the value attributable to the personal use of Y's airplane. See § 1.61–21 for rules relating to the valuation of an employer-provided vehicle and chauffeur, and personal flights on employer-provided airplanes.

Example 4. Assume that company Z retains an independent security consultant to perform a security study with respect to its chief executive officer. Assume further that, based on an objective assessment of the facts and circumstances, the security consultant reasonably recommends that 24-hour protection is not necessary but that the employee be provided security at his workplace and for ground transportation, but not for air transportation. If company Z follows the recommendations on a consistent basis, an overall security program will be deemed to exist with respect to the workplace and ground transportation security only.

Example 5. Assume the same facts as in example (4) except that company Z only provides the employee security while commuting to and from work, but not for any other ground transportation. Because the recommendations of the independent security study are not applied on a consistent basis, an overall security program will not be deemed to exist. Thus, the value of commuting to and from work is not excludable from income. However, the value of a bodyguard with professional security training who does not provide chauffeur or other personal services to the employee or any member of the employee's family may be excludable as a working condition fringe if such expense would be otherwise allowable as a deduction by the employee under section 162 or 167.

Example 6. J is a United States District Judge. At the beginning of a 3-month criminal trial in J's court, a member of J's family receives death threats. M, the division (within government agency W) responsible for evaluating threats and providing protective services to the Federal judiciary, directs its threat analysis unit to conduct a security study with respect to J and J's family. The study is conducted pursuant to internal written procedures that require an independent and objective assessment of any threats to members of the Federal judiciary and their families, a statement of the requisite security response, if any, to a particular threat (including the form of transportation to be furnished to the employee as part of the security program), and a description of the circumstances under which local transportation for the employee and the employee's spouse and dependents may be necessary for personal reasons during the time protective services are provided. M's study concludes that a bona fide business-oriented security concern exists with respect to J and J's family and determines that 24-hour protection of J and J's family is not necessary, but that protection is necessary during the course of the criminal trial whenever J or J's family is away from home. Consistent with that recommendation, J is transported every day in a government vehicle for both personal and business reasons and is accompanied by two bodyguard/chauffeurs who have been trained in evasive driving techniques. In addition, J's spouse is driven to and from work and J's children are driven to and from school and occasional school activities. Shortly after the trial is concluded, M's threat analysis unit determines that J and J's family no longer need special protection because the danger posed by the threat no longer exists and, accordingly, vehicle transportation is no longer provided. Because the security study conducted by M complies with the conditions of §1.132–5(m)(2)(v), M has satisfied the requirement for an independent security study and an overall security program with respect to J is deemed to exist. Thus, with respect to the transportation provided for security concerns, J may exclude as a working condition fringe the value of any special security features of the government vehicle and the value attributable to the two bodyguard/chauffeurs. See *Example (1)* of this paragraph (m)(8). The value of vehicle transportation provided to J and J's family for personal reasons, other than commuting, may also be excluded during the period of protection, because its provision was consistent with the recommendation of the security study.

Example 7. Assume the same facts as in *Example (6)* and that J's one-way commute between home and work is 10 miles. Under paragraph (m)(6) of this section, the Federal Government may value transportation provided to J for commuting purposes pursuant to the value set forth in either the vehicle cents-per-mile rule of §1.61–21(e) or the commuting valuation rule of §1.61–21(f). Because the commuting valuation rule yields the least amount of taxable income to J under the circumstances, W values the transportation provided to J for commuting at $1.50 per one-way commute, even though J is a control employee within the meaning of §1.61–21(f)(6).

(n) *Product testing*—(1) *In general.* The fair market value of the use of consumer goods, which are manufactured for sale to nonemployees, for product testing and evaluation by an employee of the manufacturer outside the employer's workplace, is excludible from gross income as a working condition fringe if—

(i) Consumer testing and evaluation of the product is an ordinary and necessary business expense of the employer;

(ii) Business reasons necessitate that the testing and evaluation of the product be performed off the employer's business premises by employees (*i.e.*, the testing and evaluation cannot be carried out adequately in the employer's office or in laboratory testing facilities);

(iii) The product is furnished to the employee for purposes of testing and evaluation;

(iv) The product is made available to the employee for no longer than necessary to test and evaluate its performance and (to the extent not exhausted) must be returned to the employer at completion of the testing and evaluation period;

(v) The employer imposes limits on the employee's use of the product that significantly reduce the value of any personal benefit to the employee; and

(vi) The employee must submit detailed reports to the employer on the testing and evaluation. The length of the testing and evaluation period must be reasonable in relation to the product being tested.

(2) *Employer-imposed limits.* The requirement of paragraph (n)(1)(v) of this section is satisfied if—

(i) The employer places limits on the employee's ability to select among different models or varieties of the consumer product that is furnished for testing and evaluation purposes; and

(ii) The employer generally prohibits use of the product by persons other than the employee and, in appropriate cases, requires the employee, to purchase or lease at the employee's own expense the same type of product as that being tested (so that personal use by the employee's family will be limited). In addition, any charge by the employer for the personal use by an employee of a product being tested shall be taken into account in determining whether the requirement of paragraph (n)(1)(v) of this section is satisfied.

(3) *Discriminating classifications.* If an employer furnishes products under a testing and evaluation program only, or presumably, to certain classes of employees (such as highly compensated employees, as defined in §1.132–8(g)), this fact may be relevant when determining whether the products are furnished for testing and evaluation purposes or for compensation purposes, unless the employer can show a business reason for the classification of employees to whom the products are furnished (e.g., that automobiles are furnished for testing and evaluation by an automobile manufacturer to its design engineers and supervisory mechanics).

(4) *Factors that negate the existence of a product testing program.* If an employer fails to tabulate and examine the results of the detailed reports submitted by employees within a reasonable period of time after expiration of the testing period, the program will not be considered a product testing program for purposes of the exclusion of this paragraph (n). Existence of one or more of the following factors may also establish that the program is not a bona fide product testing program for purposes of the exclusion of this paragraph (n):

(i) The program is in essence a leasing program under which employees lease the consumer goods from the employer for a fee;

(ii) The nature of the product and other considerations are insufficient to justify the testing program; or

(iii) The expense of the program outweighs the benefits to be gained from testing and evaluation.

(5) *Failure to meet the requirements of this paragraph (n).* The fair market value of the use of property for product testing and evaluation by an employee outside the employee's workplace, under a product testing program that does not meet all of the requirements of this paragraph (n), is not excludable from gross income as a working condition fringe under this paragraph (n).

(6) *Example.* The rules of this paragraph (n) may be illustrated by the following example:

Example. Assume that an employer that manufactures automobiles establishes a product testing program under which 50 of its 5,000 employees test and evaluate the automobiles for 30 days. Assume further that the 50 employees represent a fair cross-section of all of the employees of the employer, such employees submit detailed reports to the employer on the testing and evaluation, the employer tabulates and examines the test results within a reasonable time, and the use of the automobiles is restricted to the employees. If the employer imposes the limits described in paragraph (n)(2) of this section, the employees may exclude the value of the use of the automobile during the testing and evaluation period.

(o) *Qualified automobile demonstration use*—(1) *In general.* The value of qualified automobile demonstration use is excludable from gross income as a working condition fringe. ''Qualified automobile demonstration use'' is any use of a demonstration automobile by a full-time automobile salesman in the sales area in which the automobile dealer's sales office is located if—

(i) Such use is provided primarily to facilitate the salesman's performance of services for the employer; and

(ii) There are substantial restrictions on the personal use of the automobile by the salesman.

(2) *Full-time automobile salesman*—(i) *Defined.* The term ''full-time automobile salesman'' means any individual who—

(A) Is employed by an automobile dealer;

(B) Customarily spends at least half of a normal business day performing the functions of a floor salesperson or sales manager;

(C) Directly engages in substantial promotion and negotiation of sales to customers;

(D) Customarily works a number of hours considered full-time in the industry (but at a rate not less than 1,000 hours per year); and

(E) Derives at least 25 percent of his or her gross income from the automobile dealership directly as a result of the activities described in paragraphs (o)(2)(i) (B) and (C) of this section.

For purposes of paragraph (o)(2)(i) (E) of this section, income is not considered to be derived directly as a result of activities described in paragraphs (o)(2)(i) (B) and (C) of this section to the extent that the income is attributable to an individual's ownership interest in the dealership. An individual will not be considered to engage in direct sales activities if the individual's sales-related activities are substantially limited to review of sales price offers from customers. An individual, such as the general manager of an automobile dealership, who receives a sales commission on the sale of an automobile is not a full-time automobile salesman unless the requirements of this paragraph (o)(2)(i) are met. The exclusion provided in this paragraph (o) is available to an individual who meets the definition of this paragraph (o)(2)(i) whether the individual performs services in addition to those described in this paragraph (o)(2)(i). For example, an individual who is an owner of the automobile dealership but who otherwise meets the requirements of this paragraph (o)(2)(i) may exclude from gross income the value of qualified automobile demonstration use. However, the exclusion of this paragraph (o) is not available to owners of large automobile dealerships who do not customarily engage in significant sales activities.

(ii) *Use by an individual other than a full-time automobile salesman.* Personal use of a demonstration automobile by an individual other than a full-time automobile salesman is not treated as a working condition fringe. Therefore, any personal use, including commuting use, of a demonstration automobile by a part-time salesman, automobile mechanic, or other individual who is not a full-time automobile salesman is not ''qualified automobile demonstration use'' and thus not excludable from gross income. This is the case whether or not the personal use is within the sales area (as defined in paragraph (o)(5) of this section).

(3) *Demonstration automobile.* The exclusion provided in this paragraph (o) applies only to qualified use of a demonstration automobile. A demonstration automobile is an automobile that is—

(i) Currently in the inventory of the automobile dealership; and

(ii) Available for test drives by customers during the normal business hours of the employee.

(4) *Substantial restrictions on personal use.* Substantial restrictions on the personal use of a demonstration automobile exist when all of the following conditions are satisfied:

(i) Use by individuals other than the full-time automobile salesmen (e.g., the salesman's family) is prohibited;

(ii) Use for personal vacation trips is prohibited;

(iii) The storage of personal possessions in the automobile is prohibited; and

(iv) The total use by mileage of the automobile by the salesman outside the salesman's normal working hours is limited.

(5) *Sales area*—(i) *In general.* Qualified automobile demonstration use consists of use in the sales area in which the

automobile dealer's sales office is located. The sales area is the geographic area surrounding the automobile dealer's sales office from which the office regularly derives customers.

(ii) *Sales area safe harbor.* With respect to a particular full-time salesman, the automobile dealer's sales area may be treated as the area within a radius of the larger of—

(A) 75 miles or

(B) The one-way commuting distance (in miles) of the particular salesman from the dealer's sales office.

(6) *Applicability of substantiation requirements of sections 162 and 274(d).* Notwithstanding anything in this section to the contrary, the value of the use of a demonstration automobile may not be excluded from gross income as a working condition fringe, by either the employer or the employee, unless, with respect to the restrictions of paragraph (o)(4) of this section, the substantiation requirements of section 274(d) and the regulations thereunder are satisfied. See §1.132–5(c) for general and safe harbor rules relating to the applicability of the substantiation requirements of section 274(d).

(7) *Special valuation rules.* See §1.61–21(d)(6)(ii) for special rules that may be used to value the availability of demonstration automobiles.

(p) *Parking*—(1) *In general.* The value of parking provided to an employee on or near the business premises of the employer is excludable from gross income as a working condition fringe under the special rule of this paragraph (p). If the rules of this paragraph (p) are satisfied, the value of parking is excludable from gross income whether the amount paid by the employee for parking would be deductible under section 162. The working condition fringe exclusion applies whether the employer owns or rents the parking facility or parking space.

(2) *Reimbursement of parking expenses.* A reimbursement to the employee of the ordinary and necessary expenses of renting a parking space on or near the business premises of the employer is excludable from gross income as a working condition fringe, if, but for the parking expense, the employee would not have been entitled to receive and retain such amount from the employer. If, however an employee is entitled to retain a general transportation allowance or a similar benefit whether or not the employee has parking expenses, no portion of that allowance is excludable from gross income under this paragraph (p) even if it is used for parking expenses.

(3) *Parking on residential property.* With respect to an employee, this paragraph (p) does not apply to any parking facility or space located on property owned or leased by the employee for residential purposes.

(4) *Dates of applicability.* This paragraph (p) applies to benefits provided before January 1, 1993. For benefits provided after December 31, 1992, see §1.132–9.

(q) *Nonapplicability of nondiscrimination rules.* Except to the extent provided in paragraph (n)(3) of this section (relating to discriminating classifications of a product testing program), the nondiscrimination rules of section 132 (h)(1) and §1.132–8 do not apply in determining the amount, if any, of a working condition fringe.

(r) *Volunteers*—(1) *In general.* Solely for purposes of section 132(d) and paragraph (a)(1) of this section, a bona fide volunteer (including a director or officer) who performs services for an organization exempt from tax under section 501(a), or for a government employer (as defined in paragraph (m)(7) of this section), is deemed to have a profit motive under section 162.

(2) *Limit on application of this paragraph.* This paragraph (r) shall not be used to support treatment of the bona fide volunteer as having a profit motive for purposes of any provision of the Internal Revenue Code of 1986 (Code) other than section 132(d). Nothing in this paragraph (r) shall be interpreted as determining the employment status of a bona fide volunteer for purposes of any section of the Code other than section 132(d).

(3) *Definitions*—(i) *Bona fide volunteer.* For purposes of this paragraph (r), an individual is considered a ''bona fide volunteer'' if the individual does not have a profit motive for purposes of section 162. For example, an individual is considered a ''bona fide volunteer'' if the total value of the benefits provided with respect to the volunteer services

is substantially less than the total value of the volunteer services the individual provides to an exempt organization or government employer.

(ii) *Liability insurance coverage for a bona fide volunteer*. For purposes of this paragraph (r), the receipt of liability insurance coverage by a volunteer, or an exempt organization or government employer's undertaking to indemnify the volunteer for liability, does not by itself confer a profit motive on the volunteer, provided the insurance coverage or indemnification relates to acts performed by the volunteer in the discharge of duties, or the performance of services, on behalf of the exempt organization or government employer.

(4) *Example*. The following example illustrates the provisions of paragraph (r) of this section.

Example. A is a manager and full-time employee of P, a tax-exempt organization described in section 501(c)(3). B is a member of P's board of directors. Other than $25 to defray expenses for attending board meetings, B receives no compensation for serving as a director and does not have a profit motive. Therefore, B is a bona fide volunteer by application of paragraph (r)(3)(i) of this section and is deemed to have a profit motive under paragraph (r)(1) of this section for purposes of section 132(d). In order to provide liability insurance coverage, P purchases a policy that covers actions arising from A's and B's activities performed as part of their duties to P. The value of the policy and payments made to or on behalf of A under the policy are excludable for A's gross income as a working condition fringe, because A has a profit motive under section 162 and would be able to deduct payments for liability insurance coverage had he paid for it himself. The receipt of liability insurance coverage by B does not confer a profit motive on B by application of paragraph (r)(3)(ii) of this section. Thus, the value of the policy and payments made to or on behalf of B under the policy are excludable from B's income as a working condition fringe. For the year in which the liability insurance coverage is provided to A and B, P may exclude the value of the benefit on the Form W-2 it issues to A or on any Form 1099 it might otherwise issue to B.

(s) *Application of section 274(a)(3)*—(1) *In general*. If an employer's deduction under section 162(a) for dues paid or incurred for membership in any club organized for business, pleasure, recreation, or other social purpose is disallowed by section 274(a)(3), the amount, if any, of an employee's working condition fringe benefit relating to an employer-provided membership in the club is determined without regard to the application of section 274(a) to the employee. To be excludible as a working condition fringe benefit, however, the amount must otherwise qualify for deduction by the employee under section 162(a). If an employer treats the amount paid or incurred for membership in any club organized for business, pleasure, recreation, or other social purpose as compensation under section 274(e)(2), then the expense is deductible by the employer as compensation and no amount may be excluded from the employee's gross income as a working condition fringe benefit. See §1.274–2(f)(2)(iii)(A).

(2) *Treatment of tax-exempt employers*. In the case of an employer exempt from taxation under subtitle A of the Internal Revenue Code, any reference in this paragraph (s) to a deduction disallowed by section 274(a)(3) shall be treated as a reference to the amount which would be disallowed as a deduction by section 274(a)(3) to the employer if the employer were not exempt from taxation under subtitle A of the Internal Revenue Code.

(3) *Examples*. The following examples illustrate this paragraph (s):

Example 1. Assume that Company *X* provides Employee *B* with a country club membership for which it paid $20,000. B substantiates, within the meaning of paragraph (c) of this section, that the club was used 40 percent for business purposes. The business use of the club (40 percent) may be considered a working condition fringe benefit, notwithstanding that the employer's deduction for the dues allocable to the business use is disallowed by section 274(a)(3), if *X* does not treat the club membership as compensation under section 274(e)(2). Thus, *B* may exclude from gross income $8,000 (40 percent of the club dues, which reflects *B*'s business use). *X* must report $12,000 as wages subject to withholding and payment of employment taxes (60 percent of the value of the club dues, which reflects *B*'s personal use). *B* must include $12,000 in gross income. *X* may deduct as compensation the amount it paid for the club dues which reflects *B*'s personal use provided the amount satisfies the other requirements for a salary or compensation deduction under section 162.

Example 2. Assume the same facts as *Example 1* except that Company *X* treats the $20,000 as compensation to *B* under section

274(e)(2). No portion of the $20,000 will be considered a working condition fringe benefit because the section 274(a)(3) disallowance will apply to *B*. Therefore, *B* must include $20,000 in gross income.

(t) *Application of section 274(m)(3)*—(1) *In general.* If an employer's deduction under section 162(a) for amounts paid or incurred for the travel expenses of a spouse, dependent, or other individual accompanying an employee is disallowed by section 274(m)(3), the amount, if any, of the employee's working condition fringe benefit relating to the employer-provided travel is determined without regard to the application of section 274(m)(3). To be excludible as a working condition fringe benefit, however, the amount must otherwise qualify for deduction by the employee under section 162(a). The amount will qualify for deduction and for exclusion as a working condition fringe benefit if it can be adequately shown that the spouse's, dependent's, or other accompanying individual's presence on the employee's business trip has a bona fide business purpose and if the employee substantiates the travel within the meaning of paragraph (c) of this section. If the travel does not qualify as a working condition fringe benefit, the employee must include in gross income as a fringe benefit the value of the employer's payment of travel expenses with respect to a spouse, dependent, or other individual accompanying the employee on business travel. See §§1.61–21(a)(4) and 1.162–2(c). If an employer treats as compensation under section 274(e)(2) the amount paid or incurred for the travel expenses of a spouse, dependent, or other individual accompanying an employee, then the expense is deductible by the employer as compensation and no amount may be excluded from the employee's gross income as a working condition fringe benefit. See §1.274–2(f)(2)(iii)(A).

(2) *Treatment of tax-exempt employers.* In the case of an employer exempt from taxation under subtitle A of the Internal Revenue Code, any reference in this paragraph (t) to a deduction disallowed by section 274(m)(3) shall be treated as a reference to the amount which would be disallowed as a deduction by section 274(m)(3) to the employer if the employer were not exempt from taxation under subtitle A of the Internal Revenue Code.

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§ 1.132–5T Working condition fringe—1985 through 1988 (temporary).

(a) *In general*—(1) *Definition.* Gross income does not include the value of a working condition fringe. The term ''working condition fringe'' means any property or service provided to an employee of an employer to the extent that, if the employee paid for the property or service, the amount paid would be allowable as a deduction under section 162 or 167. If, under section 274 or any other section, certain substantiation requirements must be met in order for a deduction under section 162 or 167 to be allowable, those substantiation requirements apply to the determination of a working condition fringe. An amount that would be deductible by the employee under, for example, section 212 is not a working condition fringe.

(2) *Trade or business of the employee.* If the hypothetical payment for the property or service would be allowable as a deduction with respect to a trade or business of the employee other than the employee's trade or business of being an employee of the employer, it cannot be taken into account for purposes of determining the amount, if any, of the working condition fringe. For example, assume that, unrelated to company X's trade or business and unrelated to company X's employee's trade or business of being an employee of company X, the employee is a member of the board of directors of company Y. Assume further that company X provides the employee with air transportation to a company Y board of director's meeting. The employee may not exclude the value of the air transportation to the meeting as a working condition fringe. The employee may, however, deduct such amount under section 162 if the section 162 requirements are satisfied. The result would be the same whether the air

transportation was provided in the form of a flight on a commercial airline or a seat on a company X airplane.

(b) *Vehicle allocation rules*—(1) *In general*—(i) *General rule.* In general, with respect to an employer-provided vehicle, the amount excludable as a working condition fringe is the amount that would be allowable as a deduction under section 162 or 167 if the employee paid for the availability of the vehicle. For example, assume that the value of the availability of an employer-provided vehicle for a full year is $2,000, without regard to any working condition fringe (*i.e.*, assuming all personal use). Assume further that the employee drives the vehicle 6,000 miles for his employer's business and 2,000 miles for reasons other than the employer's business. In this situation, the value of the working condition fringe is $2,000 multiplied by a fraction, the numerator of which is the business-use mileage (6,000 miles) and the denominator of which is the total mileage (8,000 miles). Thus, the value of the working condition fringe is $1,500. The total amount includable in the employee's gross income on account of the availability of the vehicle is $500. For purposes of this section, the term ''vehicle'' has the same meaning given the term in §1.61–2T(e)(*2*). Generally, when determining the amount of an employee's working condition fringe, miles accumulated on the vehicle by all employees of the employer during the period in which the vehicle is available to the employee must be considered. For example, assume that an employee of the employer is provided the availability of an automobile for one year. Assume further that during the year, the automobile is regularly used in the employer's business by other employees. All miles accumulated on the automobile by all employees of the employer during the year must be considered. If, however, substantially all the use of the automobile by other employees in the employer's business is permitted during a certain period, such as the last three months of the year, the miles driven by the other employees during that period would not be considered when determining the employee's working condition fringe exclusion.

(ii) *Use by an individual other than the employee.* For purposes of this section, if the availability of a vehicle to an individual would be taxed to an employee, use of the vehicle by the individual is included in references to use by the employee.

(iii) *Provision of an expensive vehicle for personal use.* Assume an employer provides an employee with an expensive vehicle that an employee may use in part for personal purposes. Even though the decision to provide an expensive rather than an inexpensive vehicle is made by the employer for bona fide noncompensatory business reasons, there is no working condition fringe exclusion with respect to the personal miles driven by the employee. If the employee paid for the availability of the vehicle, he would not be entitled to deduct any part of the payment attributable to personal miles.

(2) *Use of different employer-provided automobiles.* The working condition fringe exclusion must be applied on an automobile by automobile basis. For example, assume that automobile Y is available to employee D for 3 days in January and for 5 days in March, and automobile Z is available to D for a week in July. Assume further that the Daily Lease Value, as defined in §1.61–2T, of each automobile is $50. For the eight days of availability of Y in January and March, D uses Y 90 percent for business (by mileage). During July, D uses Z 60 percent for business (by mileage). The value of the working condition fringe is determined separately for each automobile. Therefore, the working condition fringe for Y is $360 ($400 × .90) leaving an income inclusion of $40. The working condition fringe for Z is $210 ($350 × .60) leaving an income inclusion of $140. If the value of the availability of an automobile is determined under the Annual Lease Value rule for one period and Daily Lease Value rule for a second period (see §1.61–2T), the working condition fringe exclusion must be calculated separately for the two periods.

(c) *Applicability of sections 162 and 274(d)*—(1) *In general.* The value of property or services provided to an employee may not be excluded from the employee's gross income as a working condition fringe, by either the employer or the employee, unless the applicable substantiation requirements of either section 274(d) or section 162 (whichever is applicable) and the regulations thereunder are statisfied. With respect to listed property, the substantiation requirements of section 274(d) and the regulations thereunder do not apply to the determination of an employee's working condition fringe exclusion prior to the date that those requirements apply to the first taxable year of the employer beginning after December 31, 1985. For example, if an employer's first taxable year beginning after December 31, 1985, begins on July 1, 1986, with respect to listed property, the substantiation requirements of section 274(d) apply as of that date. The substantiation requirements of section 274(d) apply to an employee even if the requirements of section 274 do not apply to the employee's employer for deduction purposes (such as when the employer is a tax-exempt organization or a governmental unit); in these cases, the requirements of section 274(d) apply to the employee as of January 1, 1986.

(2) *Section 274(d) requirements.* The substantiation requirements of section 274(d) are satisfied by ''adequate records or sufficient evidence corroborating the [employee's] own statement''. Therefore, such records or evidence provided by the employee, and relied upon by the employer to the extent permitted by the regulations promulgated under section 274(d), will be sufficient to substantiate a working condition fringe exclusion.

(d) *Safe harbor rules*—(1) *In general.* Section 1.274–6T provides that the substantiation requirements of section 274(d) and the regulations thereunder may be satisfied, in certain circumstances, by using one or more of the safe harbor rules prescribed in §1.274–6T. If the employer uses one of the safe harbor rules prescribed in §1.274–6T during a period with respect to a vehicle (as defined in §1.61–2T), that rule must be used by the employer to substantiate a working condition fringe exclusion with respect to that vehicle during the period. An employer that is exempt from Federal income tax may still use one of the safe harbor rules (if the requirements of that section are otherwise met during a period) to substantiate a working condition fringe exclusion with respect to a vehicle during the period. If the employer uses one of the methods prescribed in §1.274–6T during a period with respect to an employer-provided vehicle, that method may be used by an employee to substantiate a working condition fringe exclusion with respect to the same vehicle during the period, as long as the employee includes in gross income the amount allocated to the employee pursuant to §1.274–6T and this section. (See §1.61–2T(c)(2)(i) for other rules concerning when an employee must include in income the amount determined by the employer.) If, however, the employer uses the safe harbor rule prescribed in §1.274–6T(a) (2) or (3) and the employee without the employer's knowledge uses the vehicle for purposes other than de minimis personal use (in the case of the rule prescribed in §1.274–6T(a)(2)), or for purposes other than de minimis personal use and commuting (in the case of the rule prescribed in §1.274–6T(a)(3)), then the employee must include additional income for the unauthorized use of the vehicle.

(2) *Period for use of safe harbor rules.* The rules prescribed in this paragraph (d) assume that the safe harbor rules prescribed in §1.274–6T are used for a one-year period. Accordingly, references to the value of the availability of a vehicle, amounts excluded as a working condition fringe, etc., are based on a one-year period. If the safe harbor rules prescribed in §1.274–6T are used for a period of less than a year, the amounts referenced in the previous sentence must be adjusted accordingly. For purposes of this section, the term ''personal use'' has the same meaning as prescribed in §1.274–6T(e)(5).

(e) *Vehicles not available to employees for personal use.* For a vehicle described in §1.274–6T(a)(2) (relating to certain vehicles not used for personal purposes), the working condition fringe exclusion is equal to the value of the availability of the vehicle if the employer uses the method prescribed in §1.274–6T(a)(2).

(f) *Vehicles not available to employees for personal use other than commuting.* For a vehicle described in §1.274–

6T(a)(3) (relating to certain vehicles not used for personal purposes other than commuting), the working condition fringe exclusion is equal to the value of the availability of the vehicle for purposes other than commuting if the employer uses the method prescribed in §1.274–6T(a)(3). This rule applies only if the special rule for valuing commuting use, as prescribed in §1.61–2T, is used and the amount determined under the special rule is either included in the employee's income or reimbursed by the employee.

(g) *Vehicles used in connection with the business of farming that are available to employees for personal use*—(1) *In general.* For a vehicle described in §1.274–6T(b) (relating to certain vehicles used in connection with the business of farming), the working condition fringe exclusion is calculated by multiplying the value of the availability of the vehicle by 75 percent.

(2) *Vehicles available to more than one individual.* If the vehicle is available to more than one individual, the employer must allocate the gross income attributable to the vehicle (25 percent of the value of the availability of the vehicle) among the employees (and other individuals whose use would not be attributed to an employee) to whom the vehicle was available. This allocation must be done in a reasonable manner to reflect the personal use of the vehicle by the individuals. An amount that would be allocated to a sole proprietor reduces the amounts that may be allocated to employees but are otherwise to be disregarded for purposes of this paragraph (g). For purposes of this paragraph (g), the value of the availability of a vehicle may be calculated as if the vehicle were available to only one employee continuously and without regard to any working condition fringe exclusion.

(3) *Examples.* The following examples illustrate a reasonable allocation of gross income with respect to an employer-provided vehicle between two employees:

Example 1. Assume that two farm employees share the use of a vehicle which for a calendar year is regularly used directly in connection with the business of farming and qualifies for use of the rule in §1.274–6T (b). Employee A uses the vehicle in the morning directly in connection with the business of farming and employee B uses the vehicle in the afternoon directly in connection with the business of farming. Assume further that employee B takes the vehicle home in the evenings and on weekends. The employer should allocate all the income attributable to the availability of the vehicle to employee B.

Example 2. Assume that for a calendar year, farm employees C and D share the use of a vehicle that is regularly used directly in connection with the business of farming and qualifies for use of the rule in §1.274–6T (b). Assume further that the employees alternate taking the vehicle home in the evening and alternate the availability of the vehicle for personal purposes on weekends. The employer should allocate the income attributable to the availability of the vehicle for personal use (25 percent of the value of the availability of the vehicle) equally between the two employees.

Example 3. Assume the same facts as in example (2) except that C is the sole proprietor of the farm. Based on these facts, C should allocate the same amount of income to D as was allocated to D in example (2). No other income attributable to the availability of the vehicle for personal use should be allocated.

(h) *Qualified non-personal use vehicles.* Effective January 1, 1985, 100 percent of the value of the use of a qualified non-personal use vehicle (as described in §1.274–5T (k)) is excluded from gross income as a working condition fringe, provided that, in the case of a vehicle described in paragraph (k) (3) through (7) of that section, the use of the vehicles conforms to the requirements of that paragraph.

(i) [Reserved]

(j) *Application of section 280F.* In determining the amount, if any, of an employee's working condition fringe, section 280F and the regulations thereunder do not apply. For example, assume that an employee has available for a calendar year an employer-provided automobile with a fair market value of $28,000. Assume further that the special rule provided in §1.61–2T is used and that the Annual Lease Value, as defined in §1.61–2T, is $7,750, and that all of the employee's use of the automobile is in the employer's business. The employee would be entitled to exclude the entire Annual Lease Value as a working condition fringe, despite the fact that if the employee paid for the availability of the automobile, an income inclusion would be required under §1.280F–5T(d)(1). This paragraph (j) does not affect the applicability of section 280F to the employer with respect to such employer-provided automobile, nor does it affect the applicability of section 274. For rules concerning substantiation of an employee's working condition fringe, see paragraph (c) of this section.

(k) *Aircraft allocation rule*. In general, with respect to a flight on an employer-provided aircraft, the amount excludable as a working condition fringe is the amount that would be allowable as a deduction under section 162 or 167 if the employee paid for the flight on the aircraft. For example, if employee P flies on P's employer's airplane primarily for business reasons of P's employer, the value of P's flight is excludable as a working condition fringe. However, if P's spouse and children accompany P on such airplane trip primarily for personal reasons, the value of the flights by P's spouse and children are includable in P's gross income. See §1.61–2T(g) for special rules for valuing personal flights.

(l) [Reserved]

(m) *Employer-provided transportation for security concerns*—(1) *In general*. The amount of a working condition fringe exclusion with respect to employer-provided transportation is the amount that would be allowable as a deduction under section 162 or 167 if the employee paid for the transportation. Generally, if an employee pays for transportation taken for primarily personal purposes, the employee may not deduct any part of the amount paid. Thus, the employee may not generally exclude the value of employer-provided transportation as a working condition fringe if such transportation is primarily personal. If, however, for bona fide business-oriented security concerns, the employee purchases transportation that provides him or her with additional security, the employee may generally deduct the excess of the amount paid for the transportation over the lesser amount the employee would have paid for the same mode of transportation absent the bona fide business-oriented security concerns. With respect to a vehicle, the phrase ''the same mode of transportation'' means use of the same vehicle without the additional security aspects, such as bulletproof glass. With respect to air transportation, the phrase ''the same mode of transportation'' means comparable air transportation. These same rules apply to the determination of an employee's working condition fringe exclusion. For example, if an employer provides an employee with an automobile for commuting and, for bona fide business-oriented security concerns, the automobile is specially designed for security, then the employee may exclude the value of the special security design as a working condition fringe if the employee's automobile would not have had such security design but for the bona fide business-oriented security concerns. The employee may not exclude the value of the commuting from income as a working condition fringe because commuting is a nondeductible personal expense. Similarly, if an employee travels on a personal trip in an employer-provided aircraft for bona fide business-oriented security concerns, the employee may exclude the excess, if any, of the value of the flight over the amount the employee would have paid for comparable air transportation, but for the bona fide business-oriented security concerns. Because personal travel is a nondeductible expense, the employee may not exclude the total value of the trip as a working condition fringe.

(2) *Demonstration of bona fide business-oriented security concerns*—(i) *In general*. For purposes of this paragraph (m), the existence of a bona fide business-oriented security concern for the furnishing of a specific form of transportation to an employee is determined on the basis of all the facts and circumstances within the following guidelines:

(A) *Services performed outside the United States*. With respect to an employee performing services for an employer in a geographic area other than the United States, a factor indicating a bona fide business-oriented security concern is a recent history of violent terrorist activity in such geographic area (such as bombings or abductions for ransom), unless such activity is focused on a group of individuals which does not include the employee or a similarly situated employee or on a section of the geographic area which does not incude the employee.

(B) *Services performed in the United States.* With respect to an employee performing services for an employer in the United States, a factor indicating a bona fide business-oriented security concern is threats on the life of the employee or on the life of a similarly situated employee because of the employee's status as an employee of the employer.

(ii) *Establishment of overall security program.* Notwithstanding anything in paragraph (m)(2)(i) of this section to the contrary, *no* bona fide business-oriented security concern will be deemed to exist unless the employee's employer establishes an overall security program with respect to the employee involved.

(iii) *Overall security program*—(A) *Definition.* An overall security program is one in which security is provided to protect the employee on a 24-hour basis. The employee must be protected while at the employee's residence, while commuting to and from the employee's workplace, and while at the employee's workplace. In addition, the employee must be protected while traveling, whether for business or personal purposes. An overall security program would include the provision of a bodyguard/driver who is trained in evasive driving techniques; and automobile specially equipped for security; guards, metal detectors, alarms, or similar methods of controling access to the employee's workplace and residence; and, in appropriate cases, flights on the employer's aircraft for business and personal reasons.

(B) *Application.* There is no overall security program when, for example, security is provided at the employee's workplace but not at the employee's residence. In addition, the fact that an employer requires an employee to travel on the employer's aircraft, or in an employer-provided vehicle that contains special security features, does not alone constitute an overall security program. The preceding sentence applies regardless of the existence of a corporate or other resolution requiring the employee to travel in the employer's airplane or vehicle for personal as well as business reasons. Similarly, the existence of an independent security study particular to the employer and its employees, or to the employee involved, does not alone constitute an overall security program.

(iv) *Effect of an independent security study.* An overall security program with respect to an employee is deemed to exist even though security is not provided to an employee on a 24-hour basis if the conditions of this paragraph (m)(2)(iv) are satisfied:

(A) A security study is performed with respect to the employer and the employee (or a similarly situated employee) by an independent security consultant;

(B) The security study is based on an objective assessment of all the facts and circumstances;

(C) The recommendation of the security study is that an overall security program (as defined in paragraph (m)(2)(iii) of this section) is not necessary and such recommendation is reasonable under the circumstances; and

(D) The employer applies the specific security recommendations contained in the security study to the employee on a consistent basis.

The value of the security provided pursuant to a security study that meets the requirements of this paragraph (m)(2)(iv) may be excluded from income, if the security study conclusions are reasonable and, but for the bona fide business-oriented security concerns, the employee would not have had such security. No exclusion from income applies to security provided by the employer that is not recommended in the security study. Security study conclusions may be reasonable even if, for example, it is recommended that security be limited to certain geographic areas, as in the case where air travel security is provided only in certain foreign countries.

(v) *Application of security rules to spouses and dependents.* The availability of a working condition fringe exclusion based on the existence of a bona fide business-oriented security concern with respect to the spouse and dependents of an employee is determined separately for such spouse and dependents under the rules established in this paragraph (m).

(vi) *Working condition safe harbor*. Under the special rule of this paragraph (m)(2)(vi), if, for a bona fide business-oriented security concern, the employer requires that the employee travel on an employer-provided aircraft for a personal trip, the employer and the employee may exclude, as a working condition fringe, the excess value of the trip over comparable first-class airfare without having to show that but for the bona fide business-oriented security concerns, the employee would have flown first-class on a commercial aircraft. If the special valuation rule provided in §1.61–2T is used, the excess over the amount determined by multiplying an aircraft multiple of 200-percent by the base aircraft valuation formula may be excluded as a working condition fringe.

(3) *Examples*. The provisions of this paragraph (m) may be illustrated by the following examples:

Example 1. Assume that in response to several death threats on the life of A, the president of a multinational company (company X), company X establishes an overall security program for A, including an alarm system at A's home and guards at A's workplace, the use of a vehicle that is specially equipped with alarms, bulletproof glass, and armor plating and a bodyguard/driver who is trained in evasive driving techniques. Assume further that A is driven for both personal and business reasons in the vehicle. Also, assume that but for the bona fide business-oriented security concerns, no part of the overall suecurity program would been provided to A. With respect to the transportation provided for security reasons, A may exclude as a working condition fringe the value of the special security features of the vehicle and the value attributable to the bodyguard/driver. Thus, if the value of the specially equipped vehicle is $40,000, and the value of the vehicle without the security features is $25,000, A may determine A's income attributable to the vehicle as if the vehicle were worth $25,000. A must include in income the value of the availability of the vehicle for personal use.

Example 2. Assume that B is the chief executive officer of a multinational corporation (company Y). Assume further that there have been kidnapping attempts and other terrorist activities in the foreign countries in which B performs services and that at least some of such activities have been directed against B or similarly situated employees. In response to these activities, company Y provides B with an overall security program, including an alarm system at B's home and bodyguards at B's workplace, a bodyguard/driver who is trained in evasive driving techniques, and a vehicle specially designed for security during B's overseas travels. In addition, assume that company Y requires B to travel in company Y's airplane for business and personal trips taken to, from, and within these foreign countries. Also, assume that but for bona fide business-oriented security concerns, no part of the overall sucurity program would have been provided to B. B may exclude as a working condition fringe the value of the special security features of the automobile and the value attributable to the bodyguards and the bodyguard/driver. B may also exclude as a working condition fringe the excess, if any, of the value of personal flights in the company Y airplane over first-class airfare (as determined under the special valuation rule provided in §1.61–2T if the safe harbor described in paragraph (m)(2)(vi) of this section is used). B must include in income the value of the availability of the vehicle for personal use and the lesser of the value of first-class airfare or the value of the flight determined under §1.61–2T for each personal flight taken by B in company Y's airplane.

Example 3. Assume the same facts as in example (2) except that company Y also requires B to travel in company Y's airplane within the United States, and provides B with a chauffeur-driven limousine for business and personal travel in the United States. Assume further that company Y also requires B's spouse and dependents to travel in company Y's airplane for personal flights in the United States. If no bona fide business-oriented security concern exists with respect to travel in the United States, B may not exclude any portion of the value of the availability of the driver or limousine for personal use in the United States. Thus, B must include in income the value of the availability of the vehicle and driver for personal use. In addition, B may not exclude any portion of the value attributable to personal flights by B or B's spouse and dependents on company Y's airplane. Thus, B must include in income the value attributable to the personal use of company Y's airplane. See §1.61–2T for rules relating to the valuation of personal flights on employer-provided airplanes.

Example 4. Assume that company Z retains an independent security consultant to perform a security study with respect to its chief executive officer. Assume further that, based on an objective assessment of the facts and circumstances, the security consultant reasonably recommends that the employee be provided security at his workplace and for ground transportation, but not for air transportation. If company Z follows the recommendations on a consistent basis, an overall security program will be deemed to exist with respect to the workplace and ground transportation security only.

Example 5. Assume the same facts as in example (4) except that company Z only provides the employee security while commuting to and from work, but not for any other ground transportation. Since the recommendations of the independent security study are not applied on a consistent basis, an overall security program will not be deemed to exist.

(n) *Product testing*—(1) *In general.* The fair market value of the use of consumer goods, which are manufactured for sale to nonemployees, for product testing and evaluation by an employee outside the employer's workplace is excludable as a working condition fringe if—

(i) Consumer testing and evaluation of the product is an ordinary and necessary business expense of the employer,

(ii) Business reasons necessitate that the testing and evaluation of the product be performed off the employer's business premises by employees (*i.e.*, the testing and evaluation cannot be carried out adequately in the employer's office or in laboratory testing facilities),

(iii) The product is furnished to the employee for purposes of testing and evaluation,

(iv) The product is made available to the employee for no longer than necessary to test and evaluate its performance and must be returned to the employer at completion of the testing and evaluation period,

(v) The employer imposes limitations of the employee's use of the product which significantly reduce the value of any personal benefit to the employee, and

(vi) The employee must submit detailed reports to the employer on the testing and evaluation.

The length of the testing and evaluation period must be reasonable in relation to the product being tested.

(2) *Employer-imposed limitations.* The requirement of paragraph (n)(1)(v) of this section is satisfied if—

(i) The employer places limitations on the employee's ability to select among different models or varieties of the consumer product that is furnished for testing and evaluation purposes,

(ii) The employer's policy provides for the employee, in appropriate cases, to purchase or lease at his or her own expense the same type of product as that being tested (so that personal use by the employee's family will be limited), and

(iii) The employer generally prohibits use of the product by members of the employee's family.

(3) *Discriminating classifications.* If an employer furnishes products under a testing and evaluation program only to officers, owners, or highly compensated employees, this fact may be considered in a determination of whether the products are furnished for testing and evaluation purposes or for compensation purposes, unless the employer can show a business reason for the classification of employees to whom the products are furnished (e.g., that automobiles are furnished for testing and evaluation by an automobile manufacturer to its design engineers and supervisory mechanics).

(4) *Factors that negate the existence of a product testing program.* If an employer fails to tabulate and examine the results of the detailed reports within a reasonable period of time after expiration of the testing period, the program will not be considered a product testing program. Existence of one or more of the following factors may also establish that the program is not a bona fide product testing program:

(i) The program is in essence a leasing program under which employees lease the consumer goods from the employer for a fee;

(ii) The nature of the product and other considerations are insufficient to justify the testing program; or

(iii) The expense of the program outweighs the benefits to be gained from testing and evaluation.

(5) *Failure to meet the requirements of this paragraph (n).* The fair market value of the use of property for product testing and evaluation by an employee outside the employee's workplace, under a product testing program that does not meet all of the requirements of this paragraph (n), is not excludable as a working condition fringe.

(6) *Example.* Assume that an employer that manufactures automobiles establishes a product testing program

under which 50 of its 5,000 employees test and evaluate the automobiles for 30 days. Assume further that the 50 employees represent a fair cross section of all of the employees of the employer, such employees submit detailed reports to the employer on the testing and evaluation, the employer tabulates and examines the test results within a reasonable time, and the use of the automobiles is restricted to the employees. If the rules of paragraph (n)(2) of this section are also met, the employees may exclude the value of the use of the automobile during the testing and evaluation period.

(o) *Qualified automobile demonstration use*—(1) *In general.* The value of qualified automobile demonstration use is excludable from gross income as a working condition fringe. The term ''qualified automobile demonstration use'' means any use of a demonstration automobile by a full-time automobile salesman in the sales area in which the automobile dealer's sales office is located if—

(i) Such use is provided primarily to facilitate the salesman's performance of services for the employer, and

(ii) There are substantial restrictions on the personal use of the automobile by the salesman.

(2) *Full-time automobile salesman*—(i) *Definition.* The term ''full-time automobile salesman'' means any individual who—

(A) Is employed by an automobile dealer,

(B) Customarily spends substantially all of a normal business day on the sales floor selling automobiles to customers of the automobile dealership,

(C) Customarily works a number of hours considered full-time in the industry (but at a rate not less than 1,000 hours per year), and

(D) Derives at least 85 percent of his or her gross income from the automobile dealership directly as a result of such automobile sales activities.

An individual, such as the general manager of an automobile dealership, who receives a sales commission on the sale of an automobile is not a full-time automobile salesman unless the requirements of this paragraph (o)(2)(i) are met. The exclusion provided in this paragraph (o) is available to an individual who meets the definition of this paragraph (o)(2)(i) regardless of whether the individual performs services in addition to those described in this paragraph (o)(2)(i). For example, an individual who is an owner of the automobile dealership but who otherwise meets the requirements of this paragraph (o)(2)(i) may exclude from gross income the value of qualified automobile demonstration use.

(ii) *Use by an individual other than a full-time automobile salesman.* Personal use of a demonstration automobile by an individual other than a full-time automobile salesman is not treated as a working condition fringe. Therefore, any personal use, including commuting use, of a demonstration automobile by a part-time salesman, automobile mechanic, manager, or other individual is not ''qualified automobile demonstration use'' and thus not excludable from gross income.

(3) *Demonstration automobile.* The exclusion provided in this paragraph (o) applies only to qualified use of a demonstration automobile. A demonstration automobile is an automobile that is—

(i) Currently in the inventory of the automobile dealership, and

(ii) Available for test drives by customers during the normal business hours of the employee.

(4) *Substantial restrictions on personal use.* Substantial restrictions on the personal use of demonstration automobiles exist when all of the following conditions are satisfied:

(i) Use by individuals other than the full-time automobile salesmen (e.g., the salesman's family) is prohibited,

(ii) Use for personal vacation trips is prohibited,

(iii) The storage of personal possessions in the automobile is prohibited, and

(iv) The total use by mileage of the automobile by the salesman outside the salesman's normal working hours is limited.

(5) *Sales area*—(i) *In general.* Qualified automobile demonstration use must be use in the sales area in which the automobile dealer's sales office is located. The sales area is the geographic area surrounding the automobile dealer's

sales office from which the office regularly derives customers.

(ii) *Sales area safe harbor.* With respect to a particular full-time salesman, the automobile dealer's sales area may be treated as the larger of the area within a 75 mile radius of the dealer's sales office, or the on-way commuting distance (in miles) of the particular salesman.

(p) *Parking*—(1) *In general.* The value of parking provided to an employee on or near the business premises of the employer is excludable from gross income as a working condition fringe. The working condition fringe exclusion applies whether the employer owns or rents the parking facility or parking space.

(2) *Reimbursement of parking expenses.* Any reimbursement to the employee of the ordinary and necessary expenses of renting a parking space on or near the business premises of the employer is excludable as a working condition fringe. The preceding sentence does not apply, however, to cash payments that are not actually used for renting a parking space. Thus, that part of a general transportation allowance that is not used for parking is not excludable as a working condition fringe under this paragraph (p).

(3) *Parking on residential property.* With respect to an employee, this paragraph (p) does not apply to any parking facility or space located on property owned or leased for residential purposes by the employee.

(q) *Nonapplicability of nondiscrimination rules.* Except to the extent provided in paragraph (n)(3) of this section, the nondiscrimination rules of section 132(h)(1) and §1.132–8T do not apply in determining the amount, if any, of a working condition fringe.

[T.D. 8063, 50 FR 52303, Dec. 23, 1985, as amended by T.D. 8256, 54 FR 28600, July 6, 1989]

§ 1.132–6 De minimis fringes.

(a) *In general.* Gross income does not include the value of a de minimis fringe provided to an employee. The term ''de minimis fringe'' means any property or service the value of which is (after taking into account the frequency with which similar fringes are provided by the employer to the employer's employees) so small as to make accounting for it unreasonable or administratively impracticable.

(b) *Frequency*—(1) *Employee-measured frequency.* Generally, the frequency with which similar fringes are provided by the employer to the employer's employees is determined by reference to the frequency with which the employer provides the fringes to each individual employee. For example, if an employer provides a free meal in kind to one employee on a daily basis, but not to any other employee, the value of the meals is not de minimis with respect to that one employee even though with respect to the employer's entire workforce the meals are provided ''infrequently.''

(2) *Employer-measured frequency.* Notwithstanding the rule of paragraph (b)(1) of this section, except for purposes of applying the special rules of paragraph (d)(2) of this section, where it would be administratively difficult to determine frequency with respect to individual employees, the frequency with which similar fringes are provided by the employer to the employer's employees is determined by reference to the frequency with which the employer provides the fringes to the workforce as a whole. Therefore, under this rule, the frequency with which any individual employee receives such a fringe benefit is not relevant and in some circumstances, the de minimis fringe exclusion may apply with respect to a benefit even though a particular employee receives the benefit frequently. For example, if an employer exercises sufficient control and imposes significant restrictions on the personal use of a company copying machine so that at least 85 percent of the use of the machine is for business purposes, any personal use of the copying machine by particular employees is considered to be a de minimis fringe.

(c) *Administrability.* Unless excluded by a provision of chapter 1 of the Internal Revenue Code of 1986 other than section 132(a)(4), the value of any fringe benefit that would not be unreasonable or administratively impracticable to account for is includible in the employee's gross income. Thus, except as provided in paragraph (d)(2) of this section, the provision of any cash fringe benefit is never excludable under section 132(a) as a de minimis fringe benefit. Similarly except as otherwise provided in paragraph (d) of this section, a cash equivalent fringe benefit (such as a fringe benefit provided to an employee through the use of a gift certificate or charge or credit card) is generally not excludable under section 132(a) even if the same property or service acquired (if provided in kind) would be excludable as a de minimis fringe benefit. For example, the provision of cash to an employee for a theatre ticket that would itself be excludable as a de minimis fringe (see paragraph (e)(1) of this section) is not excludable as a de minimis fringe.

(d) *Special rules*—(1) *Transit passes.* A public transit pass provided at a discount to defray an employee's commuting costs may be excluded from the employee's gross income as a de minimis fringe if such discount does not exceed $21 in any month. The exclusion provided in this paragraph (d)(1) also applies to the provision of tokens or fare cards that enable an individual to travel on the public transit system if the value of such tokens and fare cards in any month does not exceed by more than $21 the amount the employee paid for the tokens and fare cards for such month. Similarly, the exclusion of this paragraph (d)(1) applies to the provision of a voucher or similar instrument that is exchangeable solely for tokens, fare cards, or other instruments that enable the employee to use the public transit system if the value of such vouchers and other instruments in any month does not exceed $21. The exclusion of this paragraph (d)(1) also applies to reimbursements made by an employer to an employee after December 31, 1988, to cover the cost of commuting on a public transit system, provided the employee does not receive more than $21 in such reimbursements for commuting costs in any given month. The reimbursement must be made under a bona fide reimbursement arrangement. A reimbursement arrangement will be treated as bona fide if the employer establishes appropriate procedures for verifying on a periodic basis that the employee's use of public transportation for commuting is consistent with the value of the benefit provided by the employer for that purpose. The amount of in-kind public transit commuting benefits and reimbursements provided during any month that are excludible under this paragraph (d)(1) is limited to $21. For months ending before July 1, 1991, the amount is $15 per month. The exclusion provided in this paragraph (d)(1) does not apply to the provision of any benefit to defray public transit expenses incurred for personal travel other than commuting.

(2) *Occasional meal money or local transportation fare*—(i) *General rule.* Meals, meal money or local transportation fare provided to an employee is excluded as a de minimis fringe benefit if the benefit provided is reasonable and is provided in a manner that satisfies the following three conditions:

(A) *Occasional basis.* The meals, meal money or local transportation fare is provided to the employee on an occasional basis. Whether meal money or local transportation fare is provided to an employee on an occasional basis will depend upon the frequency *i.e.*, the availability of the benefit and regularity with which the benefit is provided by the employer to the employee. Thus, meals, meal money, or local transportation fare or a combination of such benefits provided to an employee on a regular or routine basis is not provided on an occasional basis.

(B) *Overtime.* The meals, meal money or local transportation fare is provided to an employee because overtime work necessitates an extension of the employee's normal work schedule. This condition does not fail to be satisifed merely because the circumstances giving rise to the need for overtime work are reasonably foreseeable.

(C) *Meal money.* In the case of a meal or meal money, the meal or meal money is provided to enable the employee to work overtime. Thus, for example, meals provided on the employer's premises that are consumed during the period that the employee works overtime or meal money provided for meals consumed during such period satisfy this condition.

In no event shall meal money or local transportation fare calculated on the basis of the number of hours worked (e.g., $1.00 per hour for each hour over eight hours) be considered a de minimis fringe benefit.

(ii) *Applicability of other exclusions for certain meals and for transportation provided for security concerns.* The value of meals furnished to an employee, an employee's spouse, or any of the employee's dependents by or on behalf of the employee's employer for the convenience of the employer is excluded from the employee's gross income if the meals are furnished on the business premises of the employer (see section 119). (For purposes of the exclusion under section 119, the definitions of an employee under §1.132–1(b) do not apply.) If, for a bona fide business-oriented security concern, an employer provides an employee vehicle transportation that is specially designed for security (for example, the vehicle is equipped with bulletproof glass and armor plating), and the conditions of §1.132–5(m) are satisfied, the value of the special security design is excludable from gross income as a working condition fringe if the employee would not have had such special security design but for the bona fide business-oriented security concern.

(iii) *Special rule for employer-provided transportation provided in certain circumstances.* (A) *Partial exclusion of value.* If an employer provides transportation (such as taxi fare to an employee for use in commuting to and/or from work because or unusual circumstances and because, based on the facts and circumstances, it is unsafe for the employee to use other available means of transportation, the excess of the value of each one-way trip over $1.50 per one-way commute is excluded from gross income. The rule of this paragraph (d)(2)(iii) is not available to a control employee as defined in §1.61–21(f) (5) and (6).

(B) ''*Unusual circumstances*''. Unusual circumstances are determined with respect to the employee receiving the transportation and are based on all facts and circumstances. An example of unusual circumstances would be when an employee is asked to work outside of his normal work hours (such as being called to the workplace at 1:00 am when the employee normally works from 8:00 am to 4:00 pm). Another example of unusual circumstances is a temporary change in the employee's work schedule (such as working from 12 midnight to 8:00 am rather than from 8:00 am to 4:00 pm for a two-week period).

(C) ''*Unsafe conditions*''. Factors indicating whether it is unsafe for an employee to use other available means of transportation are the history of crime in the geographic area surrounding the employee's workplace or residence and the time of day during which the employee must commute.

(3) *Use of special rules or examples to establish a general rule.* The special rules provided in this paragraph (d) or examples provided in paragraph (e) of this section may not be used to establish any general rule permitting exclusion as a de minimis fringe. For example, the fact that $252 (*i.e.*, $21 per month for 12 months) worth of public transit passes can be excluded from gross income as a de minimis fringe in 1992 does not mean that any fringe benefit with a value equal to or less than $252 may be excluded as a de minimis fringe. As another example, the fact that the commuting use of an employer-provided vehicle more than one day a month is an example of a benefit not excludable as a de minimis fringe (see paragraph (e)(2) of this section) does not mean that the commuting use of a vehicle up to 12 times per year is excludable from gross income as a de minimis fringe.

(4) *Benefits exceeding value and frequency limits.* If a benefit provided to an employee is not de minimis because either the value or frequency exceeds a limit provided in this paragraph (d), no amount of the benefit is considered to be a de minimis fringe. For example, if, in 1992, an employer provides a $50 monthly public transit pass, the entire $50 must be included in income, not just the excess value over $21.

(e) *Examples*—(1) *Benefits excludable from income.* Examples of de minimis fringe benefits are occasional typing of personal letters by a company secretary; occasional personal use of an employer's copying machine, provided that the employer exercises sufficient control and imposes significant restrictions on the personal use of the machine so that at least 85 percent of the use of the machine is for business purposes; occasional cocktail parties, group meals, or picnics for employees and their guests; traditional birthday or holiday gifts of property (not cash) with a low fair market value; occasional theater or sporting event tickets; coffee, doughnuts, and soft drinks; local telephone calls; and flowers, fruit, books, or similar property provided to employees under special circumstances (e.g., on account of illness, outstanding performance, or family crisis).

(2) *Benefits not excludable as de minimis fringes.* Examples of fringe benefits that are not excludable from gross income as de minimis fringes are: season tickets to sporting or theatrical events; the commuting use of an employer-provided automobile or other vehicle more than one day a month; membership in a private country club or athletic facility, regardless of the frequency with which the employee uses the facility; employer-provided group-term life insurance on the life of the spouse or child of an employee; and use of employer-owned or leased facilities (such as an apartment, hunting lodge, boat, etc.) for a weekend. Some amount of the value of certain of these fringe benefits may be excluded from income under other statutory provisions, such as the exclusion for working condition fringes. See § 1.132–5.

(f) *Nonapplicability of nondiscrimination rules.* Except to the extent provided in § 1.132–7, the nondiscrimination rules of section 132(h)(1) and § 1.132–8 do not apply in determining the amount, if any, of a de minimis fringe. Thus, a fringe benefit may be excludable as a de minimis fringe even if the benefit is provided exclusively to highly compensated employees of the employer.

[T.D. 8256, 54 FR 28615, July 6, 1989, as amended by T.D. 8389, 57 FR 1871, Jan. 16, 1992; 57 FR 5982, Feb. 19, 1992]

§ 1.132–6T De minimis fringe—1985 through 1988 (temporary).

(a) *In general.* Gross income does not include the value of a de minimis fringe provided to an employee. The term ''de minimis fringe'' means any property or service the value of which is (after taking into account the frequency with which similar fringes are provided by the employer to the employer's employees) so small as to make accounting for it unreasonable or administratively impracticable.

(b) *Frequency.* Generally, the frequency with which similar fringes are provided by the employer to the employer's employees is determined by reference to the frequency with which the employer provides the fringe to each individual employee. For example, if an employer provides a free meal to one employee on a daily basis, but not to any other employee, the value of the meals is not de minimis with respect to that one employee even though with respect to the employer's entire workforce the meals are provided ''infrequently.'' However, where it would be administratively difficult to determine frequency with respect to individual employees, the frequency with which similar fringes are provided by the employer to the employer's employees is determined by reference to the frequency with which the employer provides the fringes to the employees and not the frequency with which individual employees receive them. In these cases, if an employer occasionally provides a fringe benefit of de minimis value to the employer's employees, the de minimis fringe exclusion may apply even though a particular employee receives the benefit frequently. For example, if an employer exercises sufficient control and imposes significant restrictions on the personal use of a company copying machine so that at least 85 percent of the use of the machine is for business purposes, any personal use the copying machine by particular employees is considered to be a de minimis fringe.

(c) *Administrability.* Unless excluded by a statutory provision other than section 132(a)(4), the value of any fringe benefit that would not be unreasonable or administratively impracticable to account for must be included in the employee's gross income. Thus, except as otherwise provided in this section, the provision of any cash fringe benefit (or any fringe benefit provided to an employee through the use of a charge or credit card) is not excludable as a de minimis fringe. For example, the provision of cash to an employee for personal entertainment is not excludable as a de minimis fringe.

(d) *Special rules*—(1) *Transit passes.* A transit pass provided to an employee at a discount not exceeding $15 per month may be excluded as a de minimis fringe. The exclusion provided in this paragraph (d) also applies to the provision of $15 in tokens or fare cards that enable an individual to travel on the transit system. The exclusion provided in this paragraph (d) does not apply to any provision of cash or other benefit to defray transit expenses incurred for personal travel.

(2) *Occasional meal money or local transportation fare.* Occasional meal money or local transportation fare provided to an employee because overtime work necessitates an extension of the employee's normal workday is excluded as a de minimis fringe.

(3) *Use of special rules to establish a general rule.* The special rules provided in this paragraph (d) may not be used to establish any general rule. For example, the fact that $180 ($15 per month for 12 months) worth of transit passes can be excluded in a year does not mean that any fringe benefit with a value equal to or less than $180 may be excluded as a de minimis fringe.

(4) *Benefits exceeding value and frequency limitations.* If the benefit provided to an employee is not de minimis because either the value or frequency exceeds a limit provided in this paragraph (d), no amount of the benefit is considered to be de minimis. For example, if an employer provides a $20 monthly transit pass, the entire $20 must be included in income, not just the excess value over $15.

(e) *Nonapplicability of nondiscrimination rules.* Except to the extent provided in §1.132–7T, the nondiscrimination rules of section 132(h)(1) and §1.132–8T do not apply. Thus, for example, a fringe benefit may be a de minimis fringe even if the benefit is provided exclusively to officers of the employer.

(f) *Examples*—(1) *Benefits excludable from income.* Examples of de minimis fringe benefits are occasional typing of personal letters by a company secretary; occasional personal use of an employer's copying machine, provided that the employer exercises sufficient control and imposes significant restrictions on the personal use of the machine so that at least 85 percent of the use of the machine is for business purposes; occasional cocktail parties or picnics for employees and their guests; traditional holiday gifts of property (not cash) with a low fair market value; occasional theatre or sporting event tickets; and coffee and doughnuts.

(2) *Benefits not excludable as de minimis fringes.* Examples of fringe benefits that are not excludable from income as de minimis fringes are: season tickets to sporting or theatrical events; the commuting use of an employer-provided automobile or other vehicle more than once a month; membership in a private country club or athletic facility, regardless of the frequency with which the employee uses the facility; and use of employer-owned or leased facilities (such as an apartment, hunting lodge, boat, etc.) for a weekend. Some amount of the value of these fringe benefits may be excluded under other statutory provisions, such as the exclusion for working condition fringes. See §1.132–5T.

[T.D. 8063, 50 FR 52308, Dec. 23, 1985, as amended by T.D. 8256, 54 FR 28600, July 6, 1989]

§ 1.132–7 Employer-operated eating facilities.

(a) *In general*—(1) *Condition for exclusion*—(i) *General rule.* The value of meals provided to employees at an employer-operated eating facility for employees is excludable from gross income as a de minimis fringe only if on an annual basis, the revenue from the facility equals or exceeds the direct operating costs of the facility.

(ii) *Additional condition for highly compensated employees.* With respect to any highly compensated employee, an exclusion is available under this section only if the condition set out in paragraph (a)(1)(i) of this section is satisfied and access to the facility is available on substantially the same terms to each member of a group of employees that is defined under a reasonable classification set up by the employer that does not discriminate in favor of highly compensated employees. See §1.132–8. For purposes of this paragraph (a)(1)(ii), each dining room or cafeteria in which meals are served is treated as a separate eating facility, whether each such dining room or cafeteria has its own kitchen or other food-preparation area.

(2) *Employer-operated eating facility for employees*. An employer-operated eating facility for employees is a facility that meets all of the following conditions—

(i) The facility is owned or leased by the employer,

(ii) The facility is operated by the employer,

(iii) The facility is located on or near the business premises of the employer, and

(iv) The meals furnished at the facility are provided during, or immediately before or after, the employee's workday.

For purposes of this section, the term ''meals'' means food, beverages, and related services provided at the facility. If an employer can reasonably determine the number of meals that are excludable from income by the recipient employees under section 119, the employer may, in determining whether the requirement of paragraph (a)(1)(i) of this section is satisfied, disregard all costs and revenues attributable to such meals provided to such employees. If an employer can reasonably determine the number of meals received by volunteers who receive food and beverages at a hospital, free or at a discount, the employer may, in determining whether the requirement of paragraph (a)(1)(i) of this section is satisfied, disregard all costs and revenues attributable to such meals provided to such volunteers. If an employer charges nonemployees a greater amount than employees, in determining whether the requirement of paragraph (a)(1)(i) of this section is satisfied, the employer must disregard all costs and revenues attributable to such meals provided to such nonemployees.

(3) *Operation by the employer*. If an employer contracts with another to operate an eating facility for its employees, the facility is considered to be operated by the employer for purposes of this section. If an eating facility is operated by more than one employer, it is considered to be operated by each employer.

(4) *Example*. The provisions of this paragraph (a)(2) may be illustrated by the following example:

Example 1. Assume that a not-for-profit hospital system maintains cafeterias for the use of its employees and volunteers. Only the employees are charged for food service at the cafeteria and the policy of the hospital is to charge the employees only for the costs of food, beverage and labor directly attributable to the meal. Most of the cafeterias within the system furnish more free meals to volunteers than they serve paid meals to employees. For purposes of this paragraph, as long as the employer can accurately determine the number of meals received free or at a discount by volunteers, the employer may disregard all the costs and revenues attributable to such meals provided to volunteers. Therefore, for purposes of this paragraph, the costs of the hospital system for furnishing meals to employees who pay for them are the costs to be compared to determine if the revenues from the facility equal or exceed direct operating costs of the facility's service to employees.

(b) *Direct operating costs*—(1) *In general*. For purposes of this section, the direct operating costs of an eating facility are—

(i) The cost of food and beverages, and

(ii) The cost of labor for personnel whose services relating to the facility are performed primarily on the premises of the eating facility. Direct operating costs do not include the labor cost attributable to personnel whose services relating to the facility are not performed primarily on the premises of the eating facility. Thus, for example, the labor costs attributable to cooks, waiters, and waitresses are included in direct operating costs, but the labor cost attributable to a manager of an eating facility whose services relating to the facility are not primarily performed on the premises of the eating facility is not included in direct operating costs. If an employee performs services relating to the facility both on and off the premises of the eating facility, only the portion of the total labor cost of the employee relating to the facility that bears the same proportion to such total labor cost as time spent on the premises bears to total time spent performing services relating to the facility is included in direct operating costs. For example, assume that 60 percent of the services of a cook in the above example are not related to the eating facility. Only 40 percent of the total labor cost of the cook is includible in direct operating costs. For purposes of this section, labor costs include all compensation required to be reported on a Form W-2 for income tax purposes and related employment taxes paid by the employer. In determining the direct operating costs of an eating facility, the employer may include as part of the facility, vending machines that are provided by the employer and located on the same premises as the other eating facilities operated by the employer.

(2) *Multiple dining rooms or cafeterias.* The direct operating costs test may be applied separately for each dining room or cafeteria. Alternatively, the direct operating costs test may be applied with respect to all the eating facilities operated by the employer.

(3) *Payment to operator of facility.* If an employer contracts with another to operate an eating facility for its employees, the direct operating costs of the facility consist both of direct operating costs, if any, incurred by the employer and the amount paid to the operator of the facility to the extent that such amount is attributable to what would be direct operating costs if the employer operated the facility directly.

(c) *Valuation of non-excluded meals provided at an employer-operated eating facility for employees.* If the exclusion for meals provided at an employer-operated eating facility for employees is not available, the recipient of meals provided at such facility must include in income the amount by which the fair market value of the meals provided exceeds the sum of—

(1) The amount, if any, paid for the meals, and

(2) The amount, if any, specifically excluded by another section of chapter 1 of this subtitle.

For special valuation rules relating to such meals, see §1.61–21(j).

[T.D. 8256, 54 FR 28617, July 6, 1989]

§1.132–7T Treatment of employer-operated eating facilities—1985 through 1988 (temporary).

(a) *In general*—(1) *General rule.* The value of meals provided to employees at an employer-operated eating facility for employees is excludable from gross income as a de minimis fringe only if—

(i) On an annual basis, the revenue from the facility equals or exceeds the direct operating costs of the facility, and

(ii) With respect to any officer, owner or highly compensated employee, access to the facility is available on substantially the same terms to each member of a group of employees that is defined under a reasonable classification set up by the employer that does not discriminate in favor of officers, owners, and highly compensated employees. See §1.132–8T.

(2) *Employer-operated eating facility for employees.* An employer-operated eating facility for employees is a facility that meets all of the following conditions—

(i) The facility is owned or leased by the employer,

(ii) The facility is operated by the employer,

(iii) The facility is located on or near the business premises of the employer,

(iv) Substantially all of the use of the facility is by employees of the employer operating the facility, and

(v) The meals furnished at the facility are provided during, or immediately before or after, the employee's workday.

For purposes of this section, the term ''meals'' means food, beverages, and related services provided at the facility. If an employer can determine the number of employees who receive meals that are excludable from income under section 119, the employer may, in determining whether the requirement of paragraph (a)(1)(i) of this section is satisfied, disregard all costs and revenues attributable to such meals provided to such employees. For purposes of this section, each dining room or cafeteria in which meals are served is treated as a separate eating facility, regardless of whether each such dining room or cafeteria has its own kitchen or other food-preparation area.

(3) *Operation by the employer*. If an employer contracts with another to operate an eating facility for its employees, the facility is considered to be operated by the employer for purposes of this section. If an eating facility is operated by more than one employer, it is considered to be operated by each employer.

(b) *Direct operating costs*. The direct operating costs test must be applied separately for each dining room or cafeteria. For purpose of this section, the direct operating costs of an eating facilities are: (1) The cost of food and beverages and (2) the cost of labor for personnel whose services relating to the facility are performed primarily on the premises of the eating facility. Direct operating costs do not include the cost of labor for personnel whose services relating to the facility are not performed primarily on the premises of the eating facility. Thus, for example, the labor cost for cooks, waiters, and waitresses is included in direct operating costs, but the labor cost for a manager of an eating facility whose services relating to the facility are not primarily performed on the premises of the eating facility is not included in direct operating costs. If an employee perfoms services both on and off the premises of the eating facility, only the applicable percentage of the total labor cost of the employee that bears the same proportion as time spent on the premises bears to total time is included in direct operating costs. For example, assume that 60 percent of the services of the cooks in the above example are not related to the eating facility. Only 40 percent of the total labor cost of the cooks is includible in direct operating costs. For purposes of this section, labor costs include all compensation required to be reported on a Form W-2 for income tax purposes and related employment taxes paid by the employer.

(c) *Valuation of non-excluded meals provided at an employer-operated eating facility for employees*. If the exclusion for meals provided at an employer-operated eating facility for employees is not available, the recipient of meals provided at such facility must include in income the amount by which the fair market value of the meals provided exceeds the sume of: (1) The amount, if any, paid for the meals, and (2) the amount, if any, specifically excluded by another section of the Code. For special valuation rules relating to such meals see §1.61–2T (j).

[T.D. 8063, 50 FR 52308, Dec. 23, 1985, as amended by T.D. 8256, 54 FR 28600, July 6, 1989]

§ 1.132–8 Fringe benefit nondiscrimination rules.

(a) *Application of nondiscrimination rules*—(1) *General rule*. A highly compensated employee who receives a no-additional cost service, a qualified employee discount or a meal provided at an employer-operated eating facility for employees shall not be permitted to exclude such benefit from his or her income unless the benefit is available on substantially the same terms to:

(i) All employees of the employer; or

(ii) A group of employees of the employer which is defined under a reasonable classification set up by the employer that does not discriminate in favor of highly compensated employees. See paragraph (f) of this section for the definition of a highly compensated employee.

(2) *Consequences of discrimination*—(i) *In general*. If an employer maintains more than one fringe benefit program, *i.e.*, either different fringe benefits being provided to the same group of employees, or different classifications of employees or the same fringe benefit being provided to two or more classifications of employees, the nondiscrimination requirements of section 132 will generally be applied separately to each such program. Thus, a determination that one fringe benefit program discriminates in favor of highly compensated employees generally will not cause other fringe benefit programs covering the same highly compensated employees to be treated as discriminatory. If the fringe benefits provided to a highly compensated individual do not satisfy the nondiscrimination rules provided in this section, such individual shall be unable to exclude from gross income any portion of the benefit. For example, if an employer offers a 20 percent discount (which otherwise satisfies the requirements for a qualified employee discount) to all non-

highly compensated employees and a 35 percent discount to all highly compensated employees, the entire value of the 35 percent discount (not just the excess over 20 percent) is includible in the gross income and wages of the highly compensated employees who make purchases at a discount.

(ii) *Exception*—(A) *Related fringe benefit programs.* If one of a group of fringe benefit programs discriminates in favor of highly compensated employees, no related fringe benefit provided to such highly compensated employees under any other fringe benefit program may be excluded from the gross income of such highly compensated employees. For example, assume a department store provides a 20 percent merchandise discount to all employees under one fringe benefit program. Assume further that under a second fringe benefit program, the department store provides an additional 15 percent merchandise discount to a group of employees defined under a classification which discriminates in favor of highly compensated employees. Because the second fringe benefit program is discriminatory, the 15 percent merchandise discount provided to the highly compensated employees is not a qualified employee discount. In addition, because the 20 percent merchandise discount provided under the first fringe benefit program is related to the fringe benefit provided under the second fringe benefit program, the 20 percent merchandise discount provided the highly compensated employees is not a qualified employee discount. Thus, the entire 35 percent merchandise discount provided to the highly compensated employees is includible in such employees' gross incomes.

(B) *Employer operated eating facilities for employees.* For purposes of paragraph (a)(2)(ii)(A) of this section, meals at different employer-operated eating facilities for employees are not related fringe benefits, so that a highly compensated employee may exclude from gross income the value of a meal at a nondiscriminatory facility even though any meals provided to him or her at a discriminatory facility cannot be excluded.

(3) *Scope of the nondiscrimination rules provided in this section.* The nondiscrimination rules provided in this section apply only to fringe benefits provided pursuant to section 132 (a)(1), (a)(2), and (e)(2). These rules have no application to any other employee benefit that may be subject to nondiscrimination requirements under any other section of the Code.

(b) *Aggregation of employees*—(1) *Section 132(a) (1) and (2).* For purposes of determining whether the exclusions for no-additional-cost services and qualified employee discounts are available to highly compensated employees, the nondiscrimination rules of this section are applied by aggregating the employees of all related employers (as defined in §1.132–1(c)), except that employees in different lines of business (as defined in §1.132–4) are not to be aggregated. Thus, in general, for purposes of this section, the term ''employees of the employer'' refers to all employees of the employer and any other entity that is a member of a group described in sections 414 (b), (c), (m), or (o) and that performs services within the same line of business as the employer which provides the particular fringe benefit. Employees in different lines of business will be aggregated, however, if the line of business limitation has been relaxed pursuant to paragraphs (b) through (g) of §1.132–4.

(2) *Section 132 (e) (2).* For purposes of determining whether the exclusions for meals provided at employer-operated eating facilities are available to highly compensated, the nondiscrimination rules of this section are applied by aggregating the employees of all related employers (as defined in section §1.132–1(c)) who regularly work at or near the premises on which the eating facility is located, except that employees in different lines of business (as defined in §1.132–4) are not to be aggregated. The nondiscrimination rules of this section are applied separately to each eating facility. Each dining room or cafeteria in which meals are served is treated as a separate eating facility, regardless of whether each such dining room or cafeteria has its own kitchen or other food-preparation area.

(3) *Classes of employees who may be excluded.* For purposes of applying the nondiscrimination rules of this section to a particular fringe benefit program,

there may be excluded from consideration employees who may be excluded from consideration under section 89(h), as enacted by the Tax Reform Act of 1986, Pub. L. 99–514, 100 Stat. 2085 (1986) and amended by the Technical and Miscellaneous Revenue Act of 1988, Pub. L. 100–647, 102 Stat. 3342 (1988).

(c) *Availability on substantially the same terms*—(1) *General rule.* The determination of whether a benefit is available on substantially the same terms shall be made upon the basis of the facts and circumstances of each situation. In general, however, if any one of the terms or conditions governing the availability of a particular benefit to one or more employees varies from any one of the terms or conditions governing the availability of a benefit made available to one or more other employees, such benefit shall not be considered to be available on substantially the same terms except to the extent otherwise provided in paragraph (c)(2) of this section. For example, if a department store provides a 20 percent qualified employee discount to all of its employees on all merchandise, the substantially the same terms requirement will be satisfied. Similarly, if the discount provided to all employees is 30 percent on certain merchandise (such as apparel), and 20 percent on all other merchandise, the substantially the same terms requirement will be satisfied. However, if a department store provides a 20 percent qualified employee discount to all employees, but as to the employees in certain departments, the discount is available upon hire, and as to the remaining departments, the discount is only available when an employee has completed a specified term of services, the 20 percent discount is not available on substantially the same terms to all of the employees of the employer. Similarly, if a greater discount is given to employees with more seniority, full-time work status, or a particular job description, such benefit (*i.e.*, the discount) would not be available to all employees eligible for the discount on substantially the same terms, except to the extent otherwise provided in paragraph (c)(2) of this section. These examples also apply to no-additional-cost-services. Thus, if an employer charges non-highly compensated employees for a no-additional-cost service and does not charge highly compensated employees (or charges highly compensated employees a lesser amount), the substantially the same terms requirement will not be satisfied.

(2) *Certain terms relating to priority.* Certain fringe benefits made available to employees are available only in limited quantities that may be insufficient to meet employee demand. This situation may occur either because of employer policy (such as where an employer determines that only a certain number of units of a specific product will be made available to employees each year) or because of the nature of the fringe benefit (such as where an employer provides a no-additional-cost transportation service that is limited to the number of seats available just before departure). Under these circumstances, an employer may find it necessary to establish some method of allocating the limited fringe benefits among the employees eligible to receive the fringe benefits. The employer may establish the priorities described below.

(i) *Priority on a first come, first served, or similar basis.* A benefit shall not fail to be treated as available to a group of employees on substantially the same terms merely because the employer allocates the benefit among such employees on a ''first come, first served'' or lottery basis, provided that the same notice of the terms of availability is given to all employees in the group and the terms under which the benefit is provided to employees within the group are otherwise the same with respect to all employees. For purposes of the preceding sentence, a program that gives priority to employees who are the first to submit written requests for the benefit will constitute priority on a ''first come, first served'' basis. Similarly, if the employer regularly engages in the practice of allocating benefits on a priority basis to employees demonstrating a critical need, such benefit shall not fail to be treated as available on substantially the same terms to all of the employees with respect to whom such priority status is available as long as the determination is based upon uniform and objective criteria which have been communicated to all employees in the group of eligible employees. An example of a critical need would be priority transportation given to an employee in the event of a medical emergency involving the employee (or a member of the employee's immediate family) or a recent death in the employee's immediate family. Frustrated vacation plans or forfeited deposits would not be treated as giving rise to particularly critical needs.

(ii) *Priority on the basis of seniority*. Solely for purposes of §1.132–8, a benefit shall not fail to be treated as available to a group of employees of the employer on substantially the same terms merely because the employer allocates the benefit among such employees on a seniority basis provided that:

(A) The same notice of the terms of availability is given to all employees in the group; and

(B) The average value of the benefit provided for each nonhighly compensated employee is at least 75% of that provided for each highly compensated employee. For purposes of this test, the average value of the benefit provided for each nonhighly compensated (highly compensated) employee is determined by taking the sum of the fair market values of such benefit provided to all the nonhighly compensated (highly compensated) employees, determined in accordance with §1.61–21, and then dividing that sum by the total number of nonhighly compensated (highly compensated) employees of the employer. For purposes of determining the average value of the benefit provided for each employee, all employee's of the employer are counted, including those who are not eligible to receive the benefit from the employer.

(d) *Testing for discrimination*—(1) *Classification test*. In the event that a benefit described in section 132 (a)(1), (a)(2) or (e)(2) is not available on substantially the same terms to all of the employees of the employer, no exclusion shall be available to a highly compensated employee for such benefit unless the program under which the benefit is provided satisfies the nondiscrimination standards set forth in this section. The nondiscrimination standard of this section will be satisfied only if the benefit is available on substantially the same terms to a group of employees of the employer which is defined under a reasonable classification established by the employer that does not discriminate in favor of highly compensated employees. The determination of whether a particular classification is discriminatory will generally depend upon the facts and circumstances involved, based upon principles similar to those applied for purposes of section 410(b)(2)(A)(i) or, for years commencing prior to January 1, 1988, section 410(b)(1)(B). Thus, in general, except as otherwise provided in this section, if a benefit is available on substantially the same terms to a group of employees which, when compared with all of the other employees of the employer, constitutes a nondiscriminatory classification under section 410(b)(2)(A)(i) (or, if applicable, section 410(b)(1)(B)), it shall be deemed to be nondiscriminatory.

(2) *Classifications that are per se discriminatory*. A classification that, on its face, makes fringe benefits available principally to highly compensated employees is per se discriminatory. In addition, a classification that is based on either an amount or rate of compensation is per se discriminatory if it favors those with the higher amount or rate of compensation. On the other hand, a classification that is based on factors such as seniority, full-time vs. part-time employment, or job description is not per se discriminatory but may be discriminatory as applied to the workforce of a particular employer.

(3) *Former employees*. When determining whether a classification is discriminatory, former employees shall be tested separately from other employees of the employer. Therefore, a classification is not discriminatory solely because the employer does not make fringe benefits available to any former employee. Whether a classification of former employees discriminates in favor of highly compensated employees will depend upon the particular facts and circumstances.

(4) *Restructuring of benefits*. For purposes of testing whether a particular group of employees would constitute a

discriminatory classification for purposes of this section, an employer may restructure its fringe benefit program as described in this paragraph. If a fringe benefit is provided to more than one group of employees, and one or more such groups would constitute a discriminatory classification if considered by itself, then for purposes of this section, the employer may restructure its fringe benefit program so that all or some of the members of such group may be aggregated with another group, provided that each member of the restructured group will have available to him or her the same benefit upon the same terms and conditions. For example, assume that all highly compensated employees of an employer have fewer than five years of service and all nonhighly compensated employees have over five years of service. If the employer provided a five percent discount to employees with under five years of service and a ten percent discount to employees with over five years of service, the discount program available to the highly compensated employees would not satisfy the nondiscriminatory classification test; however, as a result of the rule described in this paragraph (d)(4), the employer could structure the program to consist of a five percent discount for all employees and a five percent additional discount for nonhighly compensated employees.

(5) *Employer-operated eating facilities for employees*—(i) *General rule*. If access to an employer-operated eating facility for employees is available to a classification of employees that discriminates in favor of highly compensated employees, then the classification will not be treated as discriminating in favor of highly compensated employees unless the facility is used by one or more executive group employees more than a de minimis amount.

(ii) *Executive group employee*. For purposes of this paragraph (d)(5), an employee is an ''executive group employee'' if the definition of paragraph (f)(1) of this section is satisfied. For purposes of identifying such employees, the phrase ''top one percent of the employees'' is substituted for the phrase ''top ten percent of the employees'' in section 414(q)(4) (relating to the definition of ''top-paid group'').

(e) *Cash bonuses or rebates*. A cash bonus or rebate provided to an employee by an employer that is determined with reference to the value of employer-provided property or services purchased by the employee, is treated as an equivalent employee discount. For example, assume a department store provides a 20 percent merchandise discount to all employees under a fringe benefit program. In addition, assume that the department store provides cash bonuses to a group of employees defined under a classification which discriminates in favor of highly compensated employees. Assume further that such cash bonuses equal 15 percent of the value of merchandise purchased by each employee. This arrangement is substantively identical to the example described in paragraph (e)(2)(i) of this section concerning related fringe benefit programs. Thus, both the 20 percent merchandise discount and the 15 percent cash bonus provided to the highly compensated employees are includible in such employees' gross incomes.

(f) *Highly compensated employee*—(1) *Government and nongovernment employees*. A highly compensated employee of any employer is any employee who, during the year or the preceding year—

(i) Was a 5-percent owner,

(ii) Received compensation from the employer in excess of $75,000,

(iii) Received compensation from the employer in excess of $50,000 and was in the top-paid group of employees for such year, or

(iv) Was at any time an officer and received compensation greater than 150 percent of the amount in effect under section 415(c)(1)(A) for such year.

For purposes of determining whether an employee is a highly compensated employee, the rules of sections 414 (q), (s), and (t) apply.

(2) *Former employees*. A former employee shall be treated as a highly compensated employee if—

(i) The employee was a highly compensated employee when the employee separated from service, or

(ii) The employee was a highly compensated employee at any time after attaining age 55.

[T.D. 8256, 54 FR 28618, July 6, 1989]

§ 1.132–8T Nondiscrimination rules—1985 through 1988 (temporary).

(a) *Application of nondiscrimination rules*—(1) *General rule.* To qualify under section 132 for the exclusions for nonadditional-cost services, qualified employee discounts, or meals provided at employer-operated eating facilities for employees, the fringe benefit must be available on substantially the same terms to each member of a group of employees which is defined under a reasonable classification set up by the employer that does not discriminate in favor of officers, owners, or highly compensated employees (the ''prohibited group employees'').

(2) *Consequences of discrimination.* If the availability of or the provision of the fringe benefit does not satisfy the nondiscrimination rules provided in this section, the exclusion applies only to those employees (if any) who receive the benefit and who are not prohibited group employees. For example, if an employer offers a 20 percent discount (which otherwise satisfies the requirements for a qualified employee discount) to all nonprohibited group employees and a 35 percent discount to all prohibited group employees, the entire value of the 35 percent discount (not just the excess over 20 percent) is includible in the gross income and wages of the prohibited group employees who make purchases at a discount.

(3) *Scope of the nondiscrimination rules provided in this section.* The nondiscrimination rules provided in this section apply only to fringe benefits provided pursuant to section 132 (a)(1), (a)(2), and (e)(2). These rules have no application to any other employee benefit that may be subject to nondiscrimination requirements under any other section of the Code.

(b) *Coverage requirement*—(1) *Section 132 (a)(1) and (2).* For purposes of the exclusions for no-additional-cost services and qualified employee discounts, the nondiscrimination rules of this section are applied by aggregating the employees of all related employers (as defined in §1.132–1T (c)), but without aggregating employees in different lines of business (as defined in §1.132–4T). Employees in different lines of business will be aggregated, however, if the line of business limitation has been relaxed pursuant to either section 1.132–4T (b) or (c). Except as provided in paragraph (e) of this section, the nondiscrimination rules of this section are generally applied separately to each fringe benefit program of an employer.

(2) *Section 132(e)(2).* For purposes of the exclusion for meals provided at employer-operated eating facilities for employees, the nondiscrimination rules of this section are applied by aggregating the employees of all related employers, without regard to different lines of business, who regularly work at or near the premises on which the eating facility is located. The nondiscrimination rules of this section are applied separately to each eating facility. Each dining room or cafeteria in which meals are served is treated as a separate eating facility, regardless of whether each such dining room or cafeteria has its own kitchen or other food-preparation area.

(3) *Classes of employees who may be excluded.* Except as otherwise provided in this section, for purposes of applying the nondiscrimination rules of this section to a particular fringe benefit program, there may be excluded from consideration the following classes of employees provided that, with respect to each class (other than the class described in paragraph (b)(3)(iii) of this section), all employees in the class are excluded from participating in the particular fringe benefit program—

(i) All part-time or seasonal employees who are (or who are reasonably expected to be) credited with less than 1,000 hours (or such lesser number required for the program) of service during a calendar year;

(ii) All employees who are included in a unit of employees covered by an agreement with the Secretary of Labor finds to be a collective bargaining agreement between employee representatives and one or more employers, if there is evidence that the particular fringe benefit program was the subject of good faith bargaining between such employee representatives and such employer or employers (and if, after March 31, 1984, the additional condition of section 7701(a)(46) is satisfied);

(iii) All employees who are nonresident aliens and who receive no earned income (within the meaning of section 911(d)(2)) from the employer which constitutes income from services within the United States (within the meaning of section 861(a)(3));

(iv) All employees who have not completed at least one year (or such lesser period required for the program) of service with the employer;

(v) All employees who have separated from the service of the employer in a year prior to the current year (regardless of the reason for the separation);

(vi) All employees who have separated from the service of the employer in a year prior to the current year except for retired and/or disabled employees (either with or without a time limit based on a set number of years since separation from the service of the employer); and

(vii) All employees of a leased section of a department store.

(c) *Classification requirement*—(1) *General rule*. The determination of whether a particular classification established by an employer discriminates in favor of the prohibited group will depend on the facts and circumstances involved, based on principles similar to those applied in the qualified plan area (see section 410(b)(1)(B) and the regulations thereunder). In general, except as otherwise provided in this section, a classification that would be determined to be nondiscriminatory pursuant to the application of the nondiscrimination standards that are applied in the qualified plan area shall be deemed to be nondiscriminatory for purposes of section 132.

(2) *Classifications that are per se discriminatory*. A classification that, on its face, makes fringe benefits available only to prohibited group employees is per se discriminatory, and no exclusion from gross income is available to any prohibited group employee under section 132. In addition, a classification that is based on either an amount or rate of compensation is per se discriminatory if it favors those with the higher amount or rate of compensation. On the other hand, a classification that is based on factors such as seniority, full-time vs. part-time employment, or job description is not per se discriminatory but may be discriminatory as applied to the workforce of a particular employer.

(3) *Former employees*. When determining whether a classification is discriminatory, former employees shall not be considered together with other employees of the employer. Therefore, a classification is not discriminatory if the employer does not make the fringe benefits available to any former employee. Whether a classification of former employees discriminates in favor of prohibited group employees will depend on the facts and circumstances. The rules of this section shall apply separately to the former employee classification.

(4) *Employer-operated eating facilities for employees*—(i) *General rule*. If access to an employer-operated eating facility for employees is available to a classification of employees that discriminates in favor of highly compensated employees, the classification will not be treated as discriminating in favor of the prohibited group employees unless the facility is used, more than a de minimis amount, by any executive group employee.

(ii) *Executive group employees*. For purposes of this paragraph (c)(4), the term ''executive group employees'' has the same meaning as the term ''prohibited group employees'' (as defined in paragraph (g) of this section), except that for purposes of identifying highly compensated employees—

(A) The exception provided in paragraph (g)(1)(i)(A) of this section does not apply, and

(B) The phrase ''highest-paid one percent of all employees of an employer'' is substituted for the phrase ''highest-paid ten percent of all employees of an employer'' in paragraph (g)(1)(ii)(A) of this section.

(d) *Substantially-the-same-terms requirement*—(1) *General rule*. Fringe benefits available to a particular classification of employees must be available to each employee in the classification on substantially the same terms. The determination of whether this requirement is met shall depend on the facts and circumstances involved. For example, if a department store provides a 20 percent qualified employee discount to its employees on all merchandise, the substantially-the-same-terms requirement will be satisfied. Similarly, if the discount provided to all employees is 30 percent on certain merchandise (such as apparel), and 20 percent on all other merchandise, the substantially-the-same-terms requirement will be satisfied. However, if the discount provided is 20 percent on all merchandise for hourly employees and 30 percent on all merchandise for salaried employees, the substantially-the-same-terms requirement will not be satisfied. In addition, if the percentage discount varies depending on either an employee's amount or rate of compensation, or volume of purchases, the substantially-the-same-terms requirement will not be satisfied. In order to determine whether such a discount program satisfies the nondiscrimination requirements of section 132, each group of employees that does receive fringe benefits on substantially the same terms must be treated as a separate classification. However, subject to the rules of paragraph (e)(2) of this section, an employer may divide a fringe benefit program into two programs for purposes of aggregating groups of employees. See Example (1) of paragraph (d)(3) of this section.

(2) *Terms relating to priority.* Certain fringe benefits made available to employees are available only in limited quantities that may be insufficient to meet employee demand. This may occur either because of employer policy (such as where an employer determines that only a certain number of units of a specific product will be made available to employees each year) or because of the nature of the fringe benefit (such as where an employer provides a no-additional-cost transportation service that is limited to the number of seats available just before departure). Under these circumstances, an employer may find it necessary to establish some method of allocating the limited fringe benefits among the employees eligible to receive the fringe benefits. An allocation among employees on a "first-come, first-served" basis will not violate the substantially-the-same-terms requirement provided that such an allocation is not discriminatory in practice. In addition, an allocation among employees on a lottery basis will not violate the substantially-the-same-terms requirement provided that such an allocation is nondiscriminatory in practice. For example, assume that an employer has a limited number of a particular benefit to offer to its employees. Assume further that the employees interested in receiving the benefit submit their names to the employer who then selects a number of names, at random, equal to the number of fringe benefits available. This lottery system would not violate the substantially-the-same-terms requirement. An allocation among employees on other than a "first-come, first-served", lottery, or similar basis will violate the substantially-the-same-terms requirement. Therefore, an allocation based on seniority, full-time vs. part-time employment, or job description will violate the substantially-the-same-terms requirement. In order to determine whether such a fringe benefit program satisfies the nondiscrimination requirements of section 132, each group of employees that does receive fringe benefits on substantially the same terms must be treated as a separate classification. For purposes of this rule, the last two sentences of paragraph (d)(1) of this section apply.

(3) *Examples.* The followings examples illustrate the provisions of this paragraph (d):

Example 1. Assume that with respect to a benefit available in limited quantities an employer provides priority to employees based on seniority. Assume further that all non-prohibited group employees have ten years of seniority and all prohibited group employees have nine years seniority. If each of these groups were tested separately, the benefits offered to prohibited group employees would be discriminatory under this section. In this case, the employer could divide the fringe benefit program provided to non-prohibited group employees into two parts: one relating to nine years of seniority and one relating to an additional year of seniority. As restructured in this manner, all employees receive the benefit relating to nine years seniority and only non-prohibited group employees receive the benefit relating to an additional year of seniority. Both groups (all employees and all non-prohibited group employees) are nondiscriminatory groups.

Example 2. Assume that prices charged to prohibited group employees at an employer-operated eating facility for employees are lower than prices charged to non-prohibited group employees. The substantially-the-same requirement is not satisfied.

(4) *Disproportionate use of eating facility.* If access to an employer-operated eating facility for employees is technically available on substantially-the-same-terms (to (i) all employees who regularly work at or near the premises on which the eating facility is located (the employee group), or (ii) a nondiscriminatory classification of the employee group, but in practice a highly disproportionate number of the prohibited group employees in the employee group, compared to the non-prohibited group employees in the employee group, use the facility, the substantially-the-same-terms requirement will not be satisfied unless no member of the executive group eats there more than a de minimis amount.

(e) *Aggregation of separate fringe benefit programs*—(1) *General rule.* If an employer maintains more than one fringe benefit program, *i.e.*, two or more classifications of employees providing either identical or different fringe benefits, the nondiscrimination requirements of section 132 will generally be applied separately to each such program. Thus, a determination that one fringe benefit program discriminates in favor of prohibited group employees generally will not cause other fringe benefit programs covering the same prohibited group employees to be treated as discriminatory.

(2) *Exception*—(i) *Related fringe benefit programs.* If one of a group of fringe benefit programs discriminates in favor of prohibited group employees, no related fringe benefit provided to such prohibited group employees under any other fringe benefit program may be excluded from the gross income of such prohibited group employees. For example, assume a department store provides a 20 percent merchandise discount to all employees under one fringe benefit program. Assume further that under a second fringe benefit program, the department store provides an additional 15 percent merchandise discount to a group of employees defined under a classification which discriminates in favor of the prohibited group. Because the second fringe benefit program is discriminatory, the 15 percent merchandise discount provided to the prohibited group employees is not a qualified employee discount. In addition, because the 20 percent merchandise discount provided under the first fringe benefit program is related to the fringe benefit provided under the second fringe benefit program, the 20 percent merchandise discount provided the prohibited group employees is not a qualified employee discount. Thus, the entire 35 percent merchandise discount provided to the prohibited group employees is includible in such employees' gross incomes.

(ii) *Employer-operated eating facilities for employees.* For purposes of paragraph (e)(2)(i) of this section, meals at different employer-operated eating facilities for employees are not related fringe benefits, so that a prohibited group employee may exclude the value of a meal at a nondiscriminatory facility even though any meals provided to him or her at the discriminatory facility cannot be excluded.

(f) *Cash bonuses or rebates.* A cash bonus or rebate provided to an employee by an employer that is determined pursuant to the value of employer-provided property or services purchased by the employee, is treated as an equivalent employee discount. For example, assume a department store provides a 20 percent merchandise discount to all employees under a fringe benefit program. In addition, assume that the department store provides cash bonuses to a group of employees defined under a classification which discriminates in favor of the prohibited group. Assume further that such cash bonuses equal 15 percent of the value of merchandise purchased by each employee. This arrangement is substantively identical to the example described in paragraph (e)(2) of this section. Thus, both the 20 percent merchandise discount and the 15 percent cash bonus provided to the prohibited group employees are includible in such employees' gross incomes.

(g) *Prohibited group employees*—(1) *Highly compensated*—(i) *General rule.* Except as otherwise provided in this paragraph (g)(1)(i), any employee of an employer who has (or is reasonably expected to have) compensation during a calendar year equal to or greater than the employer's base compensation amount is highly compensated. There are two exceptions to this rule:

(A) Any employee who has (or is reasonably expected to have) compensation during a calendar year equal to or greater than $50,000 is highly compensated, regardless of whether such compensation is in excess of the base compensation amount, and

(B) Any employee who is reasonably expected to have compensation during a calendar year equal to or less than $20,000 is not highly compensated, unless no employee of the employer is reasonably expected to have compensation equal to or greater than $35,000.

The determination of whether an employee is a highly compensated employee will be determined based on the entire employee workforce of all employers aggregated pursuant to the rules of section 414 (b), (c), or (m) without regard to the regular workplace of the employees.

(ii) *Base compensation amount*—(A) *General rule.* The term ''base compensation amount'' is defined as that amount corresponding to the lowest annual compensation amount received by the highest-paid ten percent of all employees of an employer (the number of employees in the top ten percent will be increased to the next highest integer if necessary), determined on the basis of the preceding calendar year. For purposes of this paragraph (g)(1)(ii), the term ''employer'' includes all entities that would be aggregated pursuant to the rules of section 414 (b), (c), or (m).

(B) *Employees that are excluded.* For purposes of determining the base compensation amount with respect to a fringe benefit program, employees described in paragraph (b)(3) of this section are excluded whether or not they are covered under the fringe benefit program, except that: (*1*) Employees described in paragraph (b)(3)(ii) of this section are taken into account with respect to the program even if they are excluded under paragraph (b)(3), and (*2*) employees described in paragraph (b)(3) (i) and (iv) of this section are taken into account with respect to the program unless they are excluded under paragraph (b)(3).

(C) *Exception to preceding calendar year rule.* In the case of an employer's first year of operation, or where an employer's business has changed significantly from the prior calendar year (e.g., due to an acquisition or merger), the employer must make a good faith attempt to either determine or adjust the base compensation amount for the current year based on reasonable estimates of current year compensation.

(iii) *Compensation.* The term ''compensation'' is defined as the amount reportable on a Form W-2 as income. Amounts that would be excluded from income but for section 132(h)(1) are not included in compensation for purposes of this paragraph (g)(1). Compensation includes amounts received from all entities which would be treated as a single employer under section 414 (b), (c), or (m) and is not restricted to amounts received with respect to any one line of business.

(iv) *Employee.* Generally, for purposes of determining whether an employee is highly compensated under this paragraph (g)(1), the term ''employee'' does not include any individual who does not perform services for the employer as an employee during the calendar year. For example, if an employer has active employees, retired or disabled employees, and widows or widowers who are ''employees'' under section 132(f)(1)(B), the general rule (described in paragraph (g)(1)(i) of this section) applies only to the active employees.

(2) *Owner*—(i) *General rule.* For purposes of this section, the term ''owner'' means any employee who owns a one percent or greater interest in either the employer or in any entity that would be aggregated with the employer pursuant to the rules of section 414 (b), (c), or (m). In addition, such an employee shall be treated as an owner of all entities that would be aggregated with the employer pursuant to the rules of section 414 (b), (c), or (m).

(ii) *Determining ownership.* Ownership in a corporation shall be determined pursuant to the rules of section 318(a). For purposes of determining ownership in an entity other than a corporation, the rules of section 318(a) shall apply in a manner similar to the way in which they apply for purposes of determining ownership in a corporation. For non-corporate interests, capital or profits interest must be substituted for stock.

(3) *Officer*—(i) *Non-government*. For purposes of this section, an officer of a non-government employer is any employee who is appointed, confirmed, or elected by the Board or shareholders of the employer. An employee who is an officer of an employer shall be treated as an officer of all entities treated as a single employer pursuant to section 414 (b), (c), or (m). The number of officers is not to exceed one-percent of the total number of employees of all entities treated as a single employer pursuant to section 414 (b), (c), or (m) (increased to the next highest integer, if necessary). If the number of officers exceeds one-percent of all employees, then the limitation is to be applied to employees in descending order of compensation (as defined in paragraph (g)(1)(iii) of this section). Thus, if an employer with 1,000 employees has 11 board-appointed officers, the employee with the least compensation of those officers would not be an officer under this paragraph (g)(3)(i). In determining the total number of employees with respect to a fringe benefit program, employees described in paragraph (b)(3) of this section are excluded whether or not they are covered under the fringe benefit program, except that (A) employees described in paragraph (b)(3)(ii) of this section are taken into account with respect to the program even if they are excluded under paragraph (b)(3), and (B) employees described in paragraph (b)(3) (i) and (iv) of this section are taken into account with respect to the program unless they are excluded under paragraph (b)(3).

(ii) *Government*. For purposes of this section, an officer of a government employer is any—

(A) Elected official,

(B) Federal employee appointed by the President and confirmed by the Senate. However, in the case of any commissioned officer of the United States Armed Forces, an officer is any employee with the rank of brigadier general or rear admiral (lower half) or above, and

(C) State or local executive officer comparable to individuals described in paragraphs (g)(3)(ii) (A) and (B) of this section.

For purposes of this paragraph (g)(3)(ii), the term "government" includes any Federal, state, or local governmental unit, and any agency or instrumentality thereof.

(4) *Former employees*. [Reserved]

[T.D. 8063, 50 FR 52309, Dec. 23, 1985, as amended by T.D. 8256, 54 FR 28600, July 6, 1989]

§ 1.132–9 Qualified transportation fringes.

(a) *Table of contents*. This section contains a list of the questions and answers in § 1.132–9.

(b) *Questions and answers.*

Q–1. What is a qualified transportation fringe?

A–1. (a) The following benefits are qualified transportation fringe benefits:

(1) Transportation in a commuter highway vehicle.

(2) Transit passes.

(3) Qualified parking.

(b) An employer may simultaneously provide an employee with any one or more of these three benefits.

Q–2. What is transportation in a commuter highway vehicle?

A–2. Transportation in a commuter highway vehicle is transportation provided by an employer to an employee in connection with travel between the employee's residence and place of employment. A commuter highway vehicle is a highway vehicle with a seating capacity of at least 6 adults (excluding the driver) and with respect to which at least 80 percent of the vehicle's mileage for a year is reasonably expected to be—

(a) For transporting employees in connection with travel between their residences and their place of employment; and

(b) On trips during which the number of employees transported for commuting is at least one-half of the adult seating capacity of the vehicle (excluding the driver).

Q–3. What are transit passes?

A–3. A transit pass is any pass, token, farecard, voucher, or similar item (including an item exchangeable for fare media) that entitles a person to transportation—

(a) On mass transit facilities (whether or not publicly owned); or

(b) Provided by any person in the business of transporting persons for compensation or hire in a highway vehicle with a seating capacity of at least 6 adults (excluding the driver).

Q–4. What is qualified parking?

A–4. (a) Qualified parking is parking provided to an employee by an employer—

(1) On or near the employer's business premises; or

(2) At a location from which the employee commutes to work (including commuting by carpool, commuter highway vehicle, mass transit facilities, or transportation provided by any person in the business of transporting persons for compensation or hire).

(b) For purposes of section 132(f), parking on or near the employer's business premises includes parking on or near a work location at which the employee provides services for the employer. However, qualified parking does not include—

(1) The value of parking provided to an employee that is excludable from gross income under section 132(a)(3) (as a working condition fringe), or

(2) Reimbursement paid to an employee for parking costs that is excludable from gross income as an amount treated as paid under an accountable plan. See §1.62–2.

(c) However, parking on or near property used by the employee for residential purposes is not qualified parking.

(d) Parking is provided by an employer if—

(1) The parking is on property that the employer owns or leases;

(2) The employer pays for the parking; or

(3) The employer reimburses the employee for parking expenses (see Q/A–16

of this section for rules relating to cash reimbursements).

Q–5. May qualified transportation fringes be provided to individuals who are not employees?

A–5. An employer may provide qualified transportation fringes only to individuals who are currently employees of the employer at the time the qualified transportation fringe is provided. The term employee for purposes of qualified transportation fringes is defined in §1.132–1(b)(2)(i). This term includes only common law employees and other statutory employees, such as officers of corporations. See Q/A–24 of this section for rules regarding partners, 2-percent shareholders, and independent contractors.

Q–6. Must a qualified transportation fringe benefit plan be in writing?

A–6. No. Section 132(f) does not require that a qualified transportation fringe benefit plan be in writing.

Q–7. Is there a limit on the value of qualified transportation fringes that may be excluded from an employee's gross income?

A–7. (a) *Transportation in a commuter highway vehicle and transit passes.* Before January 1, 2002, up to $65 per month is excludable from the gross income of an employee for transportation in a commuter highway vehicle and transit passes provided by an employer. On January 1, 2002, this amount is increased to $100 per month.

(b) *Parking.* Up to $175 per month is excludable from the gross income of an employee for qualified parking.

(c) *Combination.* An employer may provide qualified parking benefits in addition to transportation in a commuter highway vehicle and transit passes.

(d) *Cost-of-living adjustments.* The amounts in paragraphs (a) and (b) of this Q/A–7 are adjusted annually, beginning with 2000, to reflect cost-of-living. The adjusted figures are announced by the Service before the beginning of the year.

Q–8. What amount is includible in an employee's wages for income and employment tax purposes if the value of the qualified transportation fringe exceeds the applicable statutory monthly limit?

A–8. (a) Generally, an employee must include in gross income the amount by which the fair market value of the benefit exceeds the sum of the amount, if any, paid by the employee and any amount excluded from gross income under section 132(a)(5). Thus, assuming no other statutory exclusion applies, if an employer provides an employee with a qualified transportation fringe that exceeds the applicable statutory monthly limit and the employee does not make any payment, the value of the benefits provided in excess of the applicable statutory monthly limit is included in the employee's wages for income and employment tax purposes. See §1.61–21(b)(1).

(b) The following examples illustrate the principles of this Q/A–8:

Example 1. (i) For each month in a year in which the statutory monthly transit pass limit is $100 (*i.e.*, a year after 2001), Employer M provides a transit pass valued at $110 to Employee D, who does not pay any amount to Employer M for the transit pass.

(ii) In this *Example 1,* because the value of the monthly transit pass exceeds the statutory monthly limit by $10, $120 ($110—$100, times 12 months) must be included in D's wages for income and employment tax purposes for the year with respect to the transit passes.

Example 2. (i) For each month in a year in which the statutory monthly qualified parking limit is $175, Employer M provides qualified parking valued at $195 to Employee E, who does not pay any amount to M for the parking.

(ii) In this *Example 2,* because the fair market value of the qualified parking exceeds the statutory monthly limit by $20, $240 ($195—$175, times 12 months) must be included in Employee E's wages for income and employment tax purposes for the year with respect to the qualified parking.

Example 3. (i) For each month in a year in which the statutory monthly qualified parking limit is $175, Employer P provides qualified parking with a fair market value of $220 per month to its employees, but charges each employee $45 per month.

(ii) In this *Example 3,* because the sum of the amount paid by an employee ($45) plus the amount excludable for qualified parking ($175) is not less than the fair market value of the monthly benefit, no amount is includible in the employee's wages for income and employment tax purposes with respect to the qualified parking.

Q–9. Are excludable qualified transportation fringes calculated on a monthly basis?

A–9. (a) *In general.* Yes. The value of transportation in a commuter highway vehicle, transit passes, and qualified parking is calculated on a monthly basis to determine whether the value of the benefit has exceeded the applicable statutory monthly limit on qualified transportation fringes. Except in the case of a transit pass provided to an employee, the applicable statutory monthly limit applies to qualified transportation fringes used by the employee in a month. Monthly exclusion amounts are not combined to provide a qualified transportation fringe for any month exceeding the statutory limit. A month is a calendar month or a substantially equivalent period applied consistently.

(b) *Transit passes.* In the case of transit passes provided to an employee, the applicable statutory monthly limit applies to the transit passes provided by the employer to the employee in a month for that month or for any previous month in the calendar year. In addition, transit passes distributed in advance for more than one month, but not for more than twelve months, are qualified transportation fringes if the requirements in paragraph (c) of this Q/A–9 are met (relating to the income tax and employment tax treatment of advance transit passes). The applicable statutory monthly limit under section 132(f)(2) on the combined amount of transportation in a commuter highway vehicle and transit passes may be calculated by taking into account the monthly limits for all months for which the transit passes are distributed. In the case of a pass that is valid for more than one month, such as an annual pass, the value of the pass may be divided by the number of months for which it is valid for purposes of determining whether the value of the pass exceeds the statutory monthly limit.

(c) *Rule if employee's employment terminates*—(1) *Income tax treatment.* The value of transit passes provided in advance to an employee with respect to a month in which the individual is not an employee is included in the employee's wages for income tax purposes.

(2) *Reporting and employment tax treatment.* Transit passes distributed in advance to an employee are excludable from wages for employment tax purposes under sections 3121, 3306, and 3401 (FICA, FUTA, and income tax withholding) if the employer distributes transit passes to the employee in advance for not more than three months and, at the time the transit passes are distributed, there is not an established date that the employee's employment will terminate (for example, if the employee has given notice of retirement) which will occur before the beginning of the last month of the period for which the transit passes are provided. If the employer distributes transit passes to an employee in advance for not more than three months and at the time the transit passes are distributed there is an established date that the employee's employment will terminate, and the employee's employment does terminate before the beginning of the last month of the period for which the transit passes are provided, the value of transit passes provided for months beginning after the date of termination during which the employee is not employed by the employer is included in the employee's wages for employment tax purposes. If transit passes are distributed in advance for more than three months, the value of transit passes provided for the months during which the employee is not employed by the employer is includible in the employee's wages for employment tax purposes regardless of whether at the time the transit passes were distributed there was an established date of termination of the employee's employment.

(d) *Examples.* The following examples illustrate the principles of this Q/A–9:

Example 1. (i) Employee E incurs $150 for qualified parking used during the month of June of a year in which the statutory monthly parking limit is $175, for which E is reimbursed $150 by Employer R. Employee E incurs $180 in expenses for qualified parking used during the month of July of that year, for which E is reimbursed $180 by Employer R.

(ii) In this *Example 1,* because monthly exclusion amounts may not be combined to provide a benefit in any month greater than the applicable statutory limit, the amount by which the amount reimbursed for July exceeds the applicable statutory monthly limit ($180 minus $175 equals $5) is includible in Employee E's wages for income and employment tax purposes.

Example 2. (i) Employee F receives transit passes from Employer G with a value of $195 in March of a year (for which the statutory monthly transit pass limit is $65) for January, February, and March of that year. F was hired during January and has not received any transit passes from G.

(ii) In this *Example 2,* the value of the transit passes (three months times $65 equals $195) is excludable from F's wages for income and employment tax purposes.

Example 3. (i) Employer S has a qualified transportation fringe benefit plan under which its employees receive transit passes near the beginning of each calendar quarter for that calendar quarter. All employees of Employer S receive transit passes from Employer S with a value of $195 on March 31 for the second calendar quarter covering the months April, May, and June (of a year in which the statutory monthly transit pass limit is $65).

(ii) In this *Example 3,* because the value of the transit passes may be calculated by taking into account the monthly limits for all months for which the transit passes are distributed, the value of the transit passes (three months times $65 equals $195) is excludable from the employees' wages for income and employment tax purposes.

Example 4. (i) Same facts as in *Example 3,* except that Employee T, an employee of Employer S, terminates employment with S on May 31. There was not an established date of termination for Employee T at the time the transit passes were distributed.

(ii) In this *Example 4,* because at the time the transit passes were distributed there was not an established date of termination for Employee T, the value of the transit passes provided for June ($65) is excludable from T's wages for employment tax purposes. However, the value of the transit passes distributed to Employee T for June ($65) is not excludable from T's wages for income tax purposes.

(iii) If Employee T's May 31 termination date was established at the time the transit passes were provided, the value of the transit passes provided for June ($65) is included in T's wages for both income and employment tax purposes.

Example 5. (i) Employer F has a qualified transportation fringe benefit plan under which its employees receive transit passes semi-annually in advance of the months for which the transit passes are provided. All employees of Employer F, including Employee X, receive transit passes from F with a value of $390 on June 30 for the 6 months of July through December (of a year in which the statutory monthly transit pass limit is $65). Employee X's employment terminates and his last day of work is August 1. Employer F's other employees remain employed throughout the remainder of the year.

(ii) In this *Example 5,* the value of the transit passes provided to Employee X for the months September, October, November, and December ($65 times 4 months equals $260) of the year is included in X's wages for income and employment tax purposes. The value of the transit passes provided to Employer F's other employees is excludable from the employees' wages for income and employment tax purposes.

Example 6. (i) Each month during a year in which the statutory monthly transit pass limit is $65, Employer R distributes transit passes with a face amount of $70 to each of its employees. Transit passes with a face amount of $70 can be purchased from the transit system by any individual for $65.

(ii) In this *Example 6,* because the value of the transit passes distributed by Employer R does not exceed the applicable statutory monthly limit ($65), no portion of the value of the transit passes is included as wages for income and employment tax purposes.

Q–10. May an employee receive qualified transportation fringes from more than one employer?

A–10. (a) *General rule.* Yes. The statutory monthly limits described in Q/A–7 of this section apply to benefits provided by an employer to its employees. For this purpose, all employees treated as employed by a single employer under section 414(b), (c), (m), or (o) are treated as employed by a single employer. See section 414(t) and §1.132–1(c). Thus, qualified transportation fringes paid by entities under common control under section 414(b), (c), (m), or (o) are combined for purposes of applying the applicable statutory monthly limit. In addition, an individual who is treated as a leased employee of the employer under section 414(n) is treated as an employee of that employer for purposes of section 132. See section 414(n)(3)(C).

(b) *Examples.* The following examples illustrate the principles of this Q/A–10:

Example 1. (i) During a year in which the statutory monthly qualified parking limit is $175, Employee E works for Employers M and N, who are unrelated and not treated as a single employer under section 414(b), (c), (m), or (o). Each month, M and N each provide qualified parking benefits to E with a value of $100.

(ii) In this *Example 1,* because M and N are unrelated employers, and the value of the monthly parking benefit provided by each is not more than the applicable statutory monthly limit, the parking benefits provided by each employer are excludable as qualified transportation fringes assuming that the other requirements of this section are satisfied.

Example 2. (i) Same facts as in Example 1, except that Employers M and N are treated as a single employer under section 414(b).

(ii) In this *Example 2,* because M and N are treated as a single employer, the value of the monthly parking benefit provided by M and N must be combined for purposes of determining whether the applicable statutory monthly limit has been exceeded. Thus, the amount by which the value of the parking benefit exceeds the monthly limit ($200 minus the monthly limit amount of $175 equals $25) for each month in the year is includible in E's wages for income and employment tax purposes.

Q–11. May qualified transportation fringes be provided to employees pursuant to a compensation reduction agreement?

A–11. Yes. An employer may offer employees a choice between cash compensation and any qualified transportation fringe. An employee who is offered this choice and who elects qualified transportation fringes is not required to include the cash compensation in income if—

(a) The election is pursuant to an arrangement described in Q/A–12 of this section;

(b) The amount of the reduction in cash compensation does not exceed the limitation in Q/A–13 of this section;

(c) The arrangement satisfies the timing and reimbursement rules in Q/A–14 and 16 of this section; and

(d) The related fringe benefit arrangement otherwise satisfies the requirements set forth elsewhere in this section.

Q–12. What is a compensation reduction election for purposes of section 132(f)?

A–12. (a) *Election requirements generally.* A compensation reduction arrangement is an arrangement under which the employer provides the employee with the right to elect whether the employee will receive either a fixed amount of cash compensation at a specified future date or a fixed amount of qualified transportation fringes to be provided for a specified future period (such as qualified parking to be used during a future calendar month). The employee's election must be in writing or another form, such as electronic, that includes, in a permanent and verifiable form, the information required to be in the election. The election must contain the date of the election, the amount of the compensation to be reduced, and the period for which the benefit will be provided. The election must relate to a fixed dollar amount or fixed percentage of compensation reduction. An election to reduce compensation for a period by a set amount for such period may be automatically renewed for subsequent periods.

(b) *Automatic election permitted.* An employer may provide under its qualified transportation fringe benefit plan that a compensation reduction election will be deemed to have been made if the employee does not elect to receive cash compensation in lieu of the qualified transportation fringe, provided that the employee receives adequate notice that a compensation reduction will be made and is given adequate opportunity to choose to receive the cash compensation instead of the qualified transportation fringe. See §1.401(a)–21 of this chapter for rules permitting the use of electronic media to make participant elections with respect to employee benefit arrangements.

Q–13. Is there a limit to the amount of the compensation reduction?

A–13. Yes. Each month, the amount of the compensation reduction may not exceed the combined applicable statutory monthly limits for transportation in a commuter highway vehicle, transit passes, and qualified parking. For example, for a year in which the statutory monthly limit is $65 for transportation in a commuter highway vehicle and transit passes, and $175 for qualified parking, an employee could elect to reduce compensation for any month by no more than $240 ($65 plus $175) with respect to qualified transportation fringes. If an employee were to elect to reduce compensation by $250 for a month, the excess $10 ($250 minus $240) would be includible in the employee's wages for income and employment tax purposes.

Q–14. When must the employee have made a compensation reduction election and under what circumstances may the amount be paid in cash to the employee?

A–14. (a) The compensation reduction election must satisfy the requirements set forth under paragraphs (b), (c), and (d) of this Q/A–14.

(b) *Timing of election.* The compensation reduction election must be made before the employee is able currently to receive the cash or other taxable amount at the employee's discretion. The determination of whether the employee is able currently to receive the cash does not depend on whether it has been constructively received for purposes of section 451. The election must specify that the period (such as a calendar month) for which the qualified transportation fringe will be provided must not begin before the election is made. Thus, a compensation reduction election must relate to qualified transportation fringes to be provided after the election. For this purpose, the date a qualified transportation fringe is provided is—

(1) The date the employee receives a voucher or similar item; or

(2) In any other case, the date the employee uses the qualified transportation fringe.

(c) *Revocability of elections.* The employee may not revoke a compensation reduction election after the employee is able currently to receive the cash or other taxable amount at the employee's discretion. In addition, the election may not be revoked after the beginning of the period for which the qualified transportation fringe will be provided.

(d) *Compensation reduction amounts not refundable.* Unless an election is revoked in a manner consistent with paragraph (c) of this Q/A–14, an employee may not subsequently receive the compensation (in cash or any form other than by payment of a qualified transportation fringe under the employer's plan). Thus, an employer's qualified transportation fringe benefit plan may not provide that an employee who ceases to participate in the employer's qualified transportation fringe benefit plan (such as in the case of termination of employment) is entitled to receive a refund of the amount by which the employee's compensation reductions exceed the actual qualified transportation fringes provided to the employee by the employer.

(e) *Examples.* The following examples illustrate the principles of this Q/A–14:

Example 1. (i) Employer P maintains a qualified transportation fringe benefit arrangement during a year in which the statutory monthly limit is $100 for transportation in a commuter highway vehicle and transit passes (2002 or later) and $180 for qualified parking. Employees of P are paid cash compensation twice per month, with the payroll dates being the first and the fifteenth day of the month. Under P's arrangement, an employee is permitted to elect at any time before the first day of a month to reduce his or her compensation payable during that month in an amount up to the applicable statutory monthly limit ($100 if the employee elects coverage for transportation in a commuter highway vehicle or a mass transit pass, or $180 if the employee chooses qualified parking) in return for the right to receive qualified transportation fringes up to the amount of the election. If such an election is made, P will provide a mass transit pass for that month with a value not exceeding the compensation reduction amount elected by the employee or will reimburse the cost of other qualified transportation fringes used by the employee on or after the first day of that month up to the compensation reduction amount elected by the employee. Any compensation reduction amount elected by the employee for the month that is not used for qualified transportation fringes is not refunded to the employee at any future date.

(ii) In this *Example 1*, the arrangement satisfies the requirements of this Q/A–14 because the election is made before the employee is able currently to receive the cash and the election specifies the future period for which the qualified transportation fringes will be provided. The arrangement would also satisfy the requirements of this Q/A–14 and Q/A–13 of this section if employees are allowed to elect to reduce compensation up to $280 per month ($100 plus $180).

(iii) The arrangement would also satisfy the requirements of this Q/A–14 (and Q/A–13 of this section) if employees are allowed to make an election at any time before the first or the fifteenth day of the month to reduce their compensation payable on that payroll date by an amount not in excess of one-half of the applicable statutory monthly limit (depending on the type of qualified transportation fringe elected by the employee) and P provides a mass transit pass on or after the applicable payroll date for the compensation reduction amount elected by the employee for the payroll date or reimburses the cost of other qualified transportation fringes used by the employee on or after the payroll date up to the compensation reduction amount elected by the employee for that payroll date.

Example 2. (i) Employee Q elects to reduce his compensation payable on March 1 of a year (for which the statutory monthly mass transit limit is $65) by $195 in exchange for a mass transit voucher to be provided in March. The election is made on the preceding February 27. Employee Q was hired in January of the year. On March 10 of the year, the employer of Employee Q delivers to Employee Q a mass transit voucher worth $195 for the months of January, February, and March.

(ii) In this *Example 2*, $65 is included in Employee Q's wages for income and employment tax purposes because the compensation reduction election fails to satisfy the requirement in this Q/A–14 and Q/A–12 of this section that the period for which the qualified transportation fringe will be provided not begin before the election is made to the extent the election relates to $65 worth of transit passes for January of the year. The $65 for February is not taxable because the election was for a future period that includes at least one day in February.

(iii) However, no amount would be included in Employee Q's wages as a result of the election if $195 worth of mass transit passes were instead provided to Q for the months of February, March, and April (because the compensation reduction would relate solely to fringes to be provided for a period not beginning before the date of the election and the amount provided does not exceed the aggregate limit for the period, *i.e.*, the sum of $65 for each of February, March, and April). See Q/A–9 of this section for rules governing transit passes distributed in advance for more than one month.

Example 3. (i) Employee R elects to reduce his compensation payable on March 1 of a year (for which the statutory monthly parking limit is $175) by $185 in exchange for reimbursement by Employer T of parking expenses incurred by Employee R for parking on or near Employer T's business premises during the period beginning after the date of the election through March. The election is made on the preceding February 27. Employee R incurs $10 in parking expenses on February 28 of the year, and $175 in parking expenses during the month of March. On April 5 of the year, Employer T reimburses Employee R $185 for the parking expenses incurred on February 28, and during March, of the year.

(ii) In this *Example 3*, no amount would be includible in Employee R's wages for income and employment tax purposes because the compensation reduction related solely to parking on or near Employer R's business premises used during a period not beginning before the date of the election and the amount reimbursed for parking used in any one month does not exceed the statutory monthly limitation.

Q–15. May an employee whose qualified transportation fringe costs are less than the employee's compensation reduction carry over this excess amount to subsequent periods?

A–15. (a) Yes. An employee may carry over unused compensation reduction amounts to subsequent periods under the plan of the employee's employer.

(b) The following example illustrates the principles of this Q/A–15:

Example. (i) By an election made before November 1 of a year for which the statutory monthly mass transit limit is $65, Employee E elects to reduce compensation in the amount of $65 for the month of November. E incurs $50 in employee-operated commuter highway vehicle expenses during November for which E is reimbursed $50 by Employer R, E's employer. By an election made before December, E elects to reduce compensation by $65 for the month of December. E incurs $65 in employee-operated commuter highway vehicle expenses during December for which E is reimbursed $65 by R. Before the following January, E elects to reduce compensation by $50 for the month of January. E incurs $65 in employee-operated commuter highway vehicle expenses during January for which E is reimbursed $65 by R because R allows E to carry over to the next year the $15 amount by which the compensation reductions for November and December exceeded the employee-operated commuter highway vehicle expenses incurred during those months.

(ii) In this *Example*, because Employee E is reimbursed in an amount not exceeding the applicable statutory monthly limit, and the reimbursement does not exceed the amount of employee-operated commuter highway vehicle expenses incurred during the month of January, the amount reimbursed ($65) is excludable from E's wages for income and employment tax purposes.

Q–16. How does section 132(f) apply to expense reimbursements?

A–16. (a) *In general*. The term qualified transportation fringe includes cash reimbursement by an employer to an employee for expenses incurred or paid by an employee for transportation in a commuter highway vehicle or qualified parking. The term qualified transportation fringe also includes cash reimbursement for transit passes made under a bona fide reimbursement arrangement, but, in accordance with section 132(f)(3), only if permitted under paragraph (b) of this Q/A–16. The reimbursement must be made under a bona fide reimbursement arrangement which meets the rules of paragraph (c) of this Q/A–16. A payment made before the date an expense has been incurred or paid is not a reimbursement. In addition, a bona fide reimbursement arrangement does not include an arrangement that is dependent solely upon an employee certifying in advance that the employee will incur expenses at some future date.

(b) *Special rule for transit passes*—(1) *In general.* The term *qualified transportation fringe* includes cash reimbursement for transit passes made under a bona fide reimbursement arrangement, but, in accordance with section 132(f)(3), only if no voucher or similar item that may be exchanged only for a transit pass is readily available for direct distribution by the employer to employees. If a voucher is readily available, the requirement that a voucher be distributed in-kind by the employer is satisfied if the voucher is distributed by the employer or by another person on behalf of the employer (for example, if a transit operator credits amounts to the employee's fare card as a result of payments made to the operator by the employer).

(2) *Voucher or similar item.* For purposes of the special rule in paragraph (b) of this Q/A–16, a transit system voucher is an instrument that may be purchased by employers from a voucher provider that is accepted by one or more mass transit operators (e.g., train, subway, and bus) in an area as fare media or in exchange for fare media. Thus, for example, a transit pass that may be purchased by employers directly from a voucher provider is a transit system voucher.

(3) *Voucher provider.* The term voucher provider means any person in the trade or business of selling transit system vouchers to employers, or any transit system or transit operator that sells vouchers to employers for the purpose of direct distribution to employees. Thus, a transit operator might or might not be a voucher provider. A voucher provider is not, for example, a third-party employee benefits administrator that administers a transit pass benefit program for an employer using vouchers that the employer could obtain directly.

(4) *Readily available.* For purposes of this paragraph (b), a voucher or similar item is readily available for direct distribution by the employer to employees if and only if an employer can obtain it from a voucher provider that—

(i) does not impose fare media charges that cause vouchers to not be readily available as described in paragraph (b)(5) of this section; and

(ii) does not impose other restrictions that cause vouchers to not be readily available as described in paragraph (b)(6) of this section.

(5) *Fare media charges.* For purposes of paragraph (b)(4) of this section, fare media charges relate only to fees paid by the employer to voucher providers for vouchers. The determination of whether obtaining a voucher would result in fare media charges that cause vouchers to not be readily available as described in this paragraph (b) is made with respect to each transit system voucher. If more than one transit system voucher is available for direct distribution to employees, the employer must consider the fees imposed for the lowest cost monthly voucher for purposes of determining whether the fees imposed by the voucher provider satisfy this paragraph. However, if transit system vouchers for multiple transit systems are required in an area to meet the transit needs of the individual employees in that area, the employer has the option of averaging the costs applied to each transit system voucher for purposes of determining whether the fare media charges for transit system vouchers satisfy this paragraph. Fare media charges are described in this paragraph (b)(5), and therefore cause vouchers to not be readily available, if and only if the average annual fare media charges that the employer reasonably expects to incur for transit system vouchers purchased from the voucher provider (disregarding reasonable and customary delivery charges imposed by the voucher provider, e.g., not in excess of $15) are more than 1 percent of the average annual value of the vouchers for a transit system.

(6) *Other restrictions.* For purposes of paragraph (b)(4) of this section, restrictions that cause vouchers to not be

readily available are restrictions imposed by the voucher provider other than fare media charges that effectively prevent the employer from obtaining vouchers appropriate for distribution to employees. Examples of such restrictions include—

(i) *Advance purchase requirements.* Advance purchase requirements cause vouchers to not be readily available only if the voucher provider does not offer vouchers at regular intervals or fails to provide the voucher within a reasonable period after receiving payment for the voucher. For example, a requirement that vouchers may be purchased only once per year may effectively prevent an employer from obtaining vouchers for distribution to employees. An advance purchase requirement that vouchers be purchased not more frequently than monthly does not effectively prevent the employer from obtaining vouchers for distribution to employees.

(ii) *Purchase quantity requirements.* Purchase quantity requirements cause vouchers to not be readily available if the voucher provider does not offer vouchers in quantities that are reasonably appropriate to the number of the employer's employees who use mass transportation (for example, the voucher provider requires a $1,000 minimum purchase and the employer seeks to purchase only $200 of vouchers).

(iii) *Limitations on denominations of vouchers that are available.* If the voucher provider does not offer vouchers in denominations appropriate for distribution to the employer's employees, vouchers are not readily available. For example, vouchers provided in $5 increments up to the monthly limit are appropriate for distribution to employees, while vouchers available only in a denomination equal to the monthly limit are not appropriate for distribution to employees if the amount of the benefit provided to the employer's employees each month is normally less than the monthly limit.

(7) *Example.* The following example illustrates the principles of this paragraph (b):

Example. (i) Company C in City X sells mass transit vouchers to employers in the metropolitan area of X in various denominations appropriate for distribution to employees. Employers can purchase vouchers monthly in reasonably appropriate quantities. Several different bus, rail, van pool, and ferry operators service X, and a number of the operators accept the vouchers either as fare media or in exchange for fare media. To cover its operating expenses, C imposes on each voucher a 50 cents charge, plus a reasonable and customary $15 charge for delivery of each order of vouchers. Employer M disburses vouchers purchased from C to its employees who use operators that accept the vouchers and M reasonably expects that $55 is the average value of the voucher it will purchase from C for the next calendar year.

(ii) In this *Example,* vouchers for X are readily available for direct distribution by the employer to employees because the expected cost of the vouchers disbursed to M's employees for the next calendar year is not more than 1 percent of the value of the vouchers (50 cents divided by $55 equals 0.91 percent), the delivery charges are disregarded because they are reasonable and customary, and there are no other restrictions that cause the vouchers to not be readily available. Thus, any reimbursement of mass transportation costs in X would not be a qualified transportation fringe.

(c) *Substantiation requirements.* Employers that make cash reimbursements must establish a bona fide reimbursement arrangement to establish that their employees have, in fact, incurred expenses for transportation in a commuter highway vehicle, transit passes, or qualified parking. For purposes of section 132(f), whether cash reimbursements are made under a bona fide reimbursement arrangement may vary depending on the facts and circumstances, including the method or methods of payment utilized within the mass transit system. The employer must implement reasonable procedures to ensure that an amount equal to the reimbursement was incurred for transportation in a commuter highway vehicle, transit passes, or qualified parking. The expense must be substantiated within a reasonable period of time. An expense substantiated to the payor within 180 days after it has been paid will be treated as having been substantiated within a reasonable period of time. An employee certification at the time of reimbursement in either written or electronic form may be a reasonable reimbursement procedure depending on the facts and circumstances. Examples of reasonable reimbursement procedures are set forth in paragraph (d) of this Q/A–16.

(d) *Illustrations of reasonable reimbursement procedures*. The following are examples of reasonable reimbursement procedures for purposes of paragraph (c) of this Q/A–16. In each case, the reimbursement is made at or within a reasonable period after the end of the events described in paragraphs (d)(1) through (d)(3) of this section.

(1) An employee presents to the employer a parking expense receipt for parking on or near the employer's business premises, the employee certifies that the parking was used by the employee, and the employer has no reason to doubt the employee's certification.

(2) An employee either submits a used time-sensitive transit pass (such as a monthly pass) to the employer and certifies that he or she purchased it or presents an unused or used transit pass to the employer and certifies that he or she purchased it and the employee certifies that he or she has not previously been reimbursed for the transit pass. In both cases, the employer has no reason to doubt the employee's certification.

(3) If a receipt is not provided in the ordinary course of business (e.g., if the employee uses metered parking or if used transit passes cannot be returned to the user), the employee certifies to the employer the type and the amount of expenses incurred, and the employer has no reason to doubt the employee's certification.

Q–17. May an employer provide nontaxable cash reimbursement under section 132(f) for periods longer than one month?

A–17. (a) *General rule*. Yes. Qualified transportation fringes include reimbursement to employees for costs incurred for transportation in more than one month, provided the reimbursement for each month in the period is calculated separately and does not exceed the applicable statutory monthly limit for any month in the period. See Q/A–8 and 9 of this section if the limit for a month is exceeded.

(b) *Example*. The following example illustrates the principles of this Q/A–17:

Example. (i) Employee R pays $100 per month for qualified parking used during the period from April 1 through June 30 of a year in which the statutory monthly qualified parking limit is $175. After receiving adequate substantiation from Employee R, R's employer reimburses R $300 in cash on June 30 of that year.

(ii) In this *Example*, because the value of the reimbursed expenses for each month did not exceed the applicable statutory monthly limit, the $300 reimbursement is excludable from R's wages for income and employment tax purposes as a qualified transportation fringe.

Q–18. What are the substantiation requirements if an employer distributes transit passes?

A–18. There are no substantiation requirements if the employer distributes transit passes. Thus, an employer may distribute a transit pass for each month with a value not more than the statutory monthly limit without requiring any certification from the employee regarding the use of the transit pass.

Q–19. May an employer choose to impose substantiation requirements in addition to those described in this regulation?

A–19. Yes.

Q–20. How is the value of parking determined?

A–20. Section 1.61–21(b)(2) applies for purposes of determining the value of parking.

Q–21. How do the qualified transportation fringe rules apply to van pools?

A–21. (a) *Van pools generally*. Employer and employee-operated van pools, as well as private or public transit-operated van pools, may qualify as qualified transportation fringes. The value of van pool benefits which are qualified transportation fringes may be excluded up to the applicable statutory monthly limit for transportation in a commuter highway vehicle and transit passes, less the value of any transit passes provided by the employer for the month.

(b) *Employer-operated van pools*. The value of van pool transportation provided by or for an employer to its employees is excludable as a qualified transportation fringe, provided the van qualifies as a commuter highway vehicle as defined in section 132(f)(5)(B) and Q/A–2 of this section. A van pool is operated by or for the employer if the employer purchases or leases vans to enable employees to commute together or the employer contracts with and pays a third party to provide the vans and some or all of the costs of operating the vans, including maintenance, liability insurance and other operating expenses.

(c) *Employee-operated van pools.* Cash reimbursement by an employer to employees for expenses incurred for transportation in a van pool operated by employees independent of their employer are excludable as qualified transportation fringes, provided that the van qualifies as a commuter highway vehicle as defined in section 132(f)(5)(B) and Q/A–2 of this section. See Q/A–16 of this section for the rules governing cash reimbursements.

(d) *Private or public transit-operated van pool transit passes.* The qualified transportation fringe exclusion for transit passes is available for travel in van pools owned and operated either by public transit authorities or by any person in the business of transporting persons for compensation or hire. In accordance with paragraph (b) of Q/A–3 of this section, the van must seat at least 6 adults (excluding the driver). See Q/A–16(b) and (c) of this section for a special rule for cash reimbursement for transit passes and the substantiation requirements for cash reimbursement.

(e) *Value of van pool transportation benefits.* Section 1.61–21(b)(2) provides that the fair market value of a fringe benefit is based on all the facts and circumstances. Alternatively, transportation in an employer-provided commuter highway vehicle may be valued under the automobile lease valuation rule in §1.61–21(d), the vehicle cents-per-mile rule in §1.61–21(e), or the commuting valuation rule in §1.61–21(f). If one of these special valuation rules is used, the employer must use the same valuation rule to value the use of the commuter highway vehicle by each employee who share the use. See §1.61–21(c)(2)(i)(B).

(f) *Qualified parking prime member.* If an employee obtains a qualified parking space as a result of membership in a car or van pool, the applicable statutory monthly limit for qualified parking applies to the individual to whom the parking space is assigned. This individual is the prime member. In determining the tax consequences to the prime member, the statutory monthly limit amounts of each car pool member may not be combined. If the employer provides access to the space and the space is not assigned to a particular individual, then the employer must designate one of its employees as the prime member who will bear the tax consequences. The employer may not designate more than one prime member for a car or van pool during a month. The employer of the prime member is responsible for including the value of the qualified parking in excess of the statutory monthly limit in the prime member's wages for income and employment tax purposes.

Q–22. What are the reporting and employment tax requirements for qualified transportation fringes?

A–22. (a) *Employment tax treatment generally.* Qualified transportation fringes not exceeding the applicable statutory monthly limit described in Q/A–7 of this section are not wages for purposes of the Federal Insurance Contributions Act (FICA), the Federal Unemployment Tax Act (FUTA), and federal income tax withholding. Any amount by which an employee elects to reduce compensation as provided in Q/A–11 of this section is not subject to the FICA, the FUTA, and federal income tax withholding. Qualified transportation fringes exceeding the applicable statutory monthly limit described in Q/A–7 of this section are wages for purposes of the FICA, the FUTA, and federal income tax withholding and are reported on the employee's Form W-2, Wage and Tax Statement.

(b) *Employment tax treatment of cash reimbursement exceeding monthly limits.* Cash reimbursement to employees (for example, cash reimbursement for qualified parking) in excess of the applicable statutory monthly limit under section 132(f) is treated as paid for employment tax purposes when actually or constructively paid. See §§31.3121(a)–2(a), 31.3301–4, 31.3402(a)–1(b) of this chapter. Employers must report and deposit the amounts withheld in addition to reporting and depositing other employment taxes. See Q/A–16 of this section for rules governing cash reimbursements.

(c) *Noncash fringe benefits exceeding monthly limits.* If the value of noncash qualified transportation fringes exceeds the applicable statutory monthly limit, the employer may elect, for purposes of the FICA, the FUTA, and federal income tax withholding, to treat the noncash taxable fringe benefits as paid on a pay period, quarterly, semiannual, annual, or other basis, provided that the benefits are treated as paid no less frequently than annually.

Q–23. How does section 132(f) interact with other fringe benefit rules?

A–23. For purposes of section 132, the terms working condition fringe and de minimis fringe do not include any qualified transportation fringe under section 132(f). If, however, an employer provides local transportation other than transit passes (without any direct or indirect compensation reduction election), the value of the benefit may be excludable, either totally or partially, under fringe benefit rules other than the qualified transportation fringe rules under section 132(f). See §§1.132–6(d)(2)(i) (occasional local transportation fare), 1.132–6(d)(2)(iii) (transportation provided under unusual circumstances), and 1.61–21(k) (valuation of local transportation provided to qualified employees). See also Q/A–4(b) of this section.

Q–24. May qualified transportation fringes be provided to individuals who are partners, 2-percent shareholders of S-corporations, or independent contractors?

A–24. (a) *General rule.* Section 132(f)(5)(E) states that self-employed individuals who are employees within the meaning of section 401(c)(1) are not employees for purposes of section 132(f). Therefore, individuals who are partners, sole proprietors, or other independent contractors are not employees for purposes of section 132(f). In addition, under section 1372(a), 2-percent shareholders of S corporations are treated as partners for fringe benefit purposes. Thus, an individual who is both a 2-percent shareholder of an S corporation and a common law employee of that S corporation is not considered an employee for purposes of section 132(f). However, while section 132(f) does not apply to individuals who are partners, 2-percent shareholders of S corporations, or independent contractors, other exclusions for working condition and de minimis fringes may be available as described in paragraphs (b) and (c) of this Q/A–24. See §§1.132–1(b)(2) and 1.132–1(b)(4).

(b) *Transit passes.* The working condition and de minimis fringe exclusions under section 132(a)(3) and (4) are available for transit passes provided to individuals who are partners, 2-percent shareholders, and independent contractors. For example, tokens or farecards provided by a partnership to an individual who is a partner that enable the partner to commute on a public transit system (not including privately-operated van pools) are excludable from the partner's gross income if the value of the tokens and farecards in any month does not exceed the dollar amount specified in §1.132–6(d)(1). However, if the value of a pass provided in a month exceeds the dollar amount specified in §1.132–6(d)(1), the full value of the benefit provided (not merely the amount in excess of the dollar amount specified in §1.132–6(d)(1)) is includible in gross income.

(c) *Parking.* The working condition fringe rules under section 132(d) do not apply to commuter parking. See §1.132–5(a)(1). However, the de minimis fringe rules under section 132(e) are available for parking provided to individuals who are partners, 2-percent shareholders, or independent contractors that qualifies under the de minimis rules. See §1.132–6(a) and (b).

(d) *Example.* The following example illustrates the principles of this Q/A–24:

Example. (i) Individual G is a partner in partnership P. Individual G commutes to and from G's office every day and parks free of charge in P's lot.

(ii) In this *Example,* the value of the parking is not excluded under section 132(f), but may be excluded under section 132(e) if the parking is a de minimis fringe under §1.132–6.

Q–25. What is the effective date of this section?

A–25. (a) Except as provided in paragraph (b) of this Q/A–25, this section is applicable for employee taxable years beginning after December 31, 2001. For this purpose, an employer may assume that the employee taxable year is the calendar year.

(b) The last sentence of paragraph (b)(5) of Q/A–16 of this section (relating to whether transit system vouchers for transit passes are readily available) is applicable for employee taxable years beginning after December 31, 2003. For this purpose, an employer may assume that the employee taxable year is the calendar year.

[T.D. 8933, 66 FR 2244, Jan. 11, 2001; 66 FR 18190, Apr. 6, 2001, as amended by T.D. 9294, 71 FR 61883, Oct. 20, 2006]

§ 1.133–1T Questions and answers relating to interest on certain loans used to acquire employer securities (temporary).

Q–1: What does section 133 provide?

A–1: In general, section 133 provides that certain commercial lenders may exclude from gross income fifty percent of the interest received with respect to securities acquisition loans. A securities acquisition loan is any loan to an employee stock ownership plan (ESOP) (as defined in section 4975(e)(7)) that qualifies as an exempt loan under §§ 54.4975–7 and –11 to the extent that the proceeds are used to acquire employer securities (within the meaning of section 409(l)) for the ESOP. A loan made to a corporation sponsoring an ESOP (or to a person related to such corporation under section 133(b)(2)) may also qualify as a securities acquisition loan to the extent and for the period that the proceeds are (a) loaned to the corporation's ESOP under a loan that qualifies as an exempt loan under §§ 54.4975–7 and –11 and that has substantially similar terms as the loan from the commercial lender to the sponsoring corporation, and (b) used to acquire employer securities for the ESOP. The terms of the loan between the commercial lender and the sponsoring corporation (or a related corporation) and the loan between such corporation and the ESOP shall be treated as substantially similar only if the timing and rate at which employer securities would be released from encumbrance if the loan from the commercial lender were the exempt loan under the applicable rule of § 54.4975–7(b)(8) are substantially similar to the timing and rate at which employer securities will actually be released from encumbrance in accordance with such rule. For this purpose, if the loan from the commercial lender to the sponsoring corporation states a variable rate of interest and the loan between the corporation and the ESOP states a fixed rate of interest, whether the terms of the loans are substantially similar shall be determined at the time the obligations are initially issued by taking into account the adjustment interval on the variable rate loan and the maturity of the fixed rate loan. For example, if the rate on the loan from the commercial lender to the sponsoring corporation adjusts each six months and the loan from the corporation to the ESOP has a ten year term, the initial interest rate on the variable rate loan could be compared to the rate on the fixed rate loan by comparing the yields on 6 month and ten year Treasury obligations. Similarly, if the rates on the two loans are based on different compounding assumptions, whether the terms of the loans are substantially similar shall be determined by taking into account the different compounding assumptions. A securities acquisition loan may be evidenced by any note, bond, debenture, or certificate. Also, section 133(b)(2) provides that certain loans between related persons are not securities acquisition loans. In addition, a loan from a commercial lender to an ESOP or sponsoring corporation to purchase employer securities will not be treated as a securities acquisition loan to the extent that such loan is used, either directly or indirectly, to purchase employer securities from any other qualified plan, including any other ESOP, maintained by the employer or any other corporation which is a member of the same controlled group (as defined in section 409(l)(4)).

Q–2: What lenders are eligible to receive the fifty percent interest exclusion?

A–2: Under section 133(a), a bank (within the meaning of section 581), an insurance company to which subchapter L applies, or a corporation (other than a subchapter S corporation) actively engaged in the business of lending money may exclude from gross income fifty percent of the interest received with respect to a securities acquisition loan (as defined in Q&A–1

of §1.133–1T). For purposes of section 133(a)(3), a corporation is actively engaged in the business of lending money if it lends money to the public on a regular and continuing basis (other than in connection with the purchase by the public of goods and services from the lender or a related party). A corporation is not actively engaged in the business of lending money if a predominant share of the original value of the loans it makes to unrelated parties (other than in connection with the purchase by the public of goods and services from the lender or a related party) are securities acquisition loans.

Q–3: May loans which qualify for the fifty percent interest exclusion under section 133 be syndicated to other lending institutions?

A–3: Securities acquisition loans under section 133 may be syndicated to other lending institutions provided that such lending institutions are described in section 133(a) (1), (2) or (3) and the loan was originated by a qualified holder. Subsequent holders of the debt instrument may qualify for the partial interest exclusion of section 133 if such holders satisfy the requirements of section 133 and such loan does not fail to be a securities acquisition loan under section 133(b)(2).

Q–4: When is section 133 effective?

A–4: Section 133 applies to securities acquisition loans made after July 18, 1984, and used to acquire employer securities after July 18, 1984. The provision does not apply to loans made after July 18, 1984, to the extent that such loans are renegotiations, directly or indirectly, of loans outstanding on such date. A loan extended to an ESOP or sponsoring corporation after July 18, 1984, will be treated as a renegotiation of an outstanding loan if the loan proceeds are used to refinance acquisitions of employer securities made prior to July 19, 1984. For example, if an ESOP borrowed money prior to July 19, 1984, to purchase employer securities and after July 18, 1984, borrows other funds from the same or a different commercial lender to repay the first loan, the second loan will be treated as a renegotiation of an outstanding loan to the extent of the repaid amount. Similarly, if, after July 18, 1984, an ESOP sells employer securities, uses the proceeds to retire a pre-July 19, 1984, loan and obtains a second loan to acquire replacement employer securities, the second loan will be treated as a renegotiation of an outstanding loan.

[T.D. 8073, 51 FR 4319, Feb. 4, 1986]

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§ 1.141–15 Effective dates.

(a) Scope.
(b) Effective dates.
(1) In general.
(2) Certain short-term arrangements.
(3) Certain prepayments.
(c) Refunding bonds.
(d) Permissive application of regulations.
(e) Permissive retroactive application of certain sections.
(f) Effective dates for certain regulations relating to output facilities.
(1) General rule.
(2) Transition rule for requirements contracts.
(g) Refunding bonds for output facilities.
(h) Permissive retroactive application.
(i) Permissive application of certain regulations relating to output facilities.
(j) Effective dates for certain regulations relating to refundings.
(k) Effective/applicability dates for certain regulations relating to generally applicable taxes and payments in lieu of tax.

§ 1.141–16 Effective dates for qualified private activity bond provisions.

(a) Scope.
(b) Effective dates.
(c) Permissive application.
(d) Certain remedial actions.
(1) General rule.
(2) Special rule for allocations of nonqualified bonds.

[T.D. 8712, 62 FR 2283, Jan. 16, 1997, as amended by T.D. 8757, 63 FR 3259, Jan. 22, 1998; T.D. 8941, 66 FR 4664, Jan. 18, 2001; T.D. 9016, 67 FR 59759, Sept. 23, 2002; T.D. 9085, 68 FR 45775, Aug. 4, 2003; T.D. 9150, 69 FR 50066, Aug. 13, 2004; T.D. 9234, 70 FR 75031, Dec. 19, 2005; T.D. 9429, 73 FR 63374, Oct. 24, 2008]

TAX EXEMPTION REQUIREMENTS FOR STATE AND LOCAL BONDS

§ 1.141–1 Definitions and rules of general application.

(a) *In general.* For purposes of §§ 1.141–0 through 1.141–16, the following definitions and rules apply: the definitions in this section, the definitions in § 1.150–1, the definition of placed in service under § 1.150–2(c), the definition of grant under § 1.148–6(d)(4)(iii), the definition of reasonably required reserve or replacement fund in § 1.148–2(f), and the following definitions under § 1.148–1: bond year, commingled fund, fixed yield issue, higher yielding investments, investment, investment proceeds, issue price, issuer, nonpurpose investment, purpose investment, qualified guarantee, qualified hedge, reasonable expectations or reasonableness, rebate amount, replacement proceeds, sale proceeds, variable yield issue, and yield.

(b) *Certain general definitions.*

Common areas means portions of a facility that are equally available to all users of a facility on the same basis for uses that are incidental to the primary use of the facility. For example, hallways and elevators generally are treated as common areas if they are used by the different lessees of a facility in connection with the primary use of that facility.

Consistently applied means applied uniformly to account for proceeds and other amounts.

Deliberate action is defined in § 1.141–2(d)(3).

Discrete portion means a portion of a facility that consists of any separate and discrete portion of a facility to which use is limited, other than common areas. A floor of a building and a portion of a building separated by walls, partitions, or other physical barriers are examples of a discrete portion.

Disposition is defined in § 1.141–12(c)(1).

Disposition proceeds is defined in § 1.141–12(c)(1).

Essential governmental function is defined in § 1.141–5(d)(4)(ii).

Financed means constructed, reconstructed, or acquired with proceeds of an issue.

Governmental bond has the same meaning as in § 1.150–1(b), except that, for purposes of § 1.141–13, governmental bond is defined in § 1.141–13(b)(2)(iv).

Governmental person means a state or local governmental unit as defined in § 1.103–1 or any instrumentality thereof. It does not include the United States or any agency or instrumentality thereof.

Hazardous waste remediation bonds is defined in § 1.141–4(f)(1).

Measurement period is defined in § 1.141–3(g)(2).

Nongovernmental person means a person other than a governmental person.

Output facility means electric and gas generation, transmission, distribution, and related facilities, and water collection, storage, and distribution facilities.

Private business tests means the private business use test and the private security or payment test of section 141(b).

Proceeds means the sale proceeds of an issue (other than those sale proceeds used to retire bonds of the issue that are not deposited in a reasonably required reserve or replacement fund). Proceeds also include any investment proceeds from investments that accrue during the project period (net of rebate amounts attributable to the project period). Disposition proceeds of an issue are treated as proceeds to the extent provided in § 1.141–12. The Commissioner may treat any replaced amounts as proceeds.

Project period means the period beginning on the issue date and ending on the date that the project is placed in service. In the case of a multipurpose issue, the issuer may elect to treat the project period for the entire issue as ending on either the expiration of the temporary period described in §1.148–2(e)(2) or the end of the fifth bond year after the issue date.

Public utility property means public utility property as defined in section 168(i)(10).

Qualified bond means a qualified bond as defined in section 141(e).

Renewal option means a provision under which either party has a legally enforceable right to renew the contract. Thus, for example, a provision under which a contract is automatically renewed for 1-year periods absent cancellation by either party is not a renewal option (even if it is expected to be renewed).

Replaced amounts means replacement proceeds other than amounts that are treated as replacement proceeds solely because they are sinking funds or pledged funds.

Weighted average maturity is determined under section 147(b).

Weighted average reasonably expected economic life is determined under section 147(b). The reasonably expected economic life of property may be determined by reference to the class life of the property under section 168.

(c) *Elections.* Elections must be made in writing on or before the issue date and retained as part of the bond documents, and, once made, may not be revoked without the permission of the Commissioner.

(d) *Related parties.* Except as otherwise provided, all related parties are treated as one person and any reference to ''person'' includes any related party.

[T.D. 8712, 62 FR 2284, Jan. 16, 1997, as amended by T.D. 9234, 70 FR 75032, Dec. 19, 2005]

§ 1.141–2 Private activity bond tests.

(a) *Overview.* Interest on a private activity bond is not excludable from gross income under section 103(a) unless the bond is a qualified bond. The purpose of the private activity bond tests of section 141 is to limit the volume of tax-exempt bonds that finance the activities of nongovernmental persons, without regard to whether a financing actually transfers benefits of tax-exempt financing to a nongovernmental person. The private activity bond tests serve to identify arrangements that have the potential to transfer the benefits of tax-exempt financing, as well as arrangements that actually transfer these benefits. The regulations under section 141 may not be applied in a manner that is inconsistent with these purposes.

(b) *Scope.* Sections 1.141–0 through 1.141–16 apply generally for purposes of the private activity bond limitations under section 141.

(c) *General definition of private activity bond.* Under section 141, bonds are private activity bonds if they meet either the private business use test and private security or payment test of section 141(b) or the private loan financing test of section 141(c). The private business use and private security or payment tests are described in §§1.141–3 and 1.141–4. The private loan financing test is described in §1.141–5.

(d) *Reasonable expectations and deliberate actions*—(1) *In general.* An issue is an issue of private activity bonds if the issuer reasonably expects, as of the issue date, that the issue will meet either the private business tests or the private loan financing test. An issue is also an issue of private activity bonds if the issuer takes a deliberate action, subsequent to the issue date, that causes the conditions of either the private business tests or the private loan financing test to be met.

(2) *Reasonable expectations test*—(i) *In general.* In general, the reasonable expectations test must take into account reasonable expectations about events and actions over the entire stated term of an issue.

(ii) *Special rule for issues with mandatory redemption provisions.* An action that is reasonably expected, as of the issue date, to occur after the issue date and to cause either the private business tests or the private loan financing test to be met may be disregarded for purposes of those tests if—

(A) The issuer reasonably expects, as of the issue date, that the financed property will be used for a governmental purpose for a substantial period before the action;

(B) The issuer is required to redeem all nonqualifying bonds (regardless of the amount of disposition proceeds actually received) within 6 months of the date of the action;

(C) The issuer does not enter into any arrangement with a nongovernmental person, as of the issue date, with respect to that specific action; and

(D) The mandatory redemption of bonds meets all of the conditions for remedial action under § 1.141–12(a).

(3) *Deliberate action defined*—(i) *In general.* Except as otherwise provided in this paragraph (d)(3), a deliberate action is any action taken by the issuer that is within its control. An intent to violate the requirements of section 141 is not necessary for an action to be deliberate.

(ii) *Safe harbor exceptions.* An action is not treated as a deliberate action if—

(A) It would be treated as an involuntary or compulsory conversion under section 1033; or

(B) It is taken in response to a regulatory directive made by the federal government. See § 1.141–7(g)(4).

(4) *Special rule for dispositions of personal property in the ordinary course of an established governmental program*—(i) *In general.* Dispositions of personal property in the ordinary course of an established governmental program are not treated as deliberate actions if—

(A) The weighted average maturity of the bonds financing that personal property is not greater than 120 percent of the reasonably expected actual use of that property for governmental purposes;

(B) The issuer reasonably expects on the issue date that the fair market value of that property on the date of disposition will be not greater than 25 percent of its cost; and

(C) The property is no longer suitable for its governmental purposes on the date of disposition.

(ii) *Reasonable expectations test.* The reasonable expectation that a disposition described in paragraph (d)(4)(i) of this section may occur in the ordinary course while the bonds are outstanding will not cause the issue to meet the private activity bond tests if the issuer is required to deposit amounts received from the disposition in a commingled fund with substantial tax or other governmental revenues and the issuer reasonably expects to spend the amounts on governmental programs within 6 months from the date of commingling.

(iii) *Separate issue treatment.* An issuer may treat the bonds properly allocable to the personal property eligible for this exception as a separate issue under § 1.150–1(c)(3).

(5) *Special rule for general obligation bond programs that finance a large number of separate purposes.* The determination of whether bonds of an issue are private activity bonds may be based solely on the issuer's reasonable expectations as of the issue date if all of the requirements of paragraphs (d)(5)(i) through (vii) of this section are met.

(i) The issue is an issue of general obligation bonds of a general purpose governmental unit that finances at least 25 separate purposes (as defined in § 1.150–1(c)(3)) and does not predominantly finance fewer than 4 separate purposes.

(ii) The issuer has adopted a fund method of accounting for its general governmental purposes that makes tracing the bond proceeds to specific expenditures unreasonably burdensome.

(iii) The issuer reasonably expects on the issue date to allocate all of the net proceeds of the issue to capital expenditures within 6 months of the issue date and adopts reasonable procedures to verify that net proceeds are in fact so expended. A program to randomly spot check that 10 percent of the net proceeds were so expended generally is a reasonable verification procedure for this purpose.

(iv) The issuer reasonably expects on the issue date to expend all of the net proceeds of the issue before expending proceeds of a subsequent issue of similar general obligation bonds.

(v) The issuer reasonably expects on the issue date that it will not make any loans to nongovernmental persons with the proceeds of the issue.

(vi) The issuer reasonably expects on the issue date that the capital expenditures that it could make during the 6-month period beginning on the issue date with the net proceeds of the issue that would not meet the private business tests are not less than 125 percent of the capital expenditures to be financed with the net proceeds of the issue.

(vii) The issuer reasonably expects on the issue date that the weighted average maturity of the issue is not greater than 120 percent of the weighted average reasonably expected economic life of the capital expenditures financed with the issue. To determine reasonably expected economic life for this purpose an issuer may use reasonable estimates based on the type of expenditures made from a fund.

(e) *When a deliberate action occurs.* A deliberate action occurs on the date the issuer enters into a binding contract with a nongovernmental person for use of the financed property that is not subject to any material contingencies.

(f) *Certain remedial actions.* See § 1.141–12 for certain remedial actions that prevent a deliberate action with respect to property financed by an issue from causing that issue to meet the private business use test or the private loan financing test.

(g) *Examples.* The following examples illustrate the application of this section:

Example 1. Involuntary action. City B issues bonds to finance the purchase of land. On the issue date, B reasonably expects that it will be the sole user of the land for the entire term of the bonds. Subsequently, the federal government acquires the land in a condemnation action. B sets aside the condemnation proceeds to pay debt service on the bonds but does not redeem them on their first call date. The bonds are not private activity bonds because B has not taken a deliberate action after the issue date. See, however, § 1.141–14(b), *Example 2.*

Example 2. Reasonable expectations test—involuntary action. The facts are the same as in *Example 1,* except that, on the issue date, B reasonably expects that the federal government will acquire the land in a condemnation action during the term of the bonds. On the issue date, the present value of the amount that B reasonably expects to receive from the federal government is greater than 10 percent of the present value of the debt service on the bonds. The terms of the bonds do not require that the bonds be redeemed within 6 months of the acquisition by the federal government. The bonds are private activity bonds because the issuer expects as of the issue date that the private business tests will be met.

Example 3. Reasonable expectations test—mandatory redemption. City C issues bonds to rehabilitate an existing hospital that it currently owns. On the issue date of the bonds, C reasonably expects that the hospital will be used for a governmental purpose for a substantial period. On the issue date, C also plans to construct a new hospital, but the placed in service date of that new hospital is uncertain. C reasonably expects that, when the new hospital is placed in service, it will sell or lease the rehabilitated hospital to a private hospital corporation. The bond documents require that the bonds must be redeemed within 6 months of the sale or lease of the rehabilitated hospital (regardless of the amount actually received from the sale). The bonds meet the reasonable expectations requirement of the private activity bond tests if the mandatory redemption of bonds meets all of the conditions for a remedial action under § 1.141–12(a).

Example 4. Dispositions in the ordinary course of an established governmental program. City D issues bonds with a weighted average maturity of 6 years for the acquisition of police cars. D reasonably expects on the issue date that the police cars will be used solely by its police department, except that, in the ordinary course of its police operations, D sells its police cars to a taxicab corporation after 5 years of use because they are no longer suitable for police use. Further, D reasonably expects that the value of the police cars when they are no longer suitable for police use will be no more than 25 percent of cost. D subsequently sells 20 percent of the police cars after only 3 years of actual use. At that time, D deposits the proceeds from the sale of the police cars in a commingled fund with substantial tax revenues and reasonably expects to spend the proceeds on governmental programs within 6 months of the date of deposit. D does not trace the actual use of these commingled amounts. The sale of the police cars does not cause the private activity bond tests to be met because the requirements of paragraph (d)(4) of this section are met.

[T.D. 8712, 62 FR 2284, Jan. 16, 1997, as amended by T.D. 8757, 63 FR 3260, Jan. 22, 1998; T.D. 9016, 67 FR 59759, Sept. 23, 2002]

§ 1.141–3 Definition of private business use.

(a) *General rule*—(1) *In general.* The private business use test relates to the use of the proceeds of an issue. The 10 percent private business use test of section 141(b)(1) is met if more than 10 percent of the proceeds of an issue is used in a trade or business of a nongovernmental person. For this purpose, the use of financed property is treated as the direct use of proceeds. Any activity carried on by a person other than a natural person is treated as a trade or business. Unless the context or a provision clearly requires otherwise, this section also applies to the private business use test under sections 141(b)(3) (unrelated or disproportionate use), 141(b)(4) ($15 million limitation for certain output facilities), and 141(b)(5) (the coordination with the volume cap where the nonqualified amount exceeds $15 million).

(2) *Indirect use.* In determining whether an issue meets the private business use test, it is necessary to look to both the indirect and direct uses of proceeds. For example, a facility is treated as being used for a private business use if it is leased to a nongovernmental person and subleased to a governmental person or if it is leased to a governmental person and then subleased to a nongovernmental person, provided that in each case the nongovernmental person's use is in a trade or business. Similarly, the issuer's use of the proceeds to engage in a series of financing transactions for property to be used by nongovernmental persons in their trades or businesses may cause the private business use test to be met. In addition, proceeds are treated as used in the trade or business of a nongovernmental person if a nongovernmental person, as a result of a single transaction or a series of related transactions, uses property acquired with the proceeds of an issue.

(3) *Aggregation of private business use.* The use of proceeds by all nongovernmental persons is aggregated to determine whether the private business use test is met.

(b) *Types of private business use arrangements*—(1) *In general.* Both actual and beneficial use by a nongovernmental person may be treated as private business use. In most cases, the private business use test is met only if a nongovernmental person has special legal entitlements to use the financed property under an arrangement with the issuer. In general, a nongovernmental person is treated as a private business user of proceeds and financed property as a result of ownership; actual or beneficial use of property pursuant to a lease, or a management or incentive payment contract; or certain other arrangements such as a take or pay or other output-type contract.

(2) *Ownership.* Except as provided in paragraph (d)(1) or (d)(2) of this section, ownership by a nongovernmental person of financed property is private business use of that property. For this purpose, ownership refers to ownership for federal income tax purposes.

(3) *Leases.* Except as provided in paragraph (d) of this section, the lease of financed property to a nongovernmental person is private business use of that property. For this purpose, any arrangement that is properly characterized as a lease for federal income tax purposes is treated as a lease. In determining whether a management contract is properly characterized as a lease, it is necessary to consider all of the facts and circumstances, including the following factors—

(i) The degree of control over the property that is exercised by a nongovernmental person; and

(ii) Whether a nongovernmental person bears risk of loss of the financed property.

(4) *Management contracts*—(i) *Facts and circumstances test.* Except as provided in paragraph (d) of this section, a management contract (within the meaning of paragraph (b)(4)(ii) of this section) with respect to financed property may result in private business use of that property, based on all of the facts and circumstances. A management contract with respect to financed property generally results in private business use of that property if the contract provides for compensation for services rendered with compensation based, in whole or in part, on a share of net profits from the operation of the facility.

(ii) *Management contract defined.* For purposes of this section, a management contract is a management, service, or incentive payment contract between a governmental person and a service provider under which the service provider provides services involving all, a portion of, or any function of, a facility. For example, a contract for the provision of management services for an entire hospital, a contract for management services for a specific department of a hospital, and an incentive payment contract for physician services to patients of a hospital are each treated as a management contract.

(iii) *Arrangements generally not treated as management contracts.* The arrangements described in paragraphs (b)(4)(iii)(A) through (D) of this section generally are not treated as management contracts that give rise to private business use.

(A) Contracts for services that are solely incidental to the primary governmental function or functions of a financed facility (for example, contracts for janitorial, office equipment repair, hospital billing, or similar services).

(B) The mere granting of admitting privileges by a hospital to a doctor, even if those privileges are conditioned on the provision of de minimis services, if those privileges are available to all qualified physicians in the area, consistent with the size and nature of its facilities.

(C) A contract to provide for the operation of a facility or system of facilities that consists predominantly of public utility property, if the only compensation is the reimbursement of actual and direct expenses of the service provider and reasonable administrative overhead expenses of the service provider.

(D) A contract to provide for services, if the only compensation is the reimbursement of the service provider for actual and direct expenses paid by the service provider to unrelated parties.

(iv) *Management contracts that are properly treated as other types of private business use.* A management contract with respect to financed property results in private business use of that property if the service provider is treated as the lessee or owner of financed property for federal income tax purposes, unless an exception under paragraph (d) of this section applies to the arrangement.

(5) *Output contracts.* See §1.141–7 for special rules for contracts for the purchase of output of output facilities.

(6) *Research agreements*—(i) *Facts and circumstances test.* Except as provided in paragraph (d) of this section, an agreement by a nongovernmental person to sponsor research performed by a governmental person may result in private business use of the property used for the research, based on all of the facts and circumstances.

(ii) *Research agreements that are properly treated as other types of private business use.* A research agreement with respect to financed property results in private business use of that property if the sponsor is treated as the lessee or owner of financed property for federal income tax purposes, unless an exception under paragraph (d) of this section applies to the arrangement.

(7) *Other actual or beneficial use*—(i) *In general.* Any other arrangement that conveys special legal entitlements for beneficial use of bond proceeds or of financed property that are comparable to special legal entitlements described in paragraphs (b)(2), (3), (4), (5), or (6) of this section results in private business use. For example, an arrangement that conveys priority rights to the use or capacity of a facility generally results in private business use.

(ii) *Special rule for facilities not used by the general public.* In the case of financed property that is not available for use by the general public (within the meaning of paragraph (c) of this section), private business use may be established solely on the basis of a special economic benefit to one or more nongovernmental persons, even if those nongovernmental persons have no special legal entitlements to use of the property. In determining whether special economic benefit gives rise to private business use it is necessary to consider all of the facts and circumstances, including one or more of the following factors—

(A) Whether the financed property is functionally related or physically proximate to property used in the trade or business of a nongovernmental person;

(B) Whether only a small number of nongovernmental persons receive the special economic benefit; and

(C) Whether the cost of the financed property is treated as depreciable by any nongovernmental person.

(c) *Exception for general public use*—(1) *In general.* Use as a member of the general public (general public use) is not private business use. Use of financed property by nongovernmental persons in their trades or businesses is treated as general public use only if the property is intended to be available and in fact is reasonably available for use on the same basis by natural persons not engaged in a trade or business.

(2) *Use on the same basis.* In general, use under an arrangement that conveys priority rights or other preferential benefits is not use on the same basis as the general public. Arrangements providing for use that is available to the general public at no charge or on the basis of rates that are generally applicable and uniformly applied do not convey priority rights or other preferential benefits. For this purpose, rates may be treated as generally applicable and uniformly applied even if—

(i) Different rates apply to different classes of users, such as volume purchasers, if the differences in rates are customary and reasonable; or

(ii) A specially negotiated rate arrangement is entered into, but only if the user is prohibited by federal law from paying the generally applicable rates, and the rates established are as comparable as reasonably possible to the generally applicable rates.

(3) *Long-term arrangements not treated as general public use.* An arrangement is not treated as general public use if the term of the use under the arrangement, including all renewal options, is greater than 200 days. For this purpose, a right of first refusal to renew use under the arrangement is not treated as a renewal option if—

(i) The compensation for the use under the arrangement is redetermined at generally applicable, fair market value rates that are in effect at the time of renewal; and

(ii) The use of the financed property under the same or similar arrangements is predominantly by natural persons who are not engaged in a trade or business.

(4) *Relation to other use.* Use of financed property by the general public does not prevent the proceeds from being used for a private business use because of other use under this section.

(d) *Other exceptions*—(1) *Agents.* Use of proceeds by nongovernmental persons solely in their capacity as agents of a governmental person is not private business use. For example, use by a nongovernmental person that issues obligations on behalf of a governmental person is not private business use to the extent the nongovernmental person's use of proceeds is in its capacity as an agent of the governmental person.

(2) *Use incidental to financing arrangements.* Use by a nongovernmental person that is solely incidental to a financing arrangement is not private business use. A use is solely incidental to a financing arrangement only if the nongovernmental person has no substantial rights to use bond proceeds or financed property other than as an agent of the bondholders. For example, a nongovernmental person that acts solely as an owner of title in a sale and leaseback financing transaction with a city generally is not a private business user of the property leased to the city, provided that the nongovernmental person has assigned all of its rights to use the leased facility to the trustee for the bondholders upon default by the city. Similarly, bond trustees, servicers, and guarantors are generally not treated as private business users.

(3) *Exceptions for arrangements other than arrangements resulting in ownership of financed property by a nongovernmental person*—(i) *Arrangements not available for use on the same basis by natural persons not engaged in a trade or business.* Use by a nongovernmental person pursuant to an arrangement, other than an arrangement resulting in ownership of financed property by a nongovernmental person, is not private business use if—

(A) The term of the use under the arrangement, including all renewal options, is not longer than 100 days;

(B) The arrangement would be treated as general public use, except that it is not available for use on the same basis by natural persons not engaged in a trade or business because generally applicable and uniformly applied rates are not reasonably available to natural persons not engaged in a trade or business; and

(C) The property is not financed for a principal purpose of providing that property for use by that nongovernmental person.

(ii) *Negotiated arm's-length arrangements.* Use by a nongovernmental person pursuant to an arrangement, other than an arrangement resulting in ownership of financed property by a nongovernmental person, is not private business use if—

(A) The term of the use under the arrangement, including all renewal options, is not longer than 50 days;

(B) The arrangement is a negotiated arm's-length arrangement, and compensation under the arrangement is at fair market value; and

(C) The property is not financed for a principal purpose of providing that property for use by that nongovernmental person.

(4) *Temporary use by developers.* Use during an initial development period by a developer of an improvement that carries out an essential governmental function is not private business use if the issuer and the developer reasonably expect on the issue date to proceed with all reasonable speed to develop the improvement and property benefited by that improvement and to transfer the improvement to a governmental person, and if the improvement is in fact transferred to a governmental person promptly after the property benefited by the improvement is developed.

(5) *Incidental use*—(i) *General rule.* Incidental uses of a financed facility are disregarded, to the extent that those uses do not exceed 2.5 percent of the proceeds of the issue used to finance the facility. A use of a facility by a nongovernmental person is incidental if—

(A) Except for vending machines, pay telephones, kiosks, and similar uses, the use does not involve the transfer to the nongovernmental person of possession and control of space that is separated from other areas of the facility by walls, partitions, or other physical barriers, such as a night gate affixed to a structural component of a building (a nonpossessory use);

(B) The nonpossessory use is not functionally related to any other use of the facility by the same person (other than a different nonpossessory use); and

(C) All nonpossessory uses of the facility do not, in the aggregate, involve the use of more than 2.5 percent of the facility.

(ii) *Illustrations.* Incidental uses may include pay telephones, vending machines, advertising displays, and use for television cameras, but incidental uses may not include output purchases.

(6) *Qualified improvements.* Proceeds that provide a governmentally owned improvement to a governmentally owned building (including its structural components and land functionally related and subordinate to the building) are not used for a private business use if—

(i) The building was placed in service more than 1 year before the construction or acquisition of the improvement is begun;

(ii) The improvement is not an enlargement of the building or an improvement of interior space occupied exclusively for any private business use;

(iii) No portion of the improved building or any payments in respect of the improved building are taken into account under section 141(b)(2)(A) (the private security test); and

(iv) No more than 15 percent of the improved building is used for a private business use.

(e) *Special rule for tax assessment bonds.* In the case of a tax assessment bond that satisfies the requirements of §1.141–5(d), the loan (or deemed loan) of the proceeds to the borrower paying the assessment is disregarded in determining whether the private business use test is met. However, the use of the loan proceeds is not disregarded in determining whether the private business use test is met.

(f) *Examples.* The following examples illustrate the application of paragraphs (a) through (e) of this section. In each example, assume that the arrangements described are the only arrangements with nongovernmental persons for use of the financed property.

Example 1. Nongovernmental ownership. State A issues 20-year bonds to purchase land and equip and construct a factory. A then enters into an arrangement with Corporation X to sell the factory to X on an installment basis while the bonds are outstanding. The issue meets the private business use test because a nongovernmental person owns the financed facility. See also §1.141–2 (relating to the private activity bond tests), and §1.141–5 (relating to the private loan financing test).

Example 2. Lease to a nongovernmental person. (i) The facts are the same as in *Example 1*, except that A enters into an arrangement with X to lease the factory to X for 3 years rather than to sell it to X. The lease payments will be made annually and will be based on the tax-exempt interest rate on the bonds. The issue meets the private business use test because a nongovernmental person leases the financed facility. See also §1.141–14 (relating to anti-abuse rules).

(ii) The facts are the same as in *Example 2(i)*, except that the annual payments made by X will equal fair rental value of the facility and exceed the amount necessary to pay debt service on the bonds for the 3 years of the lease. The issue meets the private business use test because a nongovernmental person leases the financed facility and the test does not require that the benefits of tax-exempt financing be passed through to the nongovernmental person.

Example 3. Management contract in substance a lease. City L issues 30-year bonds to finance the construction of a city hospital. L enters into a 15-year contract with M, a nongovernmental person that operates a health maintenance organization relating to the treatment of M's members at L's hospital. The contract provides for reasonable fixed compensation to M for services rendered with no compensation based, in whole or in part, on a share of net profits from the operation of the hospital. However, the contract also provides that 30 percent of the capacity of the hospital will be exclusively available to M's members and M will bear the risk of loss of that portion of the capacity of the hospital so that, under all of the facts and circumstances, the contract is properly characterized as a lease for federal income tax purposes. The issue meets the private business use test because a nongovernmental person leases the financed facility.

Example 4. Ownership of title in substance a leasehold interest. Nonprofit Corporation R issues bonds on behalf of City P to finance the construction of a hospital. R will own legal title to the hospital. In addition, R will operate the hospital, but R is not treated as an agent of P in its capacity as operator of the hospital. P has certain rights to the hospital that establish that it is properly treated as the owner of the property for federal income tax purposes. P does not have rights, however, to directly control operation of the hospital while R owns legal title to it and operates it. The issue meets the private business use test because the arrangement provides a nongovernmental person an interest in the financed facility that is comparable to a leasehold interest. See paragraphs (a)(2) and (b)(7)(i) of this section.

Example 5. Rights to control use of property treated as private business use—parking lot. Corporation C and City D enter into a plan to finance the construction of a parking lot adjacent to C's factory. Pursuant to the plan, C conveys the site for the parking lot to D for a nominal amount, subject to a covenant running with the land that the property be used only for a parking lot. In addition, D agrees that C will have the right to approve rates charged by D for use of the parking lot. D issues bonds to finance construction of the parking lot on the site. The parking lot will be available for use by the general public on the basis of rates that are generally applicable and uniformly applied. The issue meets the private business use test because a nongovernmental person has special legal entitlements for beneficial use of the financed facility that are comparable to an ownership interest. See paragraph (b)(7)(i) of this section.

Example 6. Other actual or beneficial use—hydroelectric enhancements. J, a political subdivision, owns and operates a hydroelectric generation plant and related facilities. Pursuant to a take or pay contract, J sells 15 percent of the output of the plant to Corporation K, an investor-owned utility. K is treated as a private business user of the plant. Under the license issued to J for operation of the plant, J is required by federal regulations to construct and operate various facilities for the preservation of fish and for public recreation. J issues its obligations to finance the fish preservation and public recreation facilities. K has no special legal entitlements for beneficial use of the financed facilities. The fish preservation facilities are functionally related to the operation of the plant. The recreation facilities are available to natural persons on a short-term basis according to generally applicable and uniformly applied rates. Under paragraph (c) of this section, the recreation facilities are treated as used by the general public. Under paragraph (b)(7) of this section, K's use is not treated as private business use of the recreation facilities because K has no special legal entitlements for beneficial use of the recreation facilities. The fish preservation facilities are not of a type reasonably available for use on the same basis by natural persons not engaged in a trade or business. Under all of the facts and circumstances (including the functional relationship of the fish preservation facilities to property used in K's trade or business) under paragraph (b)(7)(ii) of this section, K derives a special economic benefit from the fish preservation facilities. Therefore, K's private business use may be established solely on the basis of that special economic benefit, and K's use of the fish preservation facilities is treated as private business use.

Example 7. Other actual or beneficial use—pollution control facilities. City B issues obligations to finance construction of a specialized pollution control facility on land that it owns adjacent to a factory owned by Corporation N. B will own and operate the pollution control facility, and N will have no special legal entitlements to use the facility. B, however, reasonably expects that N will be the only user of the facility. The facility will not be reasonably available for use on the same basis by natural persons not engaged in a trade or business. Under paragraph (b)(7)(ii) of this section, because under all of the facts and circumstances the facility is functionally related and is physically proximate to property used in N's trade or business, N derives a special economic benefit from the facility. Therefore, N's private business use may be established solely on the basis of that special economic benefit, and N's use is treated as private business use of the facility. See paragraph (b)(7)(ii) of this section.

Example 8. General public use—airport runway. (i) City I issues bonds and uses all of the proceeds to finance construction of a runway at a new city-owned airport. The runway will be available for take-off and landing by any operator of an aircraft desiring to use the airport, including general aviation operators who are natural persons not engaged in a trade or business. It is reasonably expected that most of the actual use of the runway will be by private air carriers (both charter airlines and commercial airlines) in connection with their use of the airport terminals leased by those carriers. These leases for the use of terminal space provide no priority rights or other preferential benefits to the air carriers for use of the runway. Moreover, under the leases the lease payments are determined without taking into account the revenues generated by runway landing fees (that is, the lease payments are not determined on a "residual" basis). Although the lessee air carriers receive a special economic benefit from the use of the runway, this economic benefit is not sufficient to cause the air carriers to be private business users, because the runway is available for general public use. The issue does not meet the private business use test. See paragraphs (b)(7)(ii) and (c) of this section.

(ii) The facts are the same as in *Example 8(i),* except that the runway will be available for use only by private air carriers. The use by these private air carriers is not for general public use, because the runway is not reasonably available for use on the same basis by natural persons not engaged in a trade or business. Depending on all of the facts and circumstances, including whether there are only a small number of lessee private air carriers, the issue may meet the private business use test solely because the private air carriers receive a special economic benefit from the runway. See paragraph (b)(7)(ii) of this section.

(iii) The facts are the same as in *Example 8(i),* except that the lease payments under the leases with the private air carriers are determined on a residual basis by taking into account the net revenues generated by runway landing fees. These leases cause the private business use test to be met with respect to the runway because they are arrangements that convey special legal entitlements to the financed facility to nongovernmental persons. See paragraph (b)(7)(i) of this section.

Example 9. General public use—airport parking garage. City S issues bonds and uses all of the proceeds to finance construction of a city-owned parking garage at the city-owned airport. S reasonably expects that more than 10 percent of the actual use of the parking garage will be by employees of private air carriers (both charter airlines and commercial airlines) in connection with their use of the airport terminals leased by those carriers. The air carriers' use of the parking garage, however, will be on the same basis as passengers and other members of the general public using the airport. The leases for the use of the terminal space provide no priority rights to the air carriers for use of the parking garage, and the lease payments are determined without taking into account the revenues generated by the parking garage. Although the lessee air carriers receive a special economic benefit from the use of the parking garage, this economic benefit is not sufficient to cause the air carriers to be private business users, because the parking garage is available for general public use. The issue does not meet the private business use test. See paragraphs (b)(7)(ii) and (c) of this section.

Example 10. Long-term arrangements not treated as general public use—insurance fund. Authority T deposits all of the proceeds of its bonds in its insurance fund and invests all of those proceeds in tax-exempt bonds. The insurance fund provides insurance to a large number of businesses and natural persons not engaged in a trade or business. Each participant receives insurance for a term of 1 year. The use by the participants, other than participants that are natural persons not engaged in a trade or business, is treated as private business use of the proceeds of the bonds because the participants have special legal entitlements to the use of bond proceeds, even though the contractual rights are not necessarily properly characterized as ownership, leasehold, or similar interests listed in paragraph (b) of this section. Use of the bond proceeds is not treated as general public use because the term of the insurance is greater than 200 days. See paragraphs (b)(7)(i) and (c)(3) of this section.

Example 11. General public use—port road. Highway Authority W uses all of the proceeds of its bonds to construct a 25-mile road to connect an industrial port owned by Corporation Y with existing roads owned and operated by W. Other than the port, the nearest residential or commercial development to the new road is 12 miles away. There is no reasonable expectation that development will occur in the area surrounding the new road. W and Y enter into no arrangement (either by contract or ordinance) that conveys special legal entitlements to Y for the use of the road. Use of the road will be available without restriction to all users, including natural persons who are not engaged in a trade or business. The issue does not meet the private business use test because the road is treated as used only by the general public.

Example 12. General public use of governmentally owned hotel. State Q issues bonds to purchase land and construct a hotel for use by the general public (that is, tourists, visitors, and business travelers). The bond documents provide that Q will own and operate the project for the term of the bonds. Q will not enter into a lease or license with any user for use of rooms for a period longer than 200 days (although users may actually use rooms for consecutive periods in excess of 200 days). Use of the hotel by hotel guests who are travelling in connection with trades or businesses of nongovernmental persons is not a private business use of the hotel by these persons because the hotel is intended to be available and in fact is reasonably available for use on the same basis by natural persons not engaged in a trade or business. See paragraph (c)(1) of this section.

Example 13. General public use with rights of first refusal. Authority V uses all of the proceeds of its bonds to construct a parking garage. At least 90 percent of the spaces in the garage will be available to the general public on a monthly first-come, first-served basis. V reasonably expects that the spaces will be predominantly leased to natural persons not engaged in a trade or business who have priority rights to renew their spaces at then current fair market value rates. More than 10 percent of the spaces will be leased to nongovernmental persons acting in a trade or business. These leases are not treated as arrangements with a term of use greater than 200 days. The rights to renew are not treated as renewal options because the compensation for the spaces is redetermined at generally applicable, fair market value rates that will be in effect at the time of renewal and the use of the spaces under similar arrangements is predominantly by natural persons who are not engaged in a trade or business. The issue does not meet the private business use test because at least 90 percent of the use of the parking garage is general public use. See paragraph (c)(3) of this section.

Example 14. General public use with a specially negotiated rate agreement with agency of United States. G, a sewage collection and treatment district, operates facilities that were financed with its bonds. F, an agency of the United States, has a base located within G. Approximately 20 percent of G's facilities are used to treat sewage produced by F under a specially negotiated rate agreement. Under the specially negotiated rate agreement, G uses its best efforts to charge F as closely as possible the same amount for its use of G's services as its other customers pay for the same amount of services, although those other customers pay for services based on standard district charges and tax levies. F is prohibited by federal law from paying for the services based on those standard district charges and tax levies. The use of G's facilities by F is on the same basis as the general public. See paragraph (c)(2)(ii) of this section.

Example 15. Arrangements not available for use by natural persons not engaged in a trade or business—federal use of prisons. Authority E uses all of the proceeds of its bonds to construct a prison. E contracts with federal agency F to house federal prisoners on a space-available, first-come, first-served basis, pursuant to which F will be charged approximately the same amount for each prisoner as other persons that enter into similar transfer agreements. It is reasonably expected that other persons will enter into similar agreements. The term of the use under the contract is not longer than 100 days, and F has no right to renew, although E reasonably expects to renew the contract indefinitely. The prison is not financed for a principal purpose of providing the prison for use by F. It is reasonably expected that during the term of the bonds, more than 10 percent of the prisoners at the prison will be federal prisoners. F's use of the facility is not general public use because this type of use (leasing space for prisoners) is not available for use on the same basis by natural persons not engaged in a trade or business. The issue does not meet the private business use test, however, because the leases satisfy the exception of paragraph (d)(3)(i) of this section.

Example 16. Negotiated arm's-length arrangements—auditorium reserved in advance. (i) City Z issues obligations to finance the construction of a municipal auditorium that it will own and operate. The use of the auditorium will be open to anyone who wishes to use it for a short period of time on a rate-scale basis. Z reasonably expects that the auditorium will be used by schools, church groups, sororities, and numerous commercial organizations. Corporation H, a nongovernmental person, enters into an arm's-length arrangement with Z to use the auditorium for 1 week for each year for a 10-year period (a total of 70 days), pursuant to which H will be charged a specific price reflecting fair market value. On the date the contract is entered into, Z has not established generally applicable rates for future years. Even though the auditorium is not financed for a principal purpose of providing use of the auditorium to H, H is not treated as using the auditorium as a member of the general public because its use is not on the same basis as the general public. Because the term of H's use of the auditorium is longer than 50 days, the arrangement does not meet the exception under paragraph (d)(3)(ii) of this section.

(ii) The facts are the same as in *Example 16(i)*, except that H will enter into an arm's-length arrangement with Z to use the auditorium for 1 week for each year for a 4-year period (a total of 28 days), pursuant to which H will be charged a specific price reflecting fair market value. H is not treated as a private business user of the auditorium because its contract satisfies the exception of paragraph (d)(3)(ii) of this section for negotiated arm's-length arrangements.

(g) *Measurement of private business use*—(1) *In general*. In general, the private business use of proceeds is allocated to property under §1.141–6. The amount of private business use of that property is determined according to the average percentage of private business use of that property during the measurement period.

(2) *Measurement period*—(i) *General rule*. Except as provided in this paragraph (g)(2), the measurement period of property financed by an issue begins on the later of the issue date of that issue or the date the property is placed in service and ends on the earlier of the last date of the reasonably expected economic life of the property or the latest maturity date of any bond of the issue financing the property (determined without regard to any optional redemption dates). In general, the period of reasonably expected economic life of the property for this purpose is based on reasonable expectations as of the issue date.

(ii) *Special rule for refundings of short-term obligations*. For an issue of short-term obligations that the issuer reasonably expects to refund with a long-term financing (such as bond anticipation notes), the measurement period is based on the latest maturity date of any bond of the last refunding issue with respect to the financed property (determined without regard to any optional redemption dates).

(iii) *Special rule for reasonably expected mandatory redemptions*. If an issuer reasonably expects on the issue date that an action will occur during the term of the bonds to cause either the private business tests or the private loan financing test to be met and is required to redeem bonds to meet the reasonable expectations test of §1.141–2(d)(2), the measurement period ends on the reasonably expected redemption date.

(iv) *Special rule for ownership by a nongovernmental person*. The amount of private business use resulting from ownership by a nongovernmental person is the greatest percentage of private business use in any 1-year period.

(v) *Anti-abuse rule*. If an issuer establishes the term of an issue for a period that is longer than is reasonably necessary for the governmental purposes of the issue for a principal purpose of increasing the permitted amount of private business use, the Commissioner may determine the amount of private business use according to the greatest percentage of private business use in any 1-year period.

(3) *Determining average percentage of private business use*. The average percentage of private business use is the average of the percentages of private business use during the 1-year periods within the measurement period. Appropriate adjustments must be made for beginning and ending periods of less than 1 year.

(4) *Determining the average amount of private business use for a 1-year period*—(i) *In general*. The percentage of private business use of property for any 1-year period is the average private business use during that year. This average is determined by comparing the amount of private business use during the year to the total amount of private business use and use that is not private business use (government use) during that year. Paragraphs (g)(4) (ii) through (v) of this section apply to determine the average amount of private business use for a 1-year period.

(ii) *Uses at different times*. For a facility in which actual government use and private business use occur at different times (for example, different days), the average amount of private business use generally is based on the amount of time that the facility is used for private business use as a percentage of the total time for all actual use. In determining the total amount of actual use, periods during which the facility is not in use are disregarded.

(iii) *Simultaneous use.* In general, for a facility in which government use and private business use occur simultaneously, the entire facility is treated as having private business use. For example, a governmentally owned facility that is leased or managed by a nongovernmental person in a manner that results in private business use is treated as entirely used for a private business use. If, however, there is also private business use and actual government use on the same basis, the average amount of private business use may be determined on a reasonable basis that properly reflects the proportionate benefit to be derived by the various users of the facility (for example, reasonably expected fair market value of use). For example, the average amount of private business use of a garage with unassigned spaces that is used for government use and private business use is generally based on the number of spaces used for private business use as a percentage of the total number of spaces.

(iv) *Discrete portion.* For purposes of this paragraph (g), measurement of the use of proceeds allocated to a discrete portion of a facility is determined by treating that discrete portion as a separate facility.

(v) *Relationship to fair market value.* For purposes of paragraphs (g)(4) (ii) through (iv) of this section, if private business use is reasonably expected as of the issue date to have a significantly greater fair market value than government use, the average amount of private business use must be determined according to the relative reasonably expected fair market values of use rather than another measure, such as average time of use. This determination of relative fair market value may be made as of the date the property is acquired or placed in service if making this determination as of the issue date is not reasonably possible (for example, if the financed property is not identified on the issue date). In general, the relative reasonably expected fair market value for a period must be determined by taking into account the amount of reasonably expected payments for private business use for the period in a manner that properly reflects the proportionate benefit to be derived from the private business use.

(5) *Common areas.* The amount of private business use of common areas within a facility is based on a reasonable method that properly reflects the proportionate benefit to be derived by the users of the facility. For example, in general, a method that is based on the average amount of private business use of the remainder of the entire facility reflects proportionate benefit.

(6) *Allocation of neutral costs.* Proceeds that are used to pay costs of issuance, invested in a reserve or replacement fund, or paid as fees for a qualified guarantee or a qualified hedge must be allocated ratably among the other purposes for which the proceeds are used.

(7) *Commencement of measurement of private business use.* Generally, private business use commences on the first date on which there is a right to actual use by the nongovernmental person. However, if an issuer enters into an arrangement for private business use a substantial period before the right to actual private business use commences and the arrangement transfers ownership or is an arrangement for other long-term use (such as a lease for a significant portion of the remaining economic life of financed property), private business use commences on the date the arrangement is entered into, even if the right to actual use commences after the measurement period. For this purpose, 10 percent of the measurement period is generally treated as a substantial period.

(8) *Examples.* The following examples illustrate the application of this paragraph (g):

Example 1. Research facility. University U, a state owned and operated university, owns and operates a research facility. U proposes to finance general improvements to the facility with the proceeds of an issue of bonds. U enters into sponsored research agreements with nongovernmental persons that result in private business use because the sponsors will own title to any patents resulting from the research. The governmental research conducted by U and the research U conducts for the sponsors take place simultaneously in all laboratories within the research facility. All laboratory equipment is available continuously for use by workers who perform both types of research. Because it is not possible to predict which research projects will be successful, it is not reasonably practicable to estimate the relative revenues expected to result from the governmental and nongovernmental research. U contributed 90 percent of the cost of the facility and the nongovernmental persons contributed 10 percent of the cost. Under this section, the nongovernmental persons are using the facility for a private business use on the same basis as the government use of the facility. The portions of the costs contributed by the various users of the facility provide a reasonable basis that properly reflects the proportionate benefit to be derived by the users of the facility. The nongovernmental persons are treated as using 10 percent of the proceeds of the issue.

Example 2. Stadium. (i) City L issues bonds and uses all of the proceeds to construct a stadium. L enters into a long-term contract with a professional sports team T under which T will use the stadium 20 times during each year. These uses will occur on nights and weekends. L reasonably expects that the stadium will be used more than 180 other times each year, none of which will give rise to private business use. This expectation is based on a feasibility study and historical use of the old stadium that is being replaced by the new stadium. There is no significant difference in the value of T's uses when compared to the other uses of the stadium, taking into account the payments that T is reasonably expected to make for its use. Assuming no other private business use, the issue does not meet the private business use test because not more than 10 percent of the use of the facility is for a private business use.

(ii) The facts are the same as in *Example 2(i)*, except that L reasonably expects that the stadium will be used not more than 60 other times each year, none of which will give rise to private business use. The issue meets the private business use test because 25 percent of the proceeds are used for a private business use.

Example 3. Airport terminal areas treated as common areas. City N issues bonds to finance the construction of an airport terminal. Eighty percent of the leasable space of the terminal will be leased to private air carriers. The remaining 20 percent of the leasable space will be used for the term of the bonds by N for its administrative purposes. The common areas of the terminal, including waiting areas, lobbies, and hallways are treated as 80 percent used by the air carriers for purposes of the private business use test.

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§ 1.141–4 Private security or payment test.

(a) *General rule*—(1) *Private security or payment.* The private security or payment test relates to the nature of the security for, and the source of, the payment of debt service on an issue. The private payment portion of the test takes into account the payment of the debt service on the issue that is directly or indirectly to be derived from payments (whether or not to the issuer or any related party) in respect of property, or borrowed money, used or to be used for a private business use. The private security portion of the test takes into account the payment of the debt service on the issue that is directly or indirectly secured by any interest in property used or to be used for a private business use or payments in respect of property used or to be used for a private business use. For additional rules for output facilities, see § 1.141–7.

(2) *Aggregation of private payments and security.* For purposes of the private security or payment test, payments taken into account as private payments and payments or property taken into account as private security are aggregated. However, the same payments are not taken into account as both private security and private payments.

(3) *Underlying arrangement.* The security for, and payment of debt service on, an issue is determined from both the terms of the bond documents and on the basis of any underlying arrangement. An underlying arrangement may result from separate agreements between the parties or may be determined on the basis of all of the facts and circumstances surrounding the issuance of the bonds. For example, if the payment of debt service on an issue is secured by both a pledge of the full faith and credit of a state or local governmental unit and any interest in property used or to be used in a private business use, the issue meets the private security or payment test.

(b) *Measurement of private payments and security*—(1) *Scope.* This paragraph (b) contains rules that apply to both private security and private payments.

(2) *Present value measurement*—(i) *Use of present value.* In determining whether an issue meets the private security

or payment test, the present value of the payments or property taken into account is compared to the present value of the debt service to be paid over the term of the issue.

(ii) *Debt service*—(A) *Debt service paid from proceeds.* Debt service does not include any amount paid or to be paid from sale proceeds or investment proceeds. For example, debt service does not include payments of capitalized interest funded with proceeds.

(B) *Adjustments to debt service.* Debt service is adjusted to take into account payments and receipts that adjust the yield on an issue for purposes of section 148(f). For example, debt service includes fees paid for qualified guarantees under §1.148–4(f) and is adjusted to take into account payments and receipts on qualified hedges under §1.148–4(h).

(iii) *Computation of present value*—(A) *In general.* Present values are determined by using the yield on the issue as the discount rate and by discounting all amounts to the issue date. See, however, §1.141–13 for special rules for refunding bonds.

(B) *Fixed yield issues.* For a fixed yield issue, yield is determined on the issue date and is not adjusted to take into account subsequent events.

(C) *Variable yield issues.* The yield on a variable yield issue is determined over the term of the issue. To determine the reasonably expected yield as of any date, the issuer may assume that the future interest rate on a variable yield bond will be the then-current interest rate on the bonds determined under the formula prescribed in the bond documents. A deliberate action requires a recomputation of the yield on the variable yield issue to determine the present value of payments under that arrangement. In that case, the issuer must use the yield determined as of the date of the deliberate action for purposes of determining the present value of payments under the arrangement causing the deliberate action. See paragraph (g) of this section, *Example 3.*

(iv) *Application to private security.* For purposes of determining the present value of debt service that is secured by property, the property is valued at fair market value as of the first date on which the property secures bonds of the issue.

(c) *Private payments*—(1) *In general.* This paragraph (c) contains rules that apply to private payments.

(2) *Payments taken into account*—(i) *Payments for use*—(A) *In general.* Both direct and indirect payments made by any nongovernmental person that is treated as using proceeds of the issue are taken into account as private payments to the extent allocable to the proceeds used by that person. Payments are taken into account as private payments only to the extent that they are made for the period of time that proceeds are used for a private business use. Payments for a use of proceeds include payments (whether or not to the issuer) in respect of property financed (directly or indirectly) with those proceeds, even if not made by a private business user. Payments are not made in respect of financed property if those payments are directly allocable to other property being directly used by the person making the payment and those payments represent fair market value compensation for that other use. See paragraph (g) of this section, *Example 4* and *Example 5.* See also paragraph (c)(3) of this section for rules relating to allocation of payments to the source or sources of funding of property.

(B) *Payments not to exceed use.* Payments with respect to proceeds that are used for a private business use are not taken into account to the extent that the present value of those payments exceeds the present value of debt service on those proceeds. Payments need not be directly derived from a private business user, however, to be taken into account. Thus, if 7 percent of the proceeds of an issue is used by a person over the measurement period, payments with respect to the property financed with those proceeds are taken into account as private payments only to the extent that the present value of those payments does not exceed the present value of 7 percent of the debt service on the issue.

(C) *Payments for operating expenses.* Payments by a person for a use of proceeds do not include the portion of any payment that is properly allocable to the payment of ordinary and necessary expenses (as defined under section 162) directly attributable to the operation and maintenance of the financed property used by that person. For this purpose, general overhead and administrative expenses are not directly attributable to those operations and maintenance. For example, if an issuer receives $5,000 rent during the year for use of space in a financed facility and during the year pays $500 for ordinary and necessary expenses properly allocable to the operation and maintenance of that space and $400 for general overhead and general administrative expenses properly allocable to that space, $500 of the $5,000 received would not be considered a payment for the use of the proceeds allocable to that space (regardless of the manner in which that $500 is actually used).

(ii) *Refinanced debt service.* Payments of debt service on an issue to be made from proceeds of a refunding issue are taken into account as private payments in the same proportion that the present value of the payments taken into account as private payments for the refunding issue bears to the present value of the debt service to be paid on the refunding issue. For example, if all the debt service on a note is paid with proceeds of a refunding issue, the note meets the private security or payment test if (and to the same extent that) the refunding issue meets the private security or payment test. This paragraph (c)(2)(ii) does not apply to payments that arise from deliberate actions that occur more than 3 years after the retirement of the prior issue that are not reasonably expected on the issue date of the refunding issue. For purposes of this paragraph (c)(2)(ii), whether an issue is a refunding issue is determined without regard to §1.150–1(d)(2)(i) (relating to certain payments of interest).

(3) *Allocation of payments*—(i) *In general.* Private payments for the use of property are allocated to the source or different sources of funding of property. The allocation to the source or different sources of funding is based on all of the facts and circumstances, including whether an allocation is consistent with the purposes of section 141. In general, a private payment for the use of property is allocated to a source of funding based upon the nexus between the payment and both the financed property and the source of funding. For this purpose, different sources of funding may include different tax-exempt issues, taxable issues, and amounts that are not derived from a borrowing, such as revenues of an issuer (equity).

(ii) *Payments for use of discrete property.* Payments for the use of a discrete facility (or a discrete portion of a facility) are allocated to the source or different sources of funding of that discrete property.

(iii) *Allocations among two or more sources of funding.* In general, except as provided in paragraphs (c)(3)(iv) and (v) of this section, if a payment is made for the use of property financed with two or more sources of funding (for example, equity and a tax-exempt issue), that payment must be allocated to those sources of funding in a manner that reasonably corresponds to the relative amounts of those sources of funding that are expended on that property. If an issuer has not retained records of amounts expended on the property (for example, records of costs of a building that was built 30 years before the allocation), an issuer may use reasonable estimates of those expenditures. For this purpose, costs of issuance and other similar neutral costs are allocated ratably among expenditures in the same manner as in §1.141–3(g)(6). A payment for the use of property may be allocated to two or more issues that finance property according to the relative amounts of debt service (both paid and accrued) on the issues during the annual period for which the payment is made, if that allocation reasonably reflects the economic substance of the arrangement. In general, allocations of payments according to relative debt service reasonably reflect the economic substance of the arrangement if the maturity of the bonds reasonably corresponds to the reasonably expected economic life of the property and debt service payments on the bonds are approximately level from year to year.

(iv) *Payments made under an arrangement entered into in connection with issuance of bonds.* A private payment for the use of property made under an arrangement that is entered into in connection with the issuance of the issue that finances that property generally is allocated to that issue. Whether an arrangement is entered into in connection with the issuance of an issue is determined on the basis of all of the facts and circumstances. An arrangement is ordinarily treated as entered into in connection with the issuance of an issue if—

(A) The issuer enters into the arrangement during the 3-year period beginning 18 months before the issue date; and

(B) The amount of payments reflects all or a portion of debt service on the issue.

(v) *Allocations to equity*. A private payment for the use of property may be allocated to equity before payments are allocated to an issue only if—

(A) Not later than 60 days after the date of the expenditure of those amounts, the issuer adopts an official intent (in a manner comparable to §1.150–2(e)) indicating that the issuer reasonably expects to be repaid for the expenditure from a specific arrangement; and

(B) The private payment is made not later than 18 months after the later of the date the expenditure is made or the date the project is placed in service.

(d) *Private security*—(1) *In general*. This paragraph (d) contains rules that relate to private security.

(2) *Security taken into account*. The property that is the security for, or the source of, the payment of debt service on an issue need not be property financed with proceeds. For example, unimproved land or investment securities used, directly or indirectly, in a private business use that secures an issue provides private security. Private security (other than financed property and private payments) for an issue is taken into account under section 141(b), however, only to the extent it is provided, directly or indirectly, by a user of proceeds of the issue.

(3) *Pledge of unexpended proceeds*. Proceeds qualifying for an initial temporary period under §1.148–2(e)(2) or (3) or deposited in a reasonably required reserve or replacement fund (as defined in §1.148–2(f)(2)(i)) are not taken into account under this paragraph (d) before the date on which those amounts are either expended or loaned by the issuer to an unrelated party.

(4) *Secured by any interest in property or payments*. Property used or to be used for a private business use and payments in respect of that property are treated as private security if any interest in that property or payments secures the payment of debt service on the bonds. For this purpose, the phrase any interest in is to be interpreted broadly and includes, for example, any right, claim, title, or legal share in property or payments.

(5) *Payments in respect of property*. The payments taken into account as private security are payments in respect of property used or to be used for a private business use. Except as otherwise provided in this paragraph (d)(5) and paragraph (d)(6) of this section, the rules in paragraphs (c)(2)(i)(A) and (B) and (c)(2)(ii) of this section apply to determine the amount of payments treated as payments in respect of property used or to be used for a private business use. Thus, payments made by members of the general public for use of a facility used for a private business use (for example, a facility that is the subject of a management contract that results in private business use) are taken into account as private security to the extent that they are made for the period of time that property is used by a private business user.

(6) *Allocation of security among issues*. In general, property or payments from the disposition of that property that are taken into account as private security are allocated to each issue secured by the property or payments on a reasonable basis that takes into account bondholders' rights to the payments or property upon default.

(e) *Generally applicable taxes*—(1) *General rule*. For purposes of the private security or payment test, generally applicable taxes are not taken into account (that is, are not payments from a nongovernmental person and are not payments in respect of property used for a private business use).

(2) *Definition of generally applicable taxes*. A generally applicable tax is an enforced contribution exacted pursuant to legislative authority in the exercise of the taxing power that is imposed and

collected for the purpose of raising revenue to be used for governmental or public purposes. A generally applicable tax must have a uniform tax rate that is applied to all persons of the same classification in the appropriate jurisdiction and a generally applicable manner of determination and collection.

(3) *Special charges.* A special charge (as defined in this paragraph (e)(3)) is not a generally applicable tax. For this purpose, a special charge means a payment for a special privilege granted or regulatory function (for example, a license fee), a service rendered (for example, a sanitation services fee), a use of property (for example, rent), or a payment in the nature of a special assessment to finance capital improvements that is imposed on a limited class of persons based on benefits received from the capital improvements financed with the assessment. Thus, a special assessment to finance infrastructure improvements in a new industrial park (such as sidewalks, streets, streetlights, and utility infrastructure improvements) that is imposed on a limited class of persons composed of property owners within the industrial park who benefit from those improvements is a special charge. By contrast, an otherwise qualified generally applicable tax (such as a generally applicable ad valorem tax on all real property within a governmental taxing jurisdiction) or an eligible PILOT under paragraph (e)(5) of this section that is based on such a generally applicable tax is not treated as a special charge merely because the taxes or PILOTs received are used for governmental or public purposes in a manner which benefits particular property owners.

(4) *Manner of determination and collection*—(i) *In general.* A tax does not have a generally applicable manner of determination and collection to the extent that one or more taxpayers make any impermissible agreements relating to payment of those taxes. An impermissible agreement relating to the payment of a tax is taken into account whether or not it is reasonably expected to result in any payments that would not otherwise have been made. For example, if an issuer uses proceeds to make a grant to a taxpayer to improve property, agreements that impose reasonable conditions on the use of the grant do not cause a tax on that property to fail to be a generally applicable tax. If an agreement by a taxpayer causes the tax imposed on that taxpayer not to be treated as a generally applicable tax, the entire tax paid by that taxpayer is treated as a special charge, unless the agreement is limited to a specific portion of the tax.

(ii) *Impermissible agreements.* The following are examples of agreements that cause a tax to fail to have a generally applicable manner of determination and collection: an agreement to be personally liable on a tax that does not generally impose personal liability, to provide additional credit support such as a third party guarantee, or to pay unanticipated shortfalls; an agreement regarding the minimum market value of property subject to property tax; and an agreement not to challenge or seek deferral of the tax.

(iii) *Permissible agreements.* The following are examples of agreements that do not cause a tax to fail to have a generally applicable manner of determination and collection: an agreement to use a grant for specified purposes (whether or not that agreement is secured); a representation regarding the expected value of the property following the improvement; an agreement to insure the property and, if damaged, to restore the property; a right of a grantor to rescind the grant if property taxes are not paid; and an agreement to reduce or limit the amount of taxes collected to further a bona fide governmental purpose. For example, an agreement to abate taxes to encourage a property owner to rehabilitate property in a distressed area is a permissible agreement.

(5) *Payments in lieu of taxes.* A tax equivalency payment or other payment in lieu of a tax (''PILOT'') is treated as a generally applicable tax if it meets the requirements of paragraphs (e)(5)(i) through (iv) of this section—

(i) *Maximum amount limited by underlying generally applicable tax.* The PILOT is not greater than the amount imposed by a statute for a generally applicable tax in each year.

(ii) *Commensurate with a generally applicable tax*. The PILOT is commensurate with the amount imposed by a statute for a generally applicable tax in each year under the commensurate standard set forth in this paragraph (e)(5)(ii). For this purpose, except as otherwise provided in this paragraph (e)(5)(ii), a PILOT is commensurate with a generally applicable tax only if it is equal to a fixed percentage of the generally applicable tax that would otherwise apply in each year or it reflects a fixed adjustment to the generally applicable tax that would otherwise apply in each year. A PILOT based on a property tax does not fail to be commensurate with the property tax as a result of changes in the level of the percentage of or adjustment to that property tax for a reasonable phase-in period ending when the subject property is placed in service (as defined in §1.150–2(c)). A PILOT based on a property tax must take into account the current assessed value of the property for property tax purposes for each year in which the PILOT is paid and that assessed value must be determined in the same manner and with the same frequency as property subject to the property tax. A PILOT is not commensurate with a generally applicable tax, however, if the PILOT is set at a fixed dollar amount (for example, fixed debt service on a bond issue) that cannot vary with changes in the level of the generally applicable tax on which it is based.

(iii) *Use of PILOTs for governmental or public purposes*. The PILOT is to be used for governmental or public purposes for which the generally applicable tax on which it is based may be used.

(iv) *No special charges*. The PILOT is not a special charge under paragraph (e)(3) of this section.

(f) *Certain waste remediation bonds*—(1) *Scope*. This paragraph (f) applies to bonds issued to finance hazardous waste clean-up activities on privately owned land (hazardous waste remediation bonds).

(2) *Persons that are not private users*. Payments from nongovernmental persons who are not (other than coincidentally) either users of the site being remediated or persons potentially responsible for disposing of hazardous waste on that site are not taken into account as private security. This paragraph (f)(2) applies to payments that secure (directly or indirectly) the payment of principal of, or interest on, the bonds under the terms of the bonds. This paragraph (f)(2) applies only if the payments are made pursuant to either a generally applicable state or local taxing statute or a state or local statute that regulates or restrains activities on an industry-wide basis of persons who are engaged in generating or handling hazardous waste, or in refining, producing, or transporting petroleum, provided that those payments do not represent, in substance, payment for the use of proceeds. For this purpose, a state or local statute that imposes payments that have substantially the same character as those described in Chapter 38 of the Code are treated as generally applicable taxes.

(3) *Persons that are private users*. If payments from nongovernmental persons who are either users of the site being remediated or persons potentially responsible for disposing of hazardous waste on that site do not secure (directly or indirectly) the payment of principal of, or interest on, the bonds under the terms of the bonds, the payments are not taken into account as private payments. This paragraph (f)(3) applies only if at the time the bonds are issued the payments from those nongovernmental persons are not material to the security for the bonds. For this purpose, payments are not material to the security for the bonds if—

(i) The payments are not required for the payment of debt service on the bonds;

(ii) The amount and timing of the payments are not structured or designed to reflect the payment of debt service on the bonds;

(iii) The receipt or the amount of the payment is uncertain (for example, as of the issue date, no final judgment has been entered into against the nongovernmental person);

(iv) The payments from those nongovernmental persons, when and if received, are used either to redeem bonds of the issuer or to pay for costs of any hazardous waste remediation project; and

(v) In the case when a judgment (but not a final judgment) has been entered by the issue date against a nongovernmental person, there are, as of the issue date, costs of hazardous waste remediation other than those financed with the bonds that may be financed with the payments.

(g) *Examples*. The following examples illustrate the application of this section:

Example 1. Aggregation of payments. State B issues bonds with proceeds of $10 million. B uses $9.7 million of the proceeds to construct a 10-story office building. B uses the remaining $300,000 of proceeds to make a loan to Corporation Y. In addition, Corporation X leases 1 floor of the building for the term of the bonds. Under all of the facts and circumstances, it is reasonable to allocate 10 percent of the proceeds to that 1 floor. As a percentage of the present value of the debt service on the bonds, the present value of Y's loan repayments is 3 percent and the present value of X's lease payments is 8 percent. The bonds meet the private security or payment test because the private payments taken into account are more than 10 percent of the present value of the debt service on the bonds.

Example 2. Indirect private payments. J, a political subdivision of a state, will issue several series of bonds from time to time and will use the proceeds to rehabilitate urban areas. Under all of the facts and circumstances, the private business use test will be met with respect to each issue that will be used for the rehabilitation and construction of buildings that will be leased or sold to nongovernmental persons for use in their trades or businesses. Nongovernmental persons will make payments for these sales and leases. There is no limitation either on the number of issues or the aggregate amount of bonds that may be outstanding. No group of bondholders has any legal claim prior to any other bondholders or creditors with respect to specific revenues of J, and there is no arrangement whereby revenues from a particular project are paid into a trust or constructive trust, or sinking fund, or are otherwise segregated or restricted for the benefit of any group of bondholders. There is, however, an unconditional obligation by J to pay the principal of, and the interest on, each issue. Although not directly pledged under the terms of the bond documents, the leases and sales are underlying arrangements. The payments relating to these leases and sales are taken into account as private payments to determine whether each issue of bonds meets the private security or payment test.

Example 3. Computation of payment in variable yield issues. (i) City M issues general obligation bonds with proceeds of $10 million to finance a 5-story office building. The bonds bear interest at a variable rate that is recomputed monthly according to an index that reflects current market yields. The yield that the interest index would produce on the issue date is 6 percent. M leases 1 floor of the office building to Corporation T, a nongovernmental person, for the term of the bonds. Under all of the facts and circumstances, T is treated as using more than 10 percent of the proceeds. Using the 6 percent yield as the discount rate, M reasonably expects on the issue date that the present value of lease payments to be made by T will be 8 percent of the present value of the total debt service on the bonds. After the issue date of the bonds, interest rates decline significantly, so that the yield on the bonds over their entire term is 4 percent. Using this actual 4 percent yield as the discount rate, the present value of lease payments made by T is 12 percent of the present value of the actual total debt service on the bonds. The bonds are not private activity bonds because M reasonably expected on the issue date that the bonds would not meet the private security or payment test and because M did not take any subsequent deliberate action to meet the private security or payment test.

(ii) The facts are the same as *Example 3(i)*, except that 5 years after the issue date M leases a second floor to Corporation S, a nongovernmental person, under a long-term lease. Because M has taken a deliberate action, the present value of the lease payments must be computed. On the date this lease is entered into, M reasonably expects that the yield on the bonds over their entire term will be 5.5 percent, based on actual interest rates to date and the then-current rate on the variable yield bonds. M uses this 5.5 percent yield as the discount rate. Using this 5.5 percent yield as the discount rate, as a percentage of the present value of the debt service on the bonds, the present value of the lease payments made by S is 3 percent. The bonds are private activity bonds because the present value of the aggregate private payments is greater than 10 percent of the present value of debt service.

Example 4. Payments not in respect of financed property. In order to further public safety, City Y issues tax assessment bonds the proceeds of which are used to move existing electric utility lines underground. Although the utility lines are owned by a nongovernmental utility company, that company is under no obligation to move the lines. The debt service on the bonds will be paid using assessments levied by City Y on the customers of the utility. Although the utility lines are privately owned and the utility customers make payments to the utility company for the use of those lines, the assessments are payments in respect of the cost of relocating the utility line. Thus, the assessment payments are not made in respect of property used for a private business use. Any direct or indirect payments to Y by the utility company for the undergrounding are, however, taken into account as private payments.

Example 5. Payments from users of proceeds that are not private business users taken into account. City P issues general obligation bonds to finance the renovation of a hospital that it owns. The hospital is operated for P by D, a nongovernmental person, under a management contract that results in private business use under §1.141–3. P will use the revenues from the hospital (after the required payments to D and the payment of operation and maintenance expenses) to pay the debt service on the bonds. The bonds meet the private security or payment test because the revenues from the hospital are payments in respect of property used for a private business use.

Example 6. Limitation of amount of payments to amount of private business use not determined annually. City Q issues bonds with a term of 15 years and uses the proceeds to construct an office building. The debt service on the bonds is level throughout the 15-year term. Q enters into a 5-year lease with Corporation R under which R is treated as a user of 11 percent of the proceeds. R will make lease payments equal to 20 percent of the annual debt service on the bonds for each year of the lease. The present value of R's lease payments is equal to 12 percent of the present value of the debt service over the entire 15-year term of the bonds. If, however, the lease payments taken into account as private payments were limited to 11 percent of debt service paid in each year of the lease, the present value of these payments would be only 8 percent of the debt service on the bonds over the entire term of the bonds. The bonds meet the private security or payment test, because R's lease payments are taken into account as private payments in an amount not to exceed 11 percent of the debt service of the bonds.

Example 7. Allocation of payments to funds not derived from a borrowing. City Z purchases property for $1,250,000 using $1,000,000 of proceeds of its tax increment bonds and $250,000 of other revenues that are in its redevelopment fund. Within 60 days of the date of purchase, Z declared its intent to sell the property pursuant to a redevelopment plan and to use that amount to reimburse its redevelopment fund. The bonds are secured only by the incremental property taxes attributable to the increase in value of the property from the planned redevelopment of the property. Within 18 months after the issue date, Z sells the financed property to Developer M for $250,000, which Z uses to reimburse the redevelopment fund. The property that M uses is financed both with the proceeds of the bonds and Z's redevelopment fund. The payments by M are properly allocable to the costs of property financed with the amounts in Z's redevelopment fund. See paragraphs (c)(3) (i) and (v) of this section.

Example 8. Allocation of payments to different sources of funding—improvements. In 1997, City L issues bonds with proceeds of $8 million to finance the acquisition of a building. In 2002, L spends $2 million of its general revenues to improve the heating system and roof of the building. At that time, L enters into a 10-year lease with Corporation M for the building providing for annual payments of $1 million to L. The lease payments are at fair market value, and the lease payments do not otherwise have a significant nexus to either the issue or to the expenditure of general revenues. Eighty percent of each lease payment is allocated to the issue and is taken into account under the private payment test because each lease payment is properly allocated to the sources of funding in a manner that reasonably corresponds to the relative amounts of the sources of funding that are expended on the building.

Example 9. Security not provided by users of proceeds not taken into account. County W issues certificates of participation in a lease of a building that W owns and covenants to appropriate annual payments for the lease. A portion of each payment is specified as interest. More than 10 percent of the building is used for private business use. None of the proceeds of the obligations are used with respect to the building. W uses the proceeds of the obligations to make a grant to Corporation Y for the construction of a factory that Y will own. Y makes no payments to W, directly or indirectly, for its use of proceeds, and Y has no relationship to the users of the leased building. If W defaults under the lease, the trustee for the holders of the certificates of participation has a limited right of repossession under which the trustee may not foreclose but may lease the property to a new tenant at fair market value. The obligations are secured by an interest in property used for a private business use. However, because the property is not provided by a private business user and is not financed property, the obligations do not meet the private security or payment test.

Example 10. Allocation of payments among issues. University L, a political subdivision, issued three separate series of revenue bonds during 1989, 1991, and 1993 under the same bond resolution. L used the proceeds to construct facilities exclusively for its own use. Bonds issued under the resolution are equally and ratably secured and payable solely from the income derived by L from rates, fees, and charges imposed by L for the use of the facilities. The bonds issued in 1989, 1991, and 1993 are not private activity bonds. In 1997, L issues another series of bonds under the resolution to finance additional facilities. L leases 20 percent of the new facilities for the term of the 1997 bonds to nongovernmental persons who will use the facilities in their trades or businesses. The present value of the lease payments from the nongovernmental users will equal 15 percent of the present value of the debt service on the 1997 bonds. L will commingle all of the revenues from all its bond-financed facilities in its revenue fund. The present value of the portion of the lease payments from nongovernmental lessees of the new facilities allocable to the 1997 bonds under paragraph (d) of this section is less than 10 percent of the present value of the debt service on the 1997 bonds because the bond documents provide that the bonds are equally and ratably secured. Accordingly, the 1997 bonds do not meet the private security test. The 1997 bonds meet the private payment test, however, because the private lease payments for the new facility are properly allocated to those bonds (that is, because none of the proceeds of the prior issues were used for the new facilities). See paragraph (c) of this section.

Example 11. Generally applicable tax. (i) Authority N issues bonds to finance the construction of a stadium. Under a long-term lease, Corporation X, a professional sports team, will use more than 10 percent of the stadium. X will not, however, make any payments for this private business use. The security for the bonds will be a ticket tax imposed on each person purchasing a ticket for an event at the stadium. The portion of the ticket tax attributable to tickets purchased by persons attending X's events will, on a present value basis, exceed 10 percent of the present value of the debt service on N's bonds. The bonds meet the private security or payment test. The ticket tax is not a generally applicable tax and, to the extent that the tax receipts relate to X's events, the taxes are payments in respect of property used for a private business use.

(ii) The facts are the same as *Example 11(i)*, except that the ticket tax is imposed by N on tickets purchased for events at a number of large entertainment facilities within the N's jurisdiction (for example, other stadiums, arenas, and concert halls), some of which were not financed with tax-exempt bonds. The ticket tax is a generally applicable tax and therefore the revenues from this tax are not payments in respect of property used for a private business use. The receipt of the ticket tax does not cause the bonds to meet the private security or payment test.

[T.D. 8712, 62 FR 2291, Jan. 16, 1997, as amended by T.D. 9429, 73 FR 63374, Oct. 24, 2008]

§ 1.141–5 Private loan financing test.

(a) *In general.* Bonds of an issue are private activity bonds if more than the lesser of 5 percent or $5 million of the proceeds of the issue is to be used (directly or indirectly) to make or finance loans to persons other than governmental persons. Section 1.141–2(d) applies in determining whether the private loan financing test is met. In determining whether the proceeds of an issue are used to make or finance loans, indirect, as well as direct, use of the proceeds is taken into account.

(b) *Measurement of test.* In determining whether the private loan financing test is met, the amount actually loaned to a nongovernmental person is not discounted to reflect the present value of the loan repayments.

(c) *Definition of private loan*—(1) *In general.* Any transaction that is generally characterized as a loan for federal income tax purposes is a loan for purposes of this section. In addition, a loan may arise from the direct lending of bond proceeds or may arise from transactions in which indirect benefits that are the economic equivalent of a loan are conveyed. Thus, the determination of whether a loan is made depends on the substance of a transaction rather than its form. For example, a lease or other contractual arrangement (for example, a management contract or an output contract) may in substance constitute a loan if the arrangement transfers tax ownership of the facility to a nongovernmental person. Similarly, an output contract or a management contract with respect to a financed facility generally is not treated as a loan of proceeds unless the agreement in substance shifts significant burdens and benefits of ownership to the nongovernmental purchaser or manager of the facility.

(2) *Application only to purpose investments*—(i) *In general.* A loan may be either a purpose investment or a nonpurpose investment. A loan that is a nonpurpose investment does not cause the private loan financing test to be met. For example, proceeds invested in loans, such as obligations of the United States, during a temporary period, as part of a reasonably required reserve or replacement fund, as part of a refunding escrow, or as part of a minor portion (as each of those terms are defined in § 1.148–1 or § 1.148–2) are generally not

treated as loans under the private loan financing test.

(ii) *Certain prepayments treated as loans.* Except as otherwise provided, a prepayment for property or services, including a prepayment for property or services that is made after the date that the contract to buy the property or services is entered into, is treated as a loan for purposes of the private loan financing test if a principal purpose for prepaying is to provide a benefit of tax-exempt financing to the seller. A prepayment is not treated as a loan for purposes of the private loan financing test if—

(A) Prepayments on substantially the same terms are made by a substantial percentage of persons who are similarly situated to the issuer but who are not beneficiaries of tax-exempt financing;

(B) The prepayment is made within 90 days of the reasonably expected date of delivery to the issuer of all of the property or services for which the prepayment is made; or

(C) The prepayment meets the requirements of §1.148–1(e)(2)(iii)(A) or (B) (relating to certain prepayments to acquire a supply of natural gas or electricity).

(iii) *Customary prepayments.* The determination of whether a prepayment satisfies paragraph (c)(2)(ii)(A) of this section is generally made based on all the facts and circumstances. In addition, a prepayment is deemed to satisfy paragraph (c)(2)(ii)(A) of this section if—

(A) The prepayment is made for—

(*1*) Maintenance, repair, or an extended warranty with respect to personal property (for example, automobiles or electronic equipment); or

(*2*) Updates or maintenance or support services with respect to computer software; and

(B) The same maintenance, repair, extended warranty, updates or maintenance or support services, as applicable, are regularly provided to nongovernmental persons on the same terms.

(iv) *Additional prepayments as permitted by the Commissioner.* The Commissioner may, by published guidance, set forth additional circumstances in which a prepayment is not treated as a loan for purposes of the private loan financing test.

(3) *Grants*—(i) *In general.* A grant of proceeds is not a loan. Whether a transaction may be treated as a grant or a loan depends on all of the facts and circumstances.

(ii) *Tax increment financing*—(A) *In general.* Generally, a grant using proceeds of an issue that is secured by generally applicable taxes attributable to the improvements to be made with the grant is not treated as a loan, unless the grantee makes any impermissible agreements relating to the payment that results in the taxes imposed on that taxpayer not to be treated as generally applicable taxes under §1.141–4(e).

(B) *Amount of loan.* If a grant is treated as a loan under this paragraph (c)(3), the entire grant is treated as a loan unless the impermissible agreement is limited to a specific portion of the tax. For this purpose, an arrangement with each unrelated grantee is treated as a separate grant.

(4) *Hazardous waste remediation bonds.* In the case of an issue of hazardous waste remediation bonds, payments from nongovernmental persons that are either users of the site being remediated or persons potentially responsible for disposing of hazardous waste on that site do not establish that the transaction is a loan for purposes of this section. This paragraph (c)(4) applies only if those payments do not secure the payment of principal of, or interest on, the bonds (directly or indirectly), under the terms of the bonds and those payments are not taken into account under the private payment test pursuant to §1.141–4(f)(3).

(d) *Tax assessment loan exception*—(1) *General rule.* For purposes of this section, a tax assessment loan that satisfies the requirements of this paragraph (d) is not a loan for purposes of the private loan financing test.

(2) *Tax assessment loan defined.* A tax assessment loan is a loan that arises when a governmental person permits or requires property owners to finance any governmental tax or assessment of general application for an essential governmental function that satisfies each of the requirements of paragraphs (d) (3) through (5) of this section.

(3) *Mandatory tax or other assessment.* The tax or assessment must be an enforced contribution that is imposed and collected for the purpose of raising revenue to be used for a specific purpose (that is, to defray the capital cost of an improvement). Taxes and assessments do not include fees for services. The tax or assessment must be imposed pursuant to a state law of general application that can be applied equally to natural persons not acting in a trade or business and persons acting in a trade or business. For this purpose, taxes and assessments that are imposed subject to protest procedures are treated as enforced contributions.

(4) *Specific essential governmental function*—(i) *In general.* A mandatory tax or assessment that gives rise to a tax assessment loan must be imposed for one or more specific, essential governmental functions.

(ii) *Essential governmental functions.* For purposes of paragraph (d) of this section, improvements to utilities and systems that are owned by a governmental person and that are available for use by the general public (such as sidewalks, streets and street-lights; electric, telephone, and cable television systems; sewage treatment and disposal systems; and municipal water facilities) serve essential governmental functions. For other types of facilities, the extent to which the service provided by the facility is customarily performed (and financed with governmental bonds) by governments with general taxing powers is a primary factor in determining whether the facility serves an essential governmental function. For example, parks that are owned by a governmental person and that are available for use by the general public serve an essential governmental function. Except as otherwise provided in this paragraph (d)(4)(ii), commercial or industrial facilities and improvements to property owned by a nongovernmental person do not serve an essential governmental function. Permitting installment payments of property taxes or other taxes is not an essential governmental function.

(5) *Equal basis requirement*—(i) *In general.* Owners of both business and nonbusiness property benefiting from the financed improvements must be eligible, or required, to make deferred payments of the tax or assessment giving rise to a tax assessment loan on an equal basis (the equal basis requirement). A tax or assessment does not satisfy the equal basis requirement if the terms for payment of the tax or assessment are not the same for all taxed or assessed persons. For example, the equal basis requirement is not met if certain property owners are permitted to pay the tax or assessment over a period of years while others must pay the entire tax or assessment immediately or if only certain property owners are required to prepay the tax or assessment when the property is sold.

(ii) *General rule for guarantees.* A guarantee of debt service on bonds, or of taxes or assessments, by a person that is treated as a borrower of bond proceeds violates the equal basis requirement if it is reasonable to expect on the date the guarantee is entered into that payments will be made under the guarantee.

(6) *Coordination with private business tests.* See §§1.141–3 and 1.141–4 for rules for determining whether tax assessment loans cause the bonds financing those loans to be private activity bonds under the private business use and the private security or payment tests.

(e) *Examples.* The following examples illustrate the application of this section:

Example 1. Turnkey contract not treated as a loan. State agency Z and federal agency H will each contribute to rehabilitate a project owned by Z. H can only provide its funds through a contribution to Z to be used to acquire the rehabilitated project on a turnkey basis from an approved developer. Under H's turnkey program, the developer must own the project while it is rehabilitated. Z issues its notes to provide funds for construction. A portion of the notes will be retired using the H contribution, and the balance of the notes will be retired through the issuance by Z of long-term bonds. Z lends the proceeds of its notes to Developer B as construction financing and transfers title to B for a nominal amount. The conveyance is made on condition that B rehabilitate the property and reconvey it upon completion, with Z retaining the right to force reconveyance if these conditions are not satisfied. B must name Z as an additional insured on all insurance. Upon completion, B must transfer title to the project back to Z at a set price, which price reflects B's costs and profit, not fair market value. Further, this price is adjusted downward to reflect any cost-underruns. For purposes of section 141(c), this transaction does not involve a private loan.

Example 2. Essential government function requirement not met. City D creates a special taxing district consisting of property owned by nongovernmental persons that requires environmental clean-up. D imposes a special tax on each parcel within the district in an amount that is related to the expected environmental clean-up costs of that parcel. The payment of the tax over a 20-year period is treated as a loan by the property owners for purposes of the private loan financing test. The special district issues bonds, acting on behalf of D, that are payable from the special tax levied within the district, and uses the proceeds to pay for the costs of environmental clean-up on the property within the district. The bonds meet the private loan financing test because more than 5 percent of the proceeds of the issue are loaned to nongovernmental persons. The issue does not meet the tax assessment loan exception because the improvements to property owned by a nongovernmental person are not an essential governmental function under section 141(c)(2). The issue also meets the private business tests of section 141(b).

[T.D. 8712, 62 FR 2296, Jan. 16, 1997, as amended by T.D. 9085, 68 FR 45775, Aug. 4, 2003]

§ 1.141–6 Allocation and accounting rules.

(a) *Allocation of proceeds to expenditures.* For purposes of §§ 1.141–1 through 1.141–15, the provisions of § 1.148–6(d) apply for purposes of allocating proceeds to expenditures. Thus, allocations generally may be made using any reasonable, consistently applied accounting method, and allocations under section 141 and section 148 must be consistent with each other.

(b) *Allocation of proceeds to property.* [Reserved]

(c) *Special rules for mixed use facilities.* [Reserved]

(d) *Allocation of proceeds to common areas.* [Reserved]

(e) *Allocation of proceeds to bonds.* [Reserved]

(f) *Treatment of partnerships.* [Reserved]

(g) *Examples.* [Reserved]

[T.D. 8712, 62 FR 2297, Jan. 16, 1997]

§ 1.141–7 Special rules for output facilities.

(a) *Overview.* This section provides special rules to determine whether arrangements for the purchase of output from an output facility cause an issue of bonds to meet the private business tests. For this purpose, unless otherwise stated, water facilities are treated as output facilities. Sections 1.141–3 and 1.141–4 generally apply to determine whether other types of arrangements for use of an output facility cause an issue to meet the private business tests.

(b) *Definitions.* For purposes of this section and § 1.141–8, the following definitions and rules apply:

(1) *Available output.* The available output of a facility financed by an issue is determined by multiplying the number of units produced or to be produced by the facility in one year by the number of years in the measurement period of that facility for that issue.

(i) *Generating facilities.* The number of units produced or to be produced by a generating facility in one year is determined by reference to its nameplate capacity or the equivalent (or where there is no nameplate capacity or the equivalent, its maximum capacity), which is not reduced for reserves, maintenance or other unutilized capacity.

(ii) *Transmission and other output facilities*—(A) *In general.* For transmission, distribution, cogeneration, and other output facilities, available output must be measured in a reasonable manner to reflect capacity.

(B) *Electric transmission facilities.* Measurement of the available output of all or a portion of electric transmission facilities may be determined in a manner consistent with the reporting rules and requirements for transmission networks promulgated by the Federal Energy Regulatory Commission (FERC). For example, for a transmission network, the use of aggregate load and load share ratios in a manner consistent with the requirements of the FERC may be reasonable. In addition, depending on the facts and circumstances, measurement of the available output of transmission facilities using thermal capacity or transfer capacity may be reasonable.

(iii) *Special rule for facilities with significant unutilized capacity.* If an issuer reasonably expects on the issue date that persons that are treated as private business users will purchase more than 30 percent of the actual output of the facility financed with the issue, the Commissioner may determine the number of units produced or to be produced by the facility in one year on a reasonable basis other than by reference to nameplate or other capacity, such as the average expected annual output of the facility. For example, the Commissioner may determine the available output of a financed peaking electric generating unit by reference to the reasonably expected annual output of that unit if the issuer reasonably expects, on the issue date of bonds that finance the unit, that an investor-owned utility will purchase more than 30 percent of the actual output of the facility during the measurement period under a take or pay contract, even if the amount of output purchased is less than 10 percent of the available output determined by reference to nameplate capacity. The reasonably expected annual output of the generating facility must be consistent with the capacity reported for prudent reliability purposes.

(iv) *Special rule for facilities with a limited source of supply.* If a limited source of supply constrains the output of an output facility, the number of units produced or to be produced by the facility must be determined by reasonably taking into account those constraints. For this purpose, a limited source of supply shall include a physical limitation (for example, flow of water), but not an economic limitation (for example, cost of coal or gas). For example, the available output of a hydroelectric unit must be determined by reference to the reasonably expected annual flow of water through the unit.

(2) *Measurement period.* The measurement period of an output facility financed by an issue is determined under §1.141–3(g).

(3) *Sale at wholesale.* A sale at wholesale means a sale of output to any person for resale.

(4) *Take contract and take or pay contract.* A *take contract* is an output contract under which a purchaser agrees to pay for the output under the contract if the output facility is capable of providing the output. A *take or pay contract* is an output contract under which a purchaser agrees to pay for the output under the contract, whether or not the output facility is capable of providing the output.

(5) *Requirements contract.* A *requirements contract* is an output contract, other than a take contract or a take or pay contract, under which a nongovernmental person agrees to purchase all or part of its output requirements.

(6) *Nonqualified amount.* The nonqualified amount with respect to an issue is determined under section 141(b)(8).

(c) *Output contracts*—(1) *General rule.* The purchase pursuant to a contract by a nongovernmental person of available output of an output facility (output contract) financed with proceeds of an issue is taken into account under the private business tests if the purchase has the effect of transferring the benefits of owning the facility and the burdens of paying the debt service on bonds used (directly or indirectly) to finance the facility (the benefits and burdens test). See paragraph (c)(4) of this section for the treatment of an output contract that is properly characterized as a lease for Federal income tax purposes. See paragraphs (d) and (e) of this section for rules regarding measuring the use of, and payments of debt service for, an output facility for determining whether the private business tests are met. See also §1.141–8 for rules for when an issue that finances an output facility (other than a water facility) meets the private business tests because the nonqualified amount of the issue exceeds $15 million.

(2) *Take contract or take or pay contract.* The benefits and burdens test is met if a nongovernmental person agrees pursuant to a take contract or a take or pay contract to purchase available output of a facility.

(3) *Requirements contract*—(i) *In general.* A requirements contract may satisfy the benefits and burdens test under paragraph (c)(3)(ii) or (iii) of this section. See §1.141–15(f)(2) for special effective dates for the application of this paragraph (c)(3) to issues financing facilities subject to requirements contracts.

(ii) *Requirements contract similar to take contract or take or pay contract.* A requirements contract generally meets the benefits and burdens test to the extent that it contains contractual terms that obligate the purchaser to make payments that are not contingent on the output requirements of the purchaser or that obligate the purchaser to have output requirements. For example, a requirements contract with an industrial purchaser meets the benefits and burdens test if the purchaser enters into additional contractual obligations with the issuer or another governmental unit not to cease operations. A requirements contract does not meet the benefits and burdens test, however, by reason of a provision that requires the purchaser to pay reasonable and customary damages (including liquidated damages) in the event of a default, or a provision that permits the purchaser to pay a specified amount to terminate the contract while the purchaser has requirements, in each case if the amount of the payment is reasonably related to the purchaser's obligation to buy requirements that is discharged by the payment.

(iii) *Wholesale requirements contract*—(A) *In general.* A requirements contract that is a sale at wholesale (a *wholesale requirements contract*) may satisfy the benefits and burdens test, depending on all the facts and circumstances.

(B) *Significant factors.* Significant factors that tend to establish that a wholesale requirements contract meets the benefits and burdens test include, but are not limited to—

(*1*) The term of the contract is substantial relative to the term of the issue or issues that finance the facility; and

(*2*) The amount of output to be purchased under the contract represents a substantial portion of the available output of the facility.

(C) *Safe harbors.* A wholesale requirements contract does not meet the benefits and burdens test if—

(*1*) The term of the contract, including all renewal options, does not exceed the lesser of 5 years or 30 percent of the term of the issue; or

(*2*) The amount of output to be purchased under the contract (and any other requirements contract with the same purchaser or a related party with respect to the facility) does not exceed 5 percent of the available output of the facility.

(iv) *Retail requirements contract.* Except as otherwise provided in this paragraph (c)(3), a requirements contract that is not a sale at wholesale does not meet the benefits and burdens test.

(4) *Output contract properly characterized as a lease.* Notwithstanding any other provision of this section, an output contract that is properly characterized as a lease for Federal income tax purposes shall be tested under the rules contained in §§1.141–3 and 1.141–4 to determine whether it is taken into account under the private business tests.

(d) *Measurement of private business use.* If an output contract results in private business use under this section, the amount of private business use generally is the amount of output purchased under the contract.

(e) *Measurement of private security or payment.* The measurement of payments made or to be made by nongovernmental persons under output contracts as a percent of the debt service of an issue is determined under the rules provided in §1.141–4.

(f) *Exceptions for certain contracts*—(1) *Small purchases of output.* An output contract for the use of a facility is not taken into account under the private business tests if the average annual payments to be made under the contract do not exceed 1 percent of the average annual debt service on all outstanding tax-exempt bonds issued to finance the facility, determined as of the effective date of the contract.

(2) *Swapping and pooling arrangements.* An agreement that provides for swapping or pooling of output by one or more governmental persons and one or more nongovernmental persons does not result in private business use of the output facility owned by the governmental person to the extent that—

(i) The swapped output is reasonably expected to be approximately equal in value (determined over periods of three years or less); and

(ii) The purpose of the agreement is to enable each of the parties to satisfy different peak load demands, to accommodate temporary outages, to diversify supply, or to enhance reliability in accordance with prudent reliability standards.

(3) *Short-term output contracts.* An output contract with a nongovernmental person is not taken into account under the private business tests if—

(i) The term of the contract, including all renewal options, is not longer than 3 years;

(ii) The contract either is a negotiated, arm's-length arrangement that provides for compensation at fair market value, or is based on generally applicable and uniformly applied rates; and

(iii) The output facility is not financed for a principal purpose of providing that facility for use by that nongovernmental person.

(4) *Certain conduit parties disregarded.* A nongovernmental person acting solely as a conduit for the exchange of output among governmentally owned and operated utilities is disregarded in determining whether the private business tests are met with respect to financed facilities owned by a governmental person.

(g) *Special rules for electric output facilities used to provide open access*—(1) *Operation of transmission facilities by nongovernmental persons*—(i) *In general.* The operation of an electric transmission facility by a nongovernmental person may result in private business use of the facility under §1.141–3 and this section based on all the facts and circumstances. For example, a transmission facility is generally used for a private business use if a nongovernmental person enters into a contract to operate the facility and receives compensation based, in whole or in part, on a share of net profits from the operation of the facility.

(ii) *Certain use by independent transmission operators.* A contract for the operation of an electric transmission facility by an independent entity, such as a regional transmission organization or an independent system operator (*independent transmission operator*), does not constitute private business use of the facility if—

(A) The facility is owned by a governmental person;

(B) The operation of the facility by the independent transmission operator is approved by the FERC under one or more provisions of the Federal Power Act (16 U.S.C. 791a through 825r) (or by a state authority under comparable provisions of state law);

(C) No portion of the compensation of the independent transmission operator is based on a share of net profits from the operation of the facility; and

(D) The independent transmission operator does not bear risk of loss of the facility.

(2) *Certain use by nongovernmental persons under output contracts*—(i) *Transmission facilities.* The use of an electric transmission facility by a nongovernmental person pursuant to an output contract does not constitute private business use of the facility if—

(A) The facility is owned by a governmental person;

(B) The facility is operated by an independent transmission operator in a manner that satisfies paragraph (g)(1)(ii) of this section; and

(C) The facility is not financed for a principal purpose of providing that facility for use by that nongovernmental person.

(ii) *Distribution facilities.* The use of an electric distribution facility by a nongovernmental person pursuant to an output contract does not constitute private business use of the facility if—

(A) The facility is owned by a governmental person;

(B) The facility is available for use on a nondiscriminatory, open access basis by buyers and sellers of electricity in accordance with rates that are generally applicable and uniformly applied within the meaning of §1.141–3(c)(2); and

(C) The facility is not financed for a principal purpose of providing that facility for use by that nongovernmental person (other than a retail end-user).

(3) *Ancillary services.* The use of an electric output facility to provide ancillary services required to be offered as part of an open access transmission tariff under rules promulgated by the FERC under the Federal Power Act (16 U.S.C. 791a through 825r) (or by a state regulatory authority under comparable provisions of state law) does not result in private business use.

(4) *Exceptions to deliberate action rules*—(i) *Mandated wheeling.* Entering into a contract for the use of electric transmission or distribution facilities is not treated as a deliberate action under § 1.141–2(d) if—

(A) The contract is entered into in response to (or in anticipation of) an order by the United States under sections 211 and 212 of the Federal Power Act (16 U.S.C. 824j and 824k) (or a state regulatory authority under comparable provisions of state law); and

(B) The terms of the contract are bona fide and arm's-length, and the consideration paid is consistent with the provisions of section 212(a) of the Federal Power Act.

(ii) *Actions taken to implement non-discriminatory, open access.* An action is not treated as a deliberate action under § 1.141–2(d) if it is taken to implement the offering of non-discriminatory, open access tariffs for the use of electric transmission or distribution facilities in a manner consistent with rules promulgated by the FERC under sections 205 and 206 of the Federal Power Act (16 U.S.C. 824d and 824e) (or comparable provisions of state law). This paragraph (g)(4)(ii) does not apply, however, to the sale, exchange, or other disposition (within the meaning of section 1001(a)) of transmission or distribution facilities to a nongovernmental person.

(iii) *Application of reasonable expectations test to certain current refunding bonds.* An action taken or to be taken with respect to electric transmission or distribution facilities refinanced by an issue is not taken into account under the reasonable expectations test of § 1.141–2(d) if—

(A) The action is described in paragraph (g)(4)(i) or (ii) of this section;

(B) The bonds of the issue are current refunding bonds that refund bonds originally issued before February 23, 1998; and

(C) The weighted average maturity of the refunding bonds is not greater than the remaining weighted average maturity of the prior bonds.

(5) *Additional transactions as permitted by the Commissioner.* The Commissioner may, by published guidance, set forth additional circumstances in which the use of electric output facilities in a restructured electric industry does not constitute private business use.

(h) *Allocations of output facilities and systems*—(1) *Facts and circumstances analysis.* Whether output sold under an output contract is allocated to a particular facility (for example, a generating unit), to the entire system of the seller of that output (net of any uses of that system output allocated to a particular facility), or to a portion of a facility is based on all the facts and circumstances. Significant factors to be considered in determining the allocation of an output contract to financed property are the following:

(i) The extent to which it is physically possible to deliver output to or from a particular facility or system.

(ii) The terms of a contract relating to the delivery of output (such as delivery limitations and options or obligations to deliver power from additional sources).

(iii) Whether a contract is entered into as part of a common plan of financing for a facility.

(iv) The method of pricing output under the contract, such as the use of market rates rather than rates designed to pay debt service of tax-exempt bonds used to finance a particular facility.

(2) *Illustrations.* The following illustrate the factors set forth in paragraph (h)(1) of this section:

(i) *Physical possibility.* Output from a generating unit that is fed directly into a low voltage distribution system of the owner of that unit and that cannot physically leave that distribution system generally must be allocated to those receiving electricity through that distribution system. Output may be allocated without regard to physical limitations, however, if exchange or similar agreements provide output to a purchaser where, but for the exchange agreements, it would not be possible for the seller to provide output to that purchaser.

(ii) *Contract terms relating to performance.* A contract to provide a specified amount of electricity from a system, but only when at least that amount of electricity is being generated by a particular unit, is allocated to that unit. For example, a contract to buy 20 MW of system power with a right to take up to 40 percent of the actual output of a specific 50 MW facility whenever total system output is insufficient to meet all of the seller's obligations generally is allocated to the specific facility rather than to the system.

(iii) *Common plan of financing.* A contract entered into as part of a common plan of financing for a facility generally is allocated to the facility if debt service for the issue of bonds is reasonably expected to be paid, directly or indirectly, from payments under the contract.

(iv) *Pricing method.* Pricing based on the capital and generating costs of a particular turbine tends to indicate that output under the contract is properly allocated to that turbine.

(3) *Transmission and distribution contracts.* Whether use under an output contract for transmission or distribution is allocated to a particular facility or to a transmission or distribution network is based on all the facts and circumstances, in a manner similar to paragraphs (h)(1) and (2) of this section. In general, the method used to determine payments under a contract is a more significant contract term for this purpose than nominal contract path. In general, if reasonable and consistently applied, the determination of use of transmission or distribution facilities under an output contract may be based on a method used by third parties, such as reliability councils.

(4) *Allocation of payments.* Payments for output provided by an output facility financed with two or more sources of funding are generally allocated under the rules in §1.141–4(c).

(i) *Examples.* The following examples illustrate the application of this section:

Example 1. Joint ownership. Z, an investor-owned electric utility, and City H agree to construct an electric generating facility of a size sufficient to take advantage of the economies of scale. H will issue $50 million of its 24-year bonds, and Z will use $100 million of its funds for construction of a facility they will jointly own as tenants in common. Each of the participants will share in the ownership, output, and operating expenses of the facility in proportion to its contribution to the cost of the facility, that is, one-third by H and two-thirds by Z. H's bonds will be secured by H's ownership interest in the facility and by revenues to be derived from its share of the annual output of the facility. H will need only 50 percent of its share of the annual output of the facility during the first 20 years of operations. It agrees to sell 10 percent of its share of the annual output to Z for a period of 20 years pursuant to a contract under which Z agrees to take that power if available. The facility will begin operation, and Z will begin to receive power, 4 years after the H bonds are issued. The measurement period for the property financed by the issue is 20 years. H also will sell the remaining 40 percent of its share of the annual output to numerous other private utilities under contracts of three years or less that satisfy the exception under paragraph (f)(3) of this section. No other contracts will be executed obligating any person to purchase any specified amount of the power for any specified period of time. No person (other than Z) will make payments that will result in a transfer of the burdens of paying debt service on bonds used directly or indirectly to provide H's share of the facilities. The bonds are not private activity bonds, because H's one-third interest in the facility is not treated as used by the other owners of the facility. Although 10 percent of H's share of the annual output of the facility will be used in the trade or business of Z, a nongovernmental person, under this section, that portion constitutes not more than 10 percent of the available output of H's ownership interest in the facility.

Example 2. Wholesale requirements contract. (i) City J issues 20-year bonds to acquire an electric generating facility having a reasonably expected economic life substantially greater than 20 years and a nameplate capacity of 100 MW. The available output of the facility under paragraph (b)(1) of this section is approximately 17,520,000 MWh (100 MW × 24 hours × 365 days × 20 years). On the issue date, J enters into a contract with T, an investor-owned utility, to provide T with all of its power requirements for a period of 10 years, commencing on the issue date. J reasonably expects that T will actually purchase an average of 30 MW over the 10-year period. The contract is taken into account under the private business tests pursuant to paragraph (c)(3) of this section because the term of the contract is substantial relative to the term of the issue and the amount of output to be purchased is a substantial portion of the available output.

(ii) Under paragraph (d) of this section, the amount of reasonably expected private business use under this contract is approximately 15 percent (30 MW × 24 hours × 365 days × 10 years, or 2,628,000 MWh) of the available output. Accordingly, the issue meets the private business use test. J reasonably expects that the amount to be paid for an average of 30 MW of power (less the operation and maintenance costs directly attributable to generating that 30 MW of power), will be more than 10 percent of debt service on the issue on a present-value basis. Accordingly, the issue meets the private security or payment test because J reasonably expects that payment of more than 10 percent of the debt service will be indirectly derived from payments by T. The bonds are private activity bonds under paragraph (c) of this section. Further, if 15 percent of the sale proceeds of the issue is greater than $15 million and the issue meets the private security or payment test with respect to the $15 million output limitation, the bonds are also private activity bonds under section 141(b)(4). See §1.141–8.

Example 3. Retail contracts. (i) State Agency M, a political subdivision, issues bonds in 2003 to finance the construction of a generating facility that will be used to furnish electricity to M's retail customers. In 2007, M enters into a 10-year contract with industrial corporation I. Under the contract, M agrees to supply I with all of its power requirements during the contract term, and I agrees to pay for that power at a negotiated price as it is delivered. The contract does not require I to pay for any power except to the extent I has requirements. In addition, the contract requires I to pay reasonable and customary liquidated damages in the event of a default by I, and permits I to terminate the contract while it has requirements by paying M a specified amount that is a reasonable and customary amount for terminating the contract. Any damages or termination payment by I will be reasonably related to I's obligation to buy requirements that is discharged by the payment. Under paragraph (c)(3) of this section, the contract does not meet the benefits and burdens test. Thus, it is not taken into account under the private business tests.

(ii) The facts are the same as in paragraph (i) of this *Example 3,* except that the contract requires I to make guaranteed minimum payments, regardless of I's requirements, in an amount such that the contract does not meet the exception for small purchases in paragraph (f)(1) of this section. Under paragraph (c)(3)(ii) of this section, the contract meets the benefits and burdens test because it obligates I to make payments that are not contingent on its output requirements. Thus, it is taken into account under the private business tests.

Example 4. Allocation of existing contracts to new facilities. Power Authority K, a political subdivision created by the legislature in State X to own and operate certain power generating facilities, sells all of the power from its existing facilities to four private utility systems under contracts executed in 1999, under which the four systems are required to take or pay for specified portions of the total power output until the year 2029. Existing facilities supply all of the present needs of the four utility systems, but their future power requirements are expected to increase substantially beyond the capacity of K's current generating system. K issues 20-year bonds in 2004 to construct a large generating facility. As part of the financing plan for the bonds, a fifth private utility system contracts with K to take or pay for 15 percent of the available output of the new facility. The balance of the output of the new facility will be available for sale as required, but initially it is not anticipated that there will be any need for that power. The revenues from the contract with the fifth private utility system will be sufficient to pay less than 10 percent of the debt service on the bonds (determined on a present value basis). The balance, which will exceed 10 percent of the debt service on the bonds, will be paid from revenues derived from the contracts with the four systems initially from sale of power produced by the old facilities. The output contracts with all the private utilities are allocated to K's entire generating system. See paragraphs (h)(1) and (2) of this section. Thus, the bonds meet the private business use test because more than 10 percent of the proceeds will be used in the trade or business of a nongovernmental person. In addition, the bonds meet the private security or payment test because payment of more than 10 percent of the debt service, pursuant to underlying arrangements, will be derived from payments in respect of property used for a private business use.

Example 5. Allocation to displaced resource. Municipal utility MU, a political subdivision, purchases all of the electricity required to meet the needs of its customers (1,000 MW) from B, an investor-owned utility that operates its own electric generating facilities, under a 50-year take or pay contract. MU does not anticipate that it will require additional electric resources, and any new resources would produce electricity at a higher cost to MU than its cost under its contract with B. Nevertheless, B encourages MU to construct a new generating plant sufficient to meet MU's requirements. MU issues obligations to construct facilities that will produce 1,000 MW of electricity. MU, B, and I, another investor-owned utility, enter into an agreement under which MU assigns to I its rights under MU's take or pay contract with B. Under this arrangement, I will pay MU, and MU will continue to pay B, for the 1,000 MW. I's payments to MU will at least equal the amounts required to pay debt service on MU's bonds. In addition, under paragraph (h)(1)(iii) of this section, the contract among MU, B, and I is entered into as part of a common plan of financing of the MU facilities. Under all the facts and circumstances, MU's assignment to I of its rights under the original take or pay contract is allocable to MU's new facilities under paragraph (h) of this section. Because I is a nongovernmental person, MU's bonds are private activity bonds.

Example 6. Operation of transmission facilities by regional transmission organization. (i) Public Power Agency D is a political subdivision that owns and operates electric generation, transmission and distribution facilities. In 2003, D transfers operating control of its transmission system to a regional transmission organization (RTO), a nongovernmental person, pursuant to an operating agreement that is approved by the FERC under sections 205 and 206 of the Federal Power Act. D retains ownership of its facilities. No portion of the RTO's compensation is based on a share of net profits from the operation of D's facilities, and the RTO does not bear any risk of loss of those facilities. Under paragraph (g)(1)(ii) of this section, the RTO's use of D's facilities does not constitute a private business use.

(ii) Company A is located in D's service territory. In 2004, Power Supplier E, a nongovernmental person, enters into a 10-year contract with A to supply A's electricity requirements. The electricity supplied by E to A will be transmitted over D's transmission and distribution facilities. D's distribution facilities are available for use on a nondiscriminatory, open access basis by buyers and sellers of electricity in accordance with rates that are generally applicable and uniformly applied within the meaning of §1.141–3(c)(2). D's facilities are not financed for a principal purpose of providing the facilities for use by E. Under paragraph (g)(2) of this section, the contract between A and E does not result in private business use of D's facilities.

Example 7. Certain actions not treated as deliberate actions. The facts are the same as in *Example 6* of this paragraph (i), except that the RTO's compensation is based on a share of net profits from operating D's facilities. In addition, D had issued bonds in 1994 to finance improvements to its transmission system. At the time D transfers operating control of its transmission system to the RTO, D chooses to apply the private activity bond regulations of §§1.141–1 through 1.141–15 to the 1994 bonds. The operation of D's facilities by the RTO results in private business use under §1.141–3 and paragraph (g)(1)(i) of this section. Under the special exception in paragraph (g)(4)(ii) of this section, however, the transfer of control is not treated as a deliberate action. Accordingly, the transfer of control does not cause the 1994 bonds to meet the private activity bond tests.

Example 8. Current refunding. The facts are the same as in *Example 7* of this paragraph (i), and in addition D issues bonds in 2004 to currently refund the 1994 bonds. The weighted average maturity of the 2004 bonds is not greater than the remaining weighted average maturity of the 1994 bonds. D chooses to apply the private activity bond regulations of §§1.141–1 through 1.141–15 to the refunding bonds. In general, reasonable expectations must be separately tested on the date that refunding bonds are issued under §1.141–2(d). Under the special exception in paragraph (g)(4)(iii) of this section, however, the transfer of the financed facilities to the RTO need not be taken into account in applying the reasonable expectations test to the refunding bonds.

[T.D. 9016, 67 FR 59759, Sept. 23, 2002; 67 FR 70845, Nov. 27, 2002]

§ 1.141–8 $15 million limitation for output facilities.

(a) *In general*—(1) *General rule.* Section 141(b)(4) provides a special private activity bond limitation (the $15 million output limitation) for issues 5 percent or more of the proceeds of which are to be used to finance output facilities (other than a facility for the furnishing of water). Under this rule, an issue consists of private activity bonds under the private business tests of section 141(b)(1) and (2) if the nonqualified amount with respect to output facilities financed by the proceeds of the issue exceeds $15 million. The $15 million output limitation applies in addition to the private business tests of section 141(b)(1) and (2). Under section 141(b)(4) and paragraph (a)(2) of this section, the $15 million output limitation is reduced in certain cases. Specifically, an issue meets the test in section 141(b)(4) if both of the following tests are met:

(i) More than $15 million of the proceeds of the issue to be used with respect to an output facility are to be used for a private business use. Investment proceeds are disregarded for this purpose if they are not allocated disproportionately to the private business use portion of the issue.

(ii) The payment of the principal of, or the interest on, more than $15 million of the sale proceeds of the portion of the issue used with respect to an output facility is (under the terms of the issue or any underlying arrangement) directly or indirectly—

(A) Secured by any interest in an output facility used or to be used for a private business use (or payments in respect of such an output facility); or

(B) To be derived from payments (whether or not to the issuer) in respect of an output facility used or to be used for a private business use.

(2) *Reduction in $15 million output limitation for outstanding issues*—(i) *General rule*. In determining whether an issue 5 percent or more of the proceeds of which are to be used with respect to an output facility consists of private activity bonds under the $15 million output limitation, the $15 million limitation on private business use and private security or payments is applied by taking into account the aggregate nonqualified amounts of any outstanding bonds of other issues 5 percent or more of the proceeds of which are or will be used with respect to that output facility or any other output facility that is part of the same project.

(ii) *Bonds taken into account*. For purposes of this paragraph (a)(2), in applying the $15 million output limitation to an issue (the later issue), a tax-exempt bond of another issue (the earlier issue) is taken into account if—

(A) That bond is outstanding on the issue date of the later issue;

(B) That bond will not be redeemed within 90 days of the issue date of the later issue in connection with the refunding of that bond by the later issue; and

(C) 5 percent or more of the sale proceeds of the earlier issue financed an output facility that is part of the same project as the output facility that is financed by 5 percent or more of the sale proceeds of the later issue.

(3) *Benefits and burdens test applicable*—(i) *In general*. In applying the $15 million output limitation, the benefits and burdens test of § 1.141–7 applies, except that ''$15 million'' is applied in place of ''10 percent'', or ''5 percent'' as appropriate.

(ii) *Earlier issues for the project*. If bonds of an earlier issue are outstanding and must be taken into account under paragraph (a)(2) of this section, the nonqualified amount for that earlier issue is multiplied by a fraction, the numerator of which is the adjusted issue price of the earlier issue as of the issue date of the later issue, and the denominator of which is the issue price of the earlier issue. Pre-issuance accrued interest as defined in § 1.148–1(b) is disregarded for this purpose.

(b) *Definition of project*—(1) *General rule*. For purposes of paragraph (a)(2) of this section, *project* has the meaning provided in this paragraph. Facilities that are functionally related and subordinate to a project are treated as part of that same project. Facilities having different purposes or serving different customer bases are not ordinarily part of the same project. For example, the following are generally not part of the same project—

(i) Generation, transmission and distribution facilities;

(ii) Separate facilities designed to serve wholesale customers and retail customers; and

(iii) A peaking unit and a baseload unit (regardless of the location of the units).

(2) *Separate ownership*. Except as otherwise provided in this paragraph (b)(2), facilities that are not owned by the same person are not part of the same project. If different governmental persons act in concert to finance a project, however (for example as participants in a joint powers authority), their interests are aggregated with respect to that project to determine whether the $15 million output limitation is met. In the case of undivided ownership interests in a single output facility, property that is not owned by different persons is treated as separate projects only if the separate interests are financed—

(i) With bonds of different issuers; and

(ii) Without a principal purpose of avoiding the limitation in this section.

(3) *Generating property*—(i) *Property on same site*. In the case of generation and related facilities, *project* means property located at the same site.

(ii) *Special rule for generating units*. Separate generating units are not part of the same project if one unit is reasonably expected, on the issue date of each issue that finances the units, to be placed in service more than 3 years before the other. Common facilities or property that will be functionally related to more than one generating unit must be allocated on a reasonable basis. If a generating unit already is constructed or is under construction (the first unit) and bonds are to be issued to finance an additional generating unit (the second unit), all costs for any common facilities paid or incurred before the earlier of the issue date of bonds to finance the second unit or the commencement of construction of the second unit are allocated to the first unit. At the time that bonds are issued to finance the second unit (or, if earlier, upon commencement of construction of that unit), any remaining costs of the common facilities may be allocated between the first and second units so that in the aggregate the allocation is reasonable.

(4) *Transmission and distribution.* In the case of transmission or distribution facilities, *project* means functionally related or contiguous property. Separate transmission or distribution facilities are not part of the same project if one facility is reasonably expected, on the issue date of each issue that finances the facilities, to be placed in service more than 2 years before the other.

(5) *Subsequent improvements*—(i) In general. An improvement to generation, transmission or distribution facilities that is not part of the original design of those facilities (the original project) is not part of the same project as the original project if the construction, reconstruction, or acquisition of that improvement commences more than 3 years after the original project was placed in service and the bonds issued to finance that improvement are issued more than 3 years after the original project was placed in service.

(ii) *Special rule for transmission and distribution facilities.* An improvement to transmission or distribution facilities that is not part of the original design of that property is not part of the same project as the original project if the issuer did not reasonably expect the need to make that improvement when it commenced construction of the original project and the construction, reconstruction, or acquisition of that improvement is mandated by the federal government or a state regulatory authority to accommodate requests for wheeling.

(6) *Replacement property.* For purposes of this section, property that replaces existing property of an output facility is treated as part of the same project as the replaced property unless—

(i) The need to replace the property was not reasonably expected on the issue date or the need to replace the property occurred more than 3 years before the issuer reasonably expected (determined on the issue date of the bonds financing the property) that it would need to replace the property; and

(ii) The bonds that finance (and refinance) the output facility have a weighted average maturity that is not greater than 120 percent of the reasonably expected economic life of the facility.

(c) *Example.* The application of the provisions of this section is illustrated by the following example:

Example. (i) Power Authority K, a political subdivision, intends to issue a single issue of tax-exempt bonds at par with a stated principal amount and sale proceeds of $500 million to finance the acquisition of an electric generating facility. No portion of the facility will be used for a private business use, except that L, an investor-owned utility, will purchase 10 percent of the output of the facility under a take contract and will pay 10 percent of the debt service on the bonds. The nonqualified amount with respect to the bonds is $50 million.

(ii) The maximum amount of tax-exempt bonds that may be issued for the acquisition of an interest in the facility in paragraph (i) of this *Example* is $465 million (that is, $450 million for the 90 percent of the facility that is governmentally owned and used plus a nonqualified amount of $15 million).

[T.D. 9016, 67 FR 59763, Sept. 23, 2002]

§ 1.141–9 Unrelated or disproportionate use test.

(a) *General rules*—(1) *Description of test.* Under section 141(b)(3) (the unrelated or disproportionate use test), an issue meets the private business tests if the amount of private business use and private security or payments attributable to unrelated or disproportionate private business use exceeds 5 percent of the proceeds of the issue. For this purpose, the private business use test is applied by taking into account only use that is not related to any government use of proceeds of the issue (unrelated use) and use that is related but disproportionate to any government use of those proceeds (disproportionate use).

(2) *Application of unrelated or disproportionate use test*—(i) *Order of application.* The unrelated or disproportionate use test is applied by first determining whether a private business use is related to a government use. Next, private business use that relates to a government use is examined to determine whether it is disproportionate to that government use.

(ii) *Aggregation of unrelated and disproportionate use.* All the unrelated use and disproportionate use financed with the proceeds of an issue are aggregated to determine compliance with the unrelated or disproportionate use test. The amount of permissible unrelated and disproportionate private business use is not reduced by the amount of private business use financed with the proceeds of an issue that is neither unrelated use nor disproportionate use.

(iii) *Deliberate actions.* A deliberate action that occurs after the issue date does not result in unrelated or disproportionate use if the issue meets the conditions of § 1.141–12(a).

(b) *Unrelated use*—(1) *In general.* Whether a private business use is related to a government use financed with the proceeds of an issue is determined on a case-by-case basis, emphasizing the operational relationship between the government use and the private business use. In general, a facility that is used for a related private business use must be located within, or adjacent to, the governmentally used facility.

(2) *Use for the same purpose as government use.* Use of a facility by a nongovernmental person for the same purpose as use by a governmental person is not treated as unrelated use if the government use is not insignificant. Similarly, a use of a facility in the same manner both for private business use that is related use and private business use that is unrelated use does not result in unrelated use if the related use is not insignificant. For example, a privately owned pharmacy in a governmentally owned hospital does not ordinarily result in unrelated use solely because the pharmacy also serves individuals not using the hospital. In addition, use of parking spaces in a garage by a nongovernmental person is not treated as unrelated use if more than an insignificant portion of the parking spaces are used for a government use (or a private business use that is related to a government use), even though the use by the nongovernmental person is not directly related to that other use.

(c) *Disproportionate use*—(1) *Definition of disproportionate use.* A private business use is disproportionate to a related government use only to the extent that the amount of proceeds used for that private business use exceeds the amount of proceeds used for the related government use. For example, a private use of $100 of proceeds that is related to a government use of $70 of proceeds results in $30 of disproportionate use.

(2) *Aggregation of related uses.* If two or more private business uses of the proceeds of an issue relate to a single government use of those proceeds, those private business uses are aggregated to apply the disproportionate use test.

(3) *Allocation rule.* If a private business use relates to more than a single use of the proceeds of the issue (for example, two or more government uses of the proceeds of the issue or a government use and a private use), the amount of any disproportionate use may be determined by—

(i) Reasonably allocating the proceeds used for the private business use among the related uses;

(ii) Aggregating government uses that are directly related to each other; or

(iii) Allocating the private business use to the government use to which it is primarily related.

(d) *Maximum use taken into account.* The determination of the amount of unrelated use or disproportionate use of a facility is based on the maximum amount of reasonably expected government use of a facility during the measurement period. Thus, no unrelated use or disproportionate use arises solely because a facility initially has excess capacity that is to be used by a nongovernmental person if the facility will be completely used by the issuer during the term of the issue for more than an insignificant period.

(e) *Examples*. The following examples illustrate the application of this section:

Example 1. School and remote cafeteria. County X issues bonds with proceeds of $20 million and uses $18.1 million of the proceeds for construction of a new school building and $1.9 million of the proceeds for construction of a privately operated cafeteria in its administrative office building, which is located at a remote site. The bonds are secured, in part, by the cafeteria. The $1.9 million of proceeds is unrelated to the government use (that is, school construction) financed with the bonds and exceeds 5 percent of $20 million. Thus, the issue meets the private business tests.

Example 2. Public safety building and courthouse. City Y issues bonds with proceeds of $50 million for construction of a new public safety building ($32 million) and for improvements to an existing courthouse ($15 million). Y uses $3 million of the bond proceeds for renovations to an existing privately operated cafeteria located in the courthouse. The bonds are secured, in part, by the cafeteria. Y's use of the $3 million for the privately operated cafeteria does not meet the unrelated or disproportionate use test because these expenditures are neither unrelated use nor disproportionate use.

Example 3. Unrelated garage. City Y issues bonds with proceeds of $50 million for construction of a new public safety building ($30.5 million) and for improvements to an existing courthouse ($15 million). Y uses $3 million of the bond proceeds for renovations to an existing privately operated cafeteria located in the courthouse. The bonds are secured, in part, by the cafeteria. Y also uses $1.5 million of the proceeds to construct a privately operated parking garage adjacent to a private office building. The private business use of the parking garage is unrelated to any government use of proceeds of the issue. Since the proceeds used for unrelated uses and disproportionate uses do not exceed 5 percent of the proceeds, the unrelated or disproportionate use test is not met.

Example 4. Disproportionate use of garage. County Z issues bonds with proceeds of $20 million for construction of a hospital with no private business use ($17 million); renovation of an office building with no private business use ($1 million); and construction of a garage that is entirely used for a private business use ($2 million). The use of the garage is related to the use of the office building but not to the use of the hospital. The private business use of the garage results in $1 million of disproportionate use because the proceeds used for the garage ($2 million) exceed the proceeds used for the related government use ($1 million). The bonds are not private activity bonds, however, because the disproportionate use does not exceed 5 percent of the proceeds of the issue.

Example 5. Bonds for multiple projects. (i) County W issues bonds with proceeds of $80 million for the following purposes: (1) $72 million to construct a County-owned and operated waste incinerator; (2) $1 million for a County-owned and operated facility for the temporary storage of hazardous waste prior to final disposal; (3) $1 million to construct a privately owned recycling facility located at a remote site; and (4) $6 million to build a garage adjacent to the County-owned incinerator that will be leased to Company T to store and repair trucks that it owns and uses to haul County W refuse. Company T uses 75 percent of its trucks to haul materials to the incinerator and the remaining 25 percent of its trucks to haul materials to the temporary storage facility.

(ii) The $1 million of proceeds used for the recycling facility is used for an unrelated use. The garage is related use. In addition, 75 percent of the use of the $6 million of proceeds used for the garage is allocable to the government use of proceeds at the incinerator. The remaining 25 percent of the proceeds used for the garage ($1.5 million) relates to the government use of proceeds at the temporary storage facility. Thus, this portion of the proceeds used for the garage exceeds the proceeds used for the temporary storage facility by $0.5 million and this excess is disproportionate use (but not unrelated use). Thus, the aggregate amount of unrelated use and disproportionate use financed with the proceeds of the issue is $1.5 million. Alternatively, under paragraph (c)(3)(iii) of this section, the entire garage may be treated as related to the government use of the incinerator and, under that allocation, the garage is not disproportionate use. In either event, section 141(b)(3) limits the aggregate unrelated use and disproportionate use to $4 million. Therefore, the bonds are not private activity bonds under this section.

[T.D. 8712, 62 FR 2297, Jan. 16, 1997]

§ 1.141–10 Coordination with volume cap. [Reserved]

§ 1.141–11 Acquisition of nongovernmental output property. [Reserved]

§ 1.141–12 Remedial actions.

(a) *Conditions to taking remedial action*. An action that causes an issue to meet the private business tests or the private loan financing test is not treated as a deliberate action if the issuer takes a remedial action described in paragraph (d), (e), or (f) of this section with respect to the nonqualified bonds and if all of the requirements in paragraphs (a) (1) through (5) of this section are met.

(1) *Reasonable expectations test met.* The issuer reasonably expected on the issue date that the issue would meet neither the private business tests nor the private loan financing test for the entire term of the bonds. For this purpose, if the issuer reasonably expected on the issue date to take a deliberate action prior to the final maturity date of the issue that would cause either the private business tests or the private loan financing test to be met, the term of the bonds for this purpose may be determined by taking into account a redemption provision if the provisions of §1.141–2(d)(2)(ii) (A) through (C) are met.

(2) *Maturity not unreasonably long.* The term of the issue must not be longer than is reasonably necessary for the governmental purposes of the issue (within the meaning of §1.148–1(c)(4)). Thus, this requirement is met if the weighted average maturity of the bonds of the issue is not greater than 120 percent of the average reasonably expected economic life of the property financed with the proceeds of the issue as of the issue date.

(3) *Fair market value consideration.* Except as provided in paragraph (f) of this section, the terms of any arrangement that results in satisfaction of either the private business tests or the private loan financing test are bona fide and arm's-length, and the new user pays fair market value for the use of the financed property. Thus, for example, fair market value may be determined in a manner that takes into account restrictions on the use of the financed property that serve a bona fide governmental purpose.

(4) *Disposition proceeds treated as gross proceeds for arbitrage purposes.* The issuer must treat any disposition proceeds as gross proceeds for purposes of section 148. For purposes of eligibility for temporary periods under section 148(c) and exemptions from the requirement of section 148(f) the issuer may treat the date of receipt of the disposition proceeds as the issue date of the bonds and disregard the receipt of disposition proceeds for exemptions based on expenditure of proceeds under §1.148–7 that were met before the receipt of the disposition proceeds.

(5) *Proceeds expended on a governmental purpose.* Except for a remedial action under paragraph (d) of this section, the proceeds of the issue that are affected by the deliberate action must have been expended on a governmental purpose before the date of the deliberate action.

(b) *Effect of a remedial action*—(1) *In general.* The effect of a remedial action is to cure use of proceeds that causes the private business use test or the private loan financing test to be met. A remedial action does not affect application of the private security or payment test.

(2) *Effect on bonds that have been advance refunded.* If proceeds of an issue were used to advance refund another bond, a remedial action taken with respect to the refunding bond proportionately reduces the amount of proceeds of the advance refunded bond that is taken into account under the private business use test or the private loan financing test.

(c) *Disposition proceeds*—(1) *Definition. Disposition proceeds* are any amounts (including property, such as an agreement to provide services) derived from the sale, exchange, or other disposition (disposition) of property (other than investments) financed with the proceeds of an issue.

(2) *Allocating disposition proceeds to an issue.* In general, if the requirements of paragraph (a) of this section are met, after the date of the disposition, the proceeds of the issue allocable to the transferred property are treated as financing the disposition proceeds rather than the transferred property. If a disposition is made pursuant to an installment sale, the proceeds of the issue continue to be allocated to the transferred property. If an issue does not meet the requirements for remedial action in paragraph (a) of this section or the issuer does not take an appropriate remedial action, the proceeds of the issue are allocable to either the transferred property or the disposition proceeds, whichever allocation produces the greater amount of private business use and private security or payments.

(3) *Allocating disposition proceeds to different sources of funding.* If property

has been financed by different sources of funding, for purposes of this section, the disposition proceeds from that property are first allocated to the outstanding bonds that financed that property in proportion to the principal amounts of those outstanding bonds. In no event may disposition proceeds be allocated to bonds that are no longer outstanding or to a source of funding not derived from a borrowing (such as revenues of the issuer) if the disposition proceeds are not greater than the total principal amounts of the outstanding bonds that are allocable to that property. For purposes of this paragraph (c)(3), principal amount has the same meaning as in § 1.148–9(b)(2) and outstanding bonds do not include advance refunded bonds.

(d) *Redemption or defeasance of nonqualified bonds*—(1) *In general.* The requirements of this paragraph (d) are met if all of the nonqualified bonds of the issue are redeemed. Proceeds of tax-exempt bonds must not be used for this purpose, unless the tax-exempt bonds are qualified bonds, taking into account the purchaser's use of the facility. If the bonds are not redeemed within 90 days of the date of the deliberate action, a defeasance escrow must be established for those bonds within 90 days of the deliberate action.

(2) *Special rule for dispositions for cash.* If the consideration for the disposition of financed property is exclusively cash, the requirements of this paragraph (d) are met if the disposition proceeds are used to redeem a pro rata portion of the nonqualified bonds at the earliest call date after the deliberate action. If the bonds are not redeemed within 90 days of the date of the deliberate action, the disposition proceeds must be used to establish a defeasance escrow for those bonds within 90 days of the deliberate action.

(3) *Notice of defeasance.* The issuer must provide written notice to the Commissioner of the establishment of the defeasance escrow within 90 days of the date the defeasance escrow is established.

(4) *Special limitation.* The establishment of a defeasance escrow does not satisfy the requirements of this paragraph (d) if the period between the issue date and the first call date of the bonds is more than 10½ years.

(5) *Defeasance escrow defined.* A defeasance escrow is an irrevocable escrow established to redeem bonds on their earliest call date in an amount that, together with investment earnings, is sufficient to pay all the principal of, and interest and call premium on, bonds from the date the escrow is established to the earliest call date. The escrow may not be invested in higher yielding investments or in any investment under which the obligor is a user of the proceeds of the bonds.

(e) *Alternative use of disposition proceeds*—(1) *In general.* The requirements of this paragraph (e) are met if—

(i) The deliberate action is a disposition for which the consideration is exclusively cash;

(ii) The issuer reasonably expects to expend the disposition proceeds within two years of the date of the deliberate action;

(iii) The disposition proceeds are treated as proceeds for purposes of section 141 and are used in a manner that does not cause the issue to meet either the private business tests or the private loan financing test, and the issuer does not take any action subsequent to the date of the deliberate action to cause either of these tests to be met; and

(iv) If the issuer does not use all of the disposition proceeds for an alternative use described in paragraph (e)(1)(iii) of this section, the issuer uses those remaining disposition proceeds for a remedial action that meets paragraph (d) of this section.

(2) *Special rule for use by 501(c)(3) organizations.* If the disposition proceeds are to be used by a 501(c)(3) organization, the nonqualified bonds must in addition be treated as reissued for purposes of sections 141, 145, 147, 149, and 150 and, under this treatment, satisfy all of the applicable requirements for qualified 501(c)(3) bonds. Thus, beginning on the date of the deliberate action, nonqualified bonds that satisfy these requirements must be treated as qualified 501(c)(3) bonds for all purposes, including sections 145(b) and 150(b).

(f) *Alternative use of facility.* The requirements of this paragraph (f) are met if—

(1) The facility with respect to which the deliberate action occurs is used in an alternative manner (for example, used for a qualifying purpose by a nongovernmental person or used by a 501(c)(3) organization rather than a governmental person);

(2) The nonqualified bonds are treated as reissued, as of the date of the deliberate action, for purposes of sections 55 through 59 and 141, 142, 144, 145, 146, 147, 149 and 150, and under this treatment, the nonqualified bonds satisfy all the applicable requirements for qualified bonds throughout the remaining term of the nonqualified bonds;

(3) The deliberate action does not involve a disposition to a purchaser that finances the acquisition with proceeds of another issue of tax-exempt bonds; and

(4) Any disposition proceeds other than those arising from an agreement to provide services (including disposition proceeds from an installment sale) resulting from the deliberate action are used to pay the debt service on the bonds on the next available payment date or, within 90 days of receipt, are deposited into an escrow that is restricted to the yield on the bonds to pay the debt service on the bonds on the next available payment date.

(g) *Rules for deemed reissuance.* For purposes of determining whether bonds that are treated as reissued under paragraphs (e) and (f) of this section are qualified bonds—

(1) The provisions of the Code and regulations thereunder in effect as of the date of the deliberate action apply; and

(2) For purposes of paragraph (f) of this section, section 147(d) (relating to the acquisition of existing property) does not apply.

(h) *Authority of Commissioner to provide for additional remedial actions.* The Commissioner may, by publication in the FEDERAL REGISTER or the Internal Revenue Bulletin, provide additional remedial actions, including making a remedial payment to the United States, under which a subsequent action will not be treated as a deliberate action for purposes of §1.141–2.

(i) *Effect of remedial action on continuing compliance.* Solely for purposes of determining whether deliberate actions that are taken after a remedial action cause an issue to meet the private business tests or the private loan financing test—

(1) If a remedial action is taken under paragraph (d), (e), or (f) of this section, the private business use or private loans resulting from the deliberate action are not taken into account for purposes of determining whether the bonds are private activity bonds; and

(2) After a remedial action is taken, the amount of disposition proceeds is treated as equal to the proceeds of the issue that had been allocable to the transferred property immediately prior to the disposition. See paragraph (k) of this section, *Example 5*.

(j) *Nonqualified bonds*—(1) *Amount of nonqualified bonds.* The percentage of outstanding bonds that are nonqualified bonds equals the highest percentage of private business use in any 1-year period commencing with the deliberate action.

(2) *Allocation of nonqualified bonds.* Allocations to nonqualified bonds must be made on a pro rata basis, except that, for purposes of paragraph (d) of this section (relating to redemption or defeasance), an issuer may treat bonds with longer maturities (determined on a bond-by-bond basis) as the nonqualified bonds.

(k) *Examples.* The following examples illustrate the application of this section:

Example 1. Disposition proceeds less than outstanding bonds used to retire bonds. On June 1, 1997, City C issues 30-year bonds with an issue price of $10 million to finance the construction of a hospital building. The bonds have a weighted average maturity that does not exceed 120 percent of the reasonably expected economic life of the building. On the issue date, C reasonably expects that it will be the only user of the building for the entire term of the bonds. Six years after the issue date, C sells the building to Corporation P for $5 million. The sale price is the fair market value of the building, as verified by an independent appraiser. C uses all of the $5 million disposition proceeds to immediately retire a pro rata portion of the bonds. The sale does not cause the bonds to be private activity bonds because C has taken a remedial action described in paragraph (d) of this section so that P is not treated as a private business user of bond proceeds.

Example 2. Lease to nongovernmental person. The facts are the same as in *Example 1*, except that instead of selling the building, C, 6 years after the issue date, leases the building to P for 7 years and uses other funds to redeem all of the $10 million outstanding bonds within 90 days of the deliberate act. The bonds are not treated as private activity bonds because C has taken the remedial action described in paragraph (d) of this section.

Example 3. Sale for less than fair market value. The facts are the same as in *Example 1*, except that the fair market value of the building at the time of the sale to P is $6 million. Because the transfer was for less than fair market value, the bonds are ineligible for the remedial actions under this section. The bonds are private activity bonds because P is treated as a user of all of the proceeds and P makes a payment ($6 million) for this use that is greater than 10 percent of the debt service on the bonds, on a present value basis.

Example 4. Fair market value determined taking into account governmental restrictions. The facts are the same as in *Example 1*, except that the building was used by C only for hospital purposes and C determines to sell the building subject to a restriction that it be used only for hospital purposes. After conducting a public bidding procedure as required by state law, the best price that C is able to obtain for the building subject to this restriction is $4.5 million from P. C uses all of the $4.5 million disposition proceeds to immediately retire a pro rata portion of the bonds. The sale does not cause the bonds to be private activity bonds because C has taken a remedial action described in paragraph (d) of this section so that P is not treated as a private business user of bond proceeds.

Example 5. Alternative use of disposition proceeds. The facts are the same as in *Example 1*, except that C reasonably expects on the date of the deliberate action to use the $5 million disposition proceeds for another governmental purpose (construction of governmentally owned roads) within two years of receipt, rather than using the $5 million to redeem outstanding bonds. C treats these disposition proceeds as gross proceeds for purposes of section 148. The bonds are not private activity bonds because C has taken a remedial action described in paragraph (e) of this section. After the date of the deliberate action, the proceeds of all of the outstanding bonds are treated as used for the construction of the roads, even though only $5 million of disposition proceeds was actually used for the roads.

Example 6. Alternative use of financed property. The facts are the same as in *Example 1*, except that C determines to lease the hospital building to Q, an organization described in section 501(c)(3), for a term of 10 years rather than to sell the building to P. In order to induce Q to provide hospital services, C agrees to lease payments that are less than fair market value. Before entering into the lease, an applicable elected representative of C approves the lease after a noticed public hearing. As of the date of the deliberate action, the issue meets all the requirements for qualified 501(c)(3) bonds, treating the bonds as reissued on that date. For example, the issue meets the two percent restriction on use of proceeds of finance issuance costs of section 147(g) because the issue pays no costs of issuance from disposition proceeds in connection with the deemed reissuance. C and Q treat the bonds as qualified 501(c)(3) bonds for all purposes commencing with the date of the deliberate action. The bonds are treated as qualified 501(c)(3) bonds commencing with the date of the deliberate action.

Example 7. Deliberate action before proceeds are expended on a governmental purpose. County J issues bonds with proceeds of $10 million that can be used only to finance a correctional facility. On the issue date of the bonds, J reasonably expects that it will be the sole user of the bonds for the useful life of the facility. The bonds have a weighted average maturity that does not exceed 120 percent of the reasonably expected economic life of the facility. After the issue date of the bonds, but before the facility is placed in service, J enters into a contract with the federal government pursuant to which the federal government will make a fair market value, lump sum payment equal to 25 percent of the cost of the facility. In exchange for this payment, J provides the federal government with priority rights to use of 25 percent of the facility. J uses the payment received from the federal government to defease the nonqualified bonds. The agreement does not cause the bonds to be private activity bonds because J has taken a remedial action described in paragraph (d) of this section. See paragraph (a)(5) of this section.

Example 8. Compliance after remedial action. In 1997, City G issues bonds with proceeds of $10 million to finance a courthouse. The bonds have a weighted average maturity that does not exceed 120 percent of the reasonably expected economic life of the courthouse. G uses $1 million of the proceeds for a private business use and more than 10 percent of the debt service on the issue is secured by private security or payments. G later sells one-half of the courthouse property to a nongovernmental person for cash. G immediately redeems 60 percent of the outstanding bonds. This percentage of outstanding bonds is based on the highest private business use of the courthouse in any 1-year period commencing with the deliberate action. For purposes of subsequently applying section 141 to the issue, G may continue to use all of the proceeds of the outstanding bonds in the same manner (that is, for both the courthouse and the existing private business use) without causing the issue to meet the private business use test. The issue, however, continues to meet the private security or payment test. The result would be the same if D, instead of redeeming the bonds, established a defeasance escrow for those bonds, provided that the requirement of paragraph (d)(4) of this section was met.

[T.D. 8712, 62 FR 2298, Jan. 16, 1997]

§ 1.141–13 Refunding issues.

(a) *In general*. Except as provided in this section, a refunding issue and a prior issue are tested separately under section 141. Thus, the determination of whether a refunding issue consists of private activity bonds generally does not depend on whether the prior issue consists of private activity bonds.

(b) *Application of private business use test and private loan financing test*—(1) *Allocation of proceeds*. In applying the private business use test and the private loan financing test to a refunding issue, the proceeds of the refunding issue are allocated to the same expenditures and purpose investments as the proceeds of the prior issue.

(2) *Determination of amount of private business use*—(i) *In general*. Except as provided in paragraph (b)(2)(ii) of this section, the amount of private business use of a refunding issue is determined under §1.141–3(g), based on the measurement period for that issue (for example, without regard to any private business use that occurred prior to the issue date of the refunding issue).

(ii) *Refundings of governmental bonds*. In applying the private business use test to a refunding issue that refunds a prior issue of governmental bonds, the amount of private business use of the refunding issue is the amount of private business use—

(A) During the combined measurement period; or

(B) At the option of the issuer, during the period described in paragraph (b)(2)(i) of this section, but only if, without regard to the reasonable expectations test of §1.141–2(d), the prior issue does not satisfy the private business use test, based on a measurement period that begins on the first day of the combined measurement period and ends on the issue date of the refunding issue.

(iii) *Combined measurement period*—(A) *In general*. Except as provided in paragraph (b)(2)(iii)(B) of this section, the *combined measurement period* is the period that begins on the first day of the measurement period (as defined in §1.141–3(g)) for the prior issue (or, in the case of a series of refundings of governmental bonds, the first issue of governmental bonds in the series) and ends on the last day of the measurement period for the refunding issue.

(B) *Transition rule for refundings of bonds originally issued before May 16, 1997*. If the prior issue (or, in the case of a series of refundings of governmental bonds, the first issue of governmental bonds in the series) was issued before May 16, 1997, then the issuer, at its option, may treat the combined measurement period as beginning on the date (the transition date) that is the earlier of December 19, 2005 or the first date on which the prior issue (or an earlier issue in the case of a series of refundings of governmental bonds) became subject to the 1997 regulations (as defined in §1.141–15(b)). If the issuer treats the combined measurement period as beginning on the transition date in accordance with this paragraph (b)(2)(iii)(B), then paragraph (c)(2) of this section shall be applied by treating the transition date as the issue date of the earliest issue, by treating the bonds as reissued on the transition date at an issue price equal to the value of the bonds (as determined under §1.148–4(e)) on that date, and by disregarding any private security or private payments before the transition date.

(iv) *Governmental bond*. For purposes of this section, the term *governmental bond* means any bond that, when issued, purported to be a governmental bond, as defined in §1.150–1(b), or a qualified 501(c)(3) bond, as defined in section 145(a).

(v) *Special rule for refundings of qualified 501(c)(3) bonds with governmental bonds*. For purposes of applying this paragraph (b)(2) to a refunding issue that refunds a qualified 501(c)(3) bond, any use of the property refinanced by the refunding issue before the issue date of the refunding issue by a

501(c)(3) organization with respect to its activities that do not constitute an unrelated trade or business under section 513(a) is treated as government use.

(c) *Application of private security or payment test—(1) Separate issue treatment.* If the amount of private business use of a refunding issue is determined based on the measurement period for that issue in accordance with paragraph (b)(2)(i) or (b)(2)(ii)(B) of this section, then the amount of private security and private payments allocable to the refunding issue is determined under §1.141–4 by treating the refunding issue as a separate issue.

(2) *Combined issue treatment.* If the amount of private business use of a refunding issue is determined based on the combined measurement period for that issue in accordance with paragraph (b)(2)(ii)(A) of this section, then the amount of private security and private payments allocable to the refunding issue is determined under §1.141–4 by treating the refunding issue and all earlier issues taken into account in determining the combined measurement period as a combined issue. For this purpose, the present value of the private security and private payments is compared to the present value of the debt service on the combined issue (other than debt service paid with proceeds of any refunding bond). Present values are computed as of the issue date of the earliest issue taken into account in determining the combined measurement period (the earliest issue). Except as provided in paragraph (c)(3) of this section, present values are determined by using the yield on the combined issue as the discount rate. The yield on the combined issue is determined by taking into account payments on the refunding issue and all earlier issues taken into account in determining the combined measurement period (other than payments made with proceeds of any refunding bond), and based on the issue price of the earliest issue. In the case of a refunding of only a portion of the original principal amount of a prior issue, the refunded portion of the prior issue is treated as a separate issue and any private security or private payments with respect to the prior issue are allocated ratably between the combined issue and the unrefunded portion of the prior issue in a consistent manner based on relative debt service. See paragraph (b)(2)(iii)(B) of this section for special rules relating to certain refundings of governmental bonds originally issued before May 16, 1997.

(3) *Special rule for arrangements not entered into in contemplation of the refunding issue.* In applying the private security or payment test to a refunding issue that refunds a prior issue of governmental bonds, the issuer may use the yield on the prior issue to determine the present value of private security and private payments under arrangements that were not entered into in contemplation of the refunding issue. For this purpose, any arrangement that was entered into more than 1 year before the issue date of the refunding issue is treated as not entered into in contemplation of the refunding issue.

(d) *Multipurpose issue allocations*—(1) *In general.* For purposes of section 141, unless the context clearly requires otherwise, §1.148–9(h) applies to allocations of multipurpose issues (as defined in §1.148–1(b)), including allocations involving the refunding purposes of the issue. An allocation under this paragraph (d) may be made at any time, but once made may not be changed. An allocation is not reasonable under this paragraph (d) if it achieves more favorable results under section 141 than could be achieved with actual separate issues. The issue to be allocated and each of the separate issues under the allocation must consist of one or more tax-exempt bonds. Allocations made under this paragraph (d) and §1.148–9(h) must be consistent for purposes of section 141 and section 148.

(2) *Exceptions.* This paragraph (d) does not apply for purposes of sections 141(c)(1) and 141(d)(1).

(e) *Application of reasonable expectations test to certain refunding bonds.* An action that would otherwise cause a refunding issue to satisfy the private business tests or the private loan financing test is not taken into account under the reasonable expectations test of §1.141–2(d) if—

(1) The action is not a deliberate action within the meaning of §1.141–2(d)(3); and

(2) The weighted average maturity of the refunding bonds is not greater than the weighted average reasonably expected economic life of the property financed by the prior bonds.

(f) *Special rule for refundings of certain general obligation bonds.* Notwithstanding any other provision of this section, a refunding issue does not consist of private activity bonds if—

(1) The prior issue meets the requirements of §1.141–2(d)(5) (relating to certain general obligation bond programs that finance a large number of separate purposes); or

(2) The refunded portion of the prior issue is part of a series of refundings of all or a portion of an issue that meets the requirements of §1.141–2(d)(5).

(g) *Examples.* The following examples illustrate the application of this section:

Example 1. Measuring private business use. In 2002, Authority A issues tax-exempt bonds that mature in 2032 to acquire an office building. The measurement period for the 2002 bonds under §1.141–3(g) is 30 years. At the time A acquires the building, it enters into a 10-year lease with a nongovernmental person under which the nongovernmental person will use 5 percent of the building in its trade or business during each year of the lease term. In 2007, A issues bonds to refund the 2002 bonds. The 2007 bonds mature on the same date as the 2002 bonds and have a measurement period of 25 years under §1.141–3(g). Under paragraph (b)(2)(ii)(A) of this section, the amount of private business use of the proceeds of the 2007 bonds is 1.67 percent, which equals the amount of private business use during the combined measurement period (5 percent of ⅓ of the 30-year combined measurement period). In addition, the 2002 bonds do not satisfy the private business use test, based on a measurement period beginning on the first day of the measurement period for the 2002 bonds and ending on the issue date of the 2007 bonds, because only 5 percent of the proceeds of the 2002 bonds are used for a private business use during that period. Thus, under paragraph (b)(2)(ii)(B) of this section, A may treat the amount of private business use of the 2007 bonds as 1 percent (5 percent of ⅕ of the 25-year measurement period for the 2007 bonds). The 2007 bonds do not satisfy the private business use test.

Example 2. Combined issue yield computation. (i) On January 1, 2000, County B issues 20-year bonds to finance the acquisition of a municipal auditorium. The 2000 bonds have a yield of 7.7500 percent, compounded annually, and an issue price and par amount of $100 million. The debt service payments on the 2000 bonds are as follows:

Date	Debt service
1/1/01	$9,996,470
1/1/02	9,996,470
1/1/03	9,996,470
1/1/04	9,996,470
1/1/05	9,996,470
1/1/06	9,996,470
1/1/07	9,996,470
1/1/08	9,996,470
1/1/09	9,996,470
1/1/10	9,996,470
1/1/11	9,996,470
1/1/12	9,996,470
1/1/13	9,996,470
1/1/14	9,996,470
1/1/15	9,996,470
1/1/16	9,996,470
1/1/17	9,996,470
1/1/18	9,996,470
1/1/19	9,996,470
1/1/20	9,996,470
	199,929,400

(ii) On January 1, 2005, B issues 15-year bonds to refund all of the outstanding 2000 bonds maturing after January 1, 2005 (in the aggregate principal amount of $86,500,000). The 2005 bonds have a yield of 6.0000 percent, compounded annually, and an issue price and par amount of $89,500,000. The debt service payments on the 2005 bonds are as follows:

Date	Debt service
1/1/06	$9,215,167
1/1/07	9,215,167
1/1/08	9,215,167
1/1/09	9,215,167
1/1/10	9,215,167
1/1/11	9,215,167
1/1/12	9,215,167
1/1/13	9,215,167
1/1/14	9,215,167
1/1/15	9,215,167
1/1/16	9,215,167
1/1/17	9,215,167
1/1/18	9,215,167
1/1/19	9,215,167
1/1/20	9,215,167
	138,227,511

(iii) In accordance with §1.141–15(h), B chooses to apply §1.141–13 (together with the other provisions set forth in §1.141–15(h)), to the 2005 bonds. For purposes of determining the amount of private security and private payments with respect to the 2005 bonds, the 2005 bonds and the refunded portion of the 2000 bonds are treated as a combined issue under paragraph (c)(2) of this section. The yield on the combined issue is determined in accordance with §§1.148–4, 1.141–4(b)(2)(iii) and 1.141–13(c)(2). Under this methodology, the yield on the combined issue is 7.1062 percent per year compounded annually, illustrated as follows:

Date	Previous debt service on refunded portion of prior issue	Refunding debt service	Total debt service	Present value on 1/1/00
1/1/00				($86,500,000.00)
1/1/01	6,689,793		6,689,793	6,245,945.33
1/1/02	6,689,793		6,689,793	5,831,545.62
1/1/03	6,689,793		6,689,793	5,444,640.09
1/1/04	6,689,793		6,689,793	5,083,404.58
1/1/05	6,689,793		6,689,793	4,746,135.95
1/1/06		9,215,167	9,215,167	6,104,023.84
1/1/07		9,215,167	9,215,167	5,699,040.20
1/1/08		9,215,167	9,215,167	5,320,926.00
1/1/09		9,215,167	9,215,167	4,967,898.55
1/1/10		9,215,167	9,215,167	4,638,293.40
1/1/11		9,215,167	9,215,167	4,330,556.57
1/1/12		9,215,167	9,215,167	4,043,237.15
1/1/13		9,215,167	9,215,167	3,774,980.51
1/1/14		9,215,167	9,215,167	3,524,521.90
1/1/15		9,215,167	9,215,167	3,290,680.46
1/1/16		9,215,167	9,215,167	3,072,353.70
1/1/17		9,215,167	9,215,167	2,868,512.26
1/1/18		9,215,167	9,215,167	2,678,195.09
1/1/19		9,215,167	9,215,167	2,500,504.89
1/1/20		9,215,167	9,215,167	2,334,603.90
	33,448,965	138,227,511	171,676,4760.00	0.00

Example 3. Determination of private payments allocable to combined issue. The facts are the same as in *Example 2*. In addition, on January 1, 2001, B enters into a contract with a nongovernmental person for the use of the auditorium. The contract results in a private payment in the amount of $500,000 on each January 1 beginning on January 1, 2001, and ending on January 1, 2020. Under paragraph (c)(2) of this section, the amount of the private payments allocable to the combined issue is determined by treating the refunded portion of the 2000 bonds ($86,500,000 principal amount) as a separate issue, and by allocating the total private payments ratably between the combined issue and the unrefunded portion of the 2000 bonds ($13,500,000 principal amount) based on relative debt service, as follows:

Date	Private payments	Debt service on unrefunded portion of prior issue	Debt service on combined issue	Percentage of private payments allocable to combined issue	Amount of private payments allocable to combined issue
1/1/01	$500,000	$3,306,677	$6,689,793	66.92	$334,608
1/1/02	500,000	3,306,677	6,689,793	66.92	334,608
1/1/03	500,000	3,306,677	6,689,793	66.92	334,608
1/1/04	500,000	3,306,677	6,689,793	66.92	334,608
1/1/05	500,000	3,306,677	6,689,793	66.92	334,608
1/1/06	500,000		9,215,167	100.00	500,000
1/1/07	500,000		9,215,167	100.00	500,000
1/1/08	500,000		9,215,167	100.00	500,000
1/1/09	500,000		9,215,167	100.00	500,000
1/1/10	500,000		9,215,167	100.00	500,000
1/1/11	500,000		9,215,167	100.00	500,000
1/1/12	500,000		9,215,167	100.00	500,000
1/1/13	500,000		9,215,167	100.00	500,000
1/1/14	500,000		9,215,167	100.00	500,000
1/1/15	500,000		9,215,167	100.00	500,000
1/1/16	500,000		9,215,167	100.00	500,000
1/1/17	500,000		9,215,167	100.00	500,000
1/1/18	500,000		9,215,167	100.00	500,000
1/1/19	500,000		9,215,167	100.00	500,000
1/1/20	500,000		9,215,167	100.00	500,000
	$10,000,000	$16,533,385	$171,676,476		$9,173,039

Example 4. Refunding taxable bonds and qualified bonds. (i) In 1999, City C issues taxable bonds to finance the construction of a facility for the furnishing of water. The bonds are secured by revenues from the facility. The facility is managed pursuant to a management contract with a nongovernmental person that gives rise to private business use. In 2007, C terminates the management contract and takes over the operation of the facility. In 2009, C issues bonds to refund the 1999 bonds. On the issue date of the 2009 bonds, C reasonably expects that the facility will not be used for a private business use during the term of the 2009 bonds. In addition, during the term of the 2009 bonds, the facility is not used for a private business use. Under paragraph (b)(2)(i) of this section, the 2009 bonds do not satisfy the private business use test because the amount of private business use is based on the measurement period for those bonds and therefore does not take into account any private business use that occurred pursuant to the management contract.

(ii) The facts are the same as in paragraph (i) of this *Example 4*, except that the 1999 bonds are issued as exempt facility bonds under section 142(a)(4). The 2009 bonds do not satisfy the private business use test.

Example 5. Multipurpose issue. In 2001, State D issues bonds to finance the construction of two office buildings, Building 1 and Building 2. D expends an equal amount of the proceeds on each building. D enters into arrangements that result in 8 percent of Building 1 and 12 percent of Building 2 being used for a private business use during the measurement period under §1.141–3(g). These arrangements result in a total of 10 percent of the proceeds of the 2001 bonds being used for a private business use. In 2006, D purports to allocate, under paragraph (d) of this section, an equal amount of the outstanding 2001 bonds to Building 1 and Building 2. D also enters into another private business use arrangement with respect to Building 1 that results in an additional 2 percent (and a total of 10 percent) of Building 1 being used for a private business use during the measurement period. An allocation is not reasonable under paragraph (d) of this section if it achieves more favorable results under section 141 than could be achieved with actual separate issues. D's allocation is unreasonable because, if permitted, it would result in more than 10 percent of the proceeds of the 2001 bonds being used for a private business use.

Example 6. Non-deliberate action. In 1998, City E issues bonds to finance the purchase of land and construction of a building (the prior bonds). On the issue date of the prior bonds, E reasonably expects that it will be the sole user of the financed property for the entire term of the bonds. In 2003, the federal government acquires the financed property in a condemnation action. In 2006, E issues bonds to refund the prior bonds (the refunding bonds). The weighted average maturity of the refunding bonds is not greater than the reasonably expected economic life of the financed property. In general, under §1.141–2(d) and this section, reasonable expectations must be separately tested on the issue date of a refunding issue. Under paragraph (e) of this section, however, the condemnation action is not taken into account in applying the reasonable expectations test to the refunding bonds because the condemnation action is not a deliberate action within the meaning of §1.141–2(d)(3) and the weighted average maturity of the refunding bonds is not greater than the weighted average reasonably expected economic life of the property financed by the prior bonds. Thus, the condemnation action does not cause the refunding bonds to be private activity bonds.

Example 7. Non-transitioned refunding of bonds subject to 1954 Code. In 1985, County F issues bonds to finance a court house. The 1985 bonds are subject to the provisions of the Internal Revenue Code of 1954. In 2006, F issues bonds to refund all of the outstanding 1985 bonds. The weighted average maturity of the 2006 bonds is longer than the remaining weighted average maturity of the 1985 bonds. In addition, the 2006 bonds do not satisfy any transitional rule for refundings in the Tax Reform Act of 1986, 100 Stat. 2085 (1986). Section 141 and this section apply to determine whether the 2006 bonds are private activity bonds including whether, for purposes of §1.141–13(b)(2)(ii)(B), the 1985 bonds satisfy the private business use test based on a measurement period that begins on the first day of the combined measurement period for the 2006 bonds and ends on the issue date of the 2006 bonds.

[T.D. 9234, 70 FR 75032, Dec. 19, 2006]

§ 1.141–14 Anti-abuse rules.

(a) *Authority of Commissioner to reflect substance of transactions.* If an issuer enters into a transaction or series of transactions with respect to one or more issues with a principal purpose of transferring to nongovernmental persons (other than as members of the general public) significant benefits of tax-exempt financing in a manner that is inconsistent with the purposes of section 141, the Commissioner may take any action to reflect the substance of the transaction or series of transactions, including—

(1) Treating separate issues as a single issue for purposes of the private activity bond tests;

(2) Reallocating proceeds to expenditures, property, use, or bonds;

(3) Reallocating payments to use or proceeds;

(4) Measuring private business use on a basis that reasonably reflects the economic benefit in a manner different than as provided in § 1.141–3(g); and

(5) Measuring private payments or security on a basis that reasonably reflects the economic substance in a manner different than as provided in § 1.141–4.

(b) *Examples.* The following examples illustrate the application of this section:

Example 1. Reallocating proceeds to indirect use. City C issues bonds with proceeds of $20 million for the stated purpose of financing improvements to roads that it owns. As a part of the same plan of financing, however, C also agrees to make a loan of $7 million to Corporation M from its general revenues that it otherwise would have used for the road improvements. The interest rate of the loan corresponds to the interest rate on a portion of the issue. A principal purpose of the financing arrangement is to transfer to M significant benefits of the tax-exempt financing. Although C actually allocates all of the proceeds of the bonds to the road improvements, the Commissioner may reallocate a portion of the proceeds of the bonds to the loan to M because a principal purpose of the financing arrangement is to transfer to M significant benefits of tax-exempt financing in a manner that is inconsistent with the purposes of section 141. The bonds are private activity bonds because the issue meets the private loan financing test. The bonds also meet the private business tests. See also §§ 1.141–3(a)(2), 1.141–4(a)(1), and 1.141–5(a), under which indirect use of proceeds and payments are taken into account.

Example 2. Taking into account use of amounts derived from proceeds that would be otherwise disregarded. County B issues bonds with proceeds of $10 million to finance the purchase of land. On the issue date, B reasonably expects that it will be the sole user of the land. Subsequently, the federal government acquires the land for $3 million in a condemnation action. B uses this amount to make a loan to Corporation M. In addition, the interest rate on the loan reflects the tax-exempt interest rate on the bonds and thus is substantially less than a current market rate. A principal purpose of the arrangement is to transfer to M significant benefits of the tax-exempt financing. Although the condemnation action is not a deliberate action, the Commissioner may treat the condemnation proceeds as proceeds of the issue because a principal purpose of the arrangement is to transfer to M significant benefits of tax-exempt financing in a manner inconsistent with the purposes of section 141. The bonds are private activity bonds.

Example 3. Measuring private business use on an alternative basis. City F issues bonds with a 30-year term to finance the acquisition of an industrial building having a remaining reasonably expected useful economic life of more than 30 years. On the issue date, F leases the building to Corporation G for 3 years. F reasonably expects that it will be the sole user of the building for the remaining term of the bonds. Because of the local market conditions, it is reasonably expected that the fair rental value of the industrial building will be significantly greater during the early years of the term of the bonds than in the later years. The annual rental payments are significantly less than fair market value, reflecting the interest rate on the bonds. The present value of these rental payments (net of operation and maintenance expenses) as of the issue date, however, is approximately 25 percent of the present value of debt service on the issue. Under § 1.141–3, the issue does not meet the private business tests, because only 10 percent of the proceeds are used in a trade or business by a nongovernmental person. A principal purpose of the issue is to transfer to G significant benefits of tax-exempt financing in a manner inconsistent with the purposes of section 141. The method of measuring private business use over the reasonably expected useful economic life of financed property is for the administrative convenience of issuers of state and local bonds. In cases where this method is used in a manner inconsistent with the purposes of section 141, the Commissioner may measure private business use on another basis that reasonably reflects economic benefit, such as in this case on an annual basis. If the Commissioner measures private business use on an annual basis, the bonds are private activity bonds because the private payment test is met and more than 10 percent of the proceeds are used in a trade or business by a nongovernmental person.

Example 4. Treating separate issues as a single issue. City D enters into a development agreement with Corporation T to induce T to locate its headquarters within D's city limits. Pursuant to the development agreement, in 1997 D will issue $20 million of its general obligation bonds (the 1997 bonds) to purchase land that it will grant to T. The development agreement also provides that, in 1998, D will issue $20 million of its tax increment bonds (the 1998 bonds), secured solely by the increase in property taxes in a special taxing district. Substantially all of the property within the special taxing district is owned by T or D. T will separately enter into an agreement to guarantee the payment of tax increment to D in an amount sufficient to retire the 1998 bonds. The proceeds of the 1998 bonds will be used to finance improvements owned and operated by D that will not give rise to private business use. Treated separately, the 1997 issue meets the private business use test, but not the private security or payment test; the 1998 issue meets the private security or payment test, but not the private business use test. A principal purpose of the financing plan, including the two issues, is to transfer significant benefits of tax-exempt financing to T for its headquarters. Thus, the 1997 issue and the 1998 issue may be treated by the Commissioner as a single issue for purposes of applying the private activity bond tests. Accordingly, the bonds of both the 1997 issue and the 1998 issue may be treated as private activity bonds.

Example 5. Reallocating proceeds. City E acquires an electric generating facility with a useful economic life of more than 40 years and enters into a 30-year take or pay contract to sell 30 percent of the available output to investor-owned utility M. E plans to use the remaining 70 percent of available output for its own governmental purposes. To finance the entire cost of the facility, E issues $30 million of its series A taxable bonds at taxable interest rates and $70 million series B bonds, which purport to be tax-exempt bonds, at tax-exempt interest rates. E allocates all of M's private business use to the proceeds of the series A bonds and all of its own government use to the proceeds of the series B bonds. The series A bonds have a weighted average maturity of 15 years, while the series B bonds have a weighted average maturity of 26 years. M's payments under the take or pay contract are expressly determined by reference to 30 percent of M's total costs (that is, the sum of the debt service required to be paid on both the series A and the series B bonds and all other operating costs). The allocation of all of M's private business use to the series A bonds does not reflect economic substance because the series of transactions transfers to M significant benefits of the tax-exempt interest rates paid on the series B bonds. A principal purpose of the financing arrangement is to transfer to M significant benefits of the tax-exempt financing. Accordingly, the Commissioner may allocate M's private business use on a pro rata basis to both the series B bonds as well as the series A bonds, in which case the series B bonds are private activity bonds.

Example 6. Allocations respected. The facts are the same as in *Example 5*, except that the debt service component of M's payments under the take or pay contract is based exclusively on the amounts necessary to pay the debt service on the taxable series A bonds. E's allocation of all of M's private business use to the series A bonds is respected because the series of transactions does not actually transfer benefits of tax-exempt interest rates to M. Accordingly, the series B bonds are not private activity bonds. The result would be the same if M's payments under the take or pay contract were based exclusively on fair market value pricing, rather than the tax-exempt interest rates on E's bonds. The result also would be the same if the series A bonds and the series B bonds had substantially equivalent weighted average maturities and E and M had entered into a customary contract providing for payments based on a ratable share of total debt service. E would not be treated by the Commissioner in any of these cases as entering into the contract with a principal purpose of transferring the benefits of tax-exempt financing to M in a manner inconsistent with the purposes of section 141.

[T.D. 8712, 62 FR 2301, Jan. 16, 1997]

§ 1.141–15 Effective dates.

(a) *Scope.* The effective dates of this section apply for purposes of §§ 1.141–1 through 1.141–6(a), 1.141–7 through 1.141–14, 1.145–1 through 1.145–2, 1.150–1(a)(3) and the definition of bond documents contained in § 1.150–1(b).

(b) *Effective dates*—(1) *In general.* Except as otherwise provided in this section, §§ 1.141–0 through 1.141–6(a), 1.141–9 through 1.141–12, 1.141–14, 1.145–1 through 1.145–2(c), and the definition of bond documents contained in § 1.150–1(b) (the 1997 regulations) apply to bonds issued on or after May 16, 1997, that are subject to section 1301 of the Tax Reform Act of 1986 (100 Stat. 2602).

(2) *Certain short-term arrangements.* The provisions of § 1.141–3 that refer to arrangements for 200 days, 100 days, or 50 days apply to any bond sold on or after November 20, 2001 and may be applied to any bond outstanding on November 20, 2001 to which § 1.141–3 applies.

(3) *Certain prepayments.* Except as provided in paragraph (c) of this section, paragraphs (c)(2)(ii), (c)(2)(iii) and (c)(2)(iv) of § 1.141–5 apply to bonds sold on or after October 3, 2003. Issuers may apply paragraphs (c)(2)(ii), (c)(2)(iii) and (c)(2)(iv) of § 1.141–5, in whole but not in part, to bonds sold before October 3, 2003 that are subject to § 1.141–5.

(c) *Refunding bonds.* Except as otherwise provided in this section, the 1997 regulations (defined in paragraph (b)(1) of this section) do not apply to any bonds issued on or after May 16, 1997, to refund a bond to which those regulations do not apply unless—

(1) The refunding bonds are subject to section 1301 of the Tax Reform Act of 1986 (100 Stat. 2602); and

(2)(i) The weighted average maturity of the refunding bonds is longer than—

(A) The weighted average maturity of the refunded bonds; or

(B) In the case of a short-term obligation that the issuer reasonably expects to refund with a long-term financing (such as a bond anticipation note), 120 percent of the weighted average reasonably expected economic life of the facilities financed; or

(ii) A principal purpose for the issuance of the refunding bonds is to make one or more new conduit loans.

(d) *Permissive application of regulations*. Except as provided in paragraph (e) of this section, the 1997 regulations (defined in paragraph (b)(1) of this section) may be applied in whole, but not in part, to actions taken before February 23, 1998, with respect to—

(1) Bonds that are outstanding on May 16, 1997, and subject to section 141; or

(2) Refunding bonds issued on or after May 16, 1997, that are subject to 141.

(e) *Permissive application of certain sections*. The following sections may each be applied to any bonds—

(1) Section 1.141–3(b)(4);

(2) Section 1.141–3(b)(6); and

(3) Section 1.141–12.

(f) *Effective dates for certain regulations relating to output facilities*—(1) *General rule*. Except as otherwise provided in this section, §§1.141–7 and 1.141–8 apply to bonds sold on or after November 22, 2002, that are subject to section 1301 of the Tax Reform Act of 1986 (100 Stat. 2602).

(2) *Transition rule for requirements contracts*. For bonds otherwise subject to §§1.141–7 and 1.141–8, §1.141–7(c)(3) applies to output contracts entered into on or after September 19, 2002. An output contract is treated as entered into on or after that date if it is amended on or after that date, but only if the amendment results in a change in the parties to the contract or increases the amount of requirements covered by the contract by reason of an extension of the contract term or a change in the method for determining such requirements. For purposes of this paragraph (f)(2)—

(i) The extension of the term of a contract causes the contract to be treated as entered into on the first day of the additional term;

(ii) The exercise by a party of a legally enforceable right that was provided under a contract before September 19, 2002, on terms that were fixed and determinable before such date, is not treated as an amendment of the contract. For example, the exercise by a purchaser after September 19, 2002 of a renewal option that was provided under a contract before that date, on terms identical to the original contract, is not treated as an amendment of the contract; and

(iii) An amendment that increases the amount of requirements covered by the contract by reason of a change in the method for determining such requirements is treated as a separate contract that is entered into as of the effective date of the amendment, but only with respect to the increased output to be provided under the contract.

(g) *Refunding bonds for output facilities*. Except as otherwise provided in paragraph (h) or (i) of this section, §§1.141–7 and 1.141–8 do not apply to any bonds sold on or after November 22, 2002, to refund a bond to which §§1.141–7 and 1.141–8 do not apply unless—

(1) The refunding bonds are subject to section 1301 of the Tax Reform Act of 1986 (100 Stat. 2602); and

(2)(i) The weighted average maturity of the refunding bonds is longer than—

(A) The weighted average maturity of the refunded bonds; or

(B) In the case of a short-term obligation that the issuer reasonably expects to refund with a long-term financing (such as a bond anticipation note), 120 percent of the weighted average reasonably expected economic life of the facilities financed; or

(ii) A principal purpose for the issuance of the refunding bonds is to make one or more new conduit loans.

(h) *Permissive retroactive application*. Except as provided in paragraphs (d), (e) or (i) of this section, §§1.141–1 through 1.141–6(a), 1.141–7 through 1.141–14, 1.145–1 through 1.145–2, 1.149(d)–1(g), 1.150–1(a)(3), the definition of bond documents contained in §1.150–1(b) and §1.150–1(c)(3)(ii) may be applied by issuers in whole, but not in part, to—

(1) Outstanding bonds that are sold before February 17, 2006, and subject to section 141; or

(2) Refunding bonds that are sold on or after February 17, 2006, and subject to section 141.

(i) *Permissive application of certain regulations relating to output facilities.* Issuers may apply §§ 1.141–7(f)(3) and 1.141–7(g) to any bonds.

(j) *Effective dates for certain regulations relating to refundings.* Except as otherwise provided in this section, §§ 1.141–13, 1.145–2(d), 1.149(d)–1(g), 1.150–1(a)(3) and 1.150–1(c)(3)(ii) apply to bonds that are sold on or after February 17, 2006, and that are subject to the 1997 regulations (defined in paragraph (b)(1) of this section).

(k) *Effective/applicability dates for certain regulations relating to generally applicable taxes and payments in lieu of tax*—(1) *In general.* Except as otherwise provided in paragraphs (k)(2) and (k)(3) of this section, revised §§ 1.141–4(e)(2), 1.141–4(e)(3) and 1.141–4(e)(5) apply to bonds sold on or after October 24, 2008 that are otherwise subject to the 1997 Regulations (defined in paragraph (b)(1) of this section).

(2) *Transitional rule for certain refundings.* Paragraph (k)(1) does not apply to bonds that are issued to refund bonds if—

(i) Either—

(A) The refunded bonds (or the original bonds in a series of refundings) were sold before October 24, 2008, or

(B) The refunded bonds (or the original bonds in a series of refundings) satisfied the transitional rule for projects substantially in progress under paragraph (k)(3) of this section; and

(ii) The weighted average maturity of the refunding bonds does not exceed the remaining weighted average maturity of the refunded bonds.

(3) *Transitional rule for certain projects substantially in progress.* Paragraph (k)(1) of this section does not apply to bonds issued for projects for which all of the following requirements are met:

(i) A governmental person (as defined in § 1.141–1) took official action evidencing its preliminary approval of the project before October 19, 2006, and the plan of finance for the project in place at that time contemplated financing the project with tax-exempt bonds to be paid or secured by PILOTs.

(ii) Before October 19, 2006, significant expenditures were paid or incurred with respect to the project or a contract was entered into to pay or incur significant expenditures with respect to the project.

(iii) The bonds for the project (excluding refunding bonds) are issued on or before December 31, 2009.

[T.D. 8757, 63 FR 3265, Jan. 22, 1998, as amended by T.D. 8941, 66 FR 4670, Jan. 18, 2001; T.D. 8967, 66 FR 58062, Nov. 20, 2001; T.D. 9016, 67 FR 59765, Sept. 23, 2002; T.D. 9085, 68 FR 45775, Aug. 4, 2003; T.D. 9234, 70 FR 75035, Dec. 19, 2005; 71 FR 1971, Jan. 12, 2006; T.D. 9429, 73 FR 63375, Oct. 24, 2008]

§ 1.141–16 Effective dates for qualified private activity bond provisions.

(a) *Scope.* The effective dates of this section apply for purposes of §§ 1.142–0 through 1.142–2, 1.144–0 through 1.144–2, 1.147–0 through 1.147–2, and 1.150–4.

(b) *Effective dates.* Except as otherwise provided in this section, the regulations designated in paragraph (a) of this section apply to bonds issued on or after May 16, 1997 (the effective date).

(c) *Permissive application.* The regulations designated in paragraph (a) of this section may be applied by issuers in whole, but not in part, to bonds outstanding on the effective date. For this purpose, issuers may apply § 1.142–2 without regard to paragraph (c)(3) thereof to failures to properly use proceeds that occur on or after April 21, 2003.

(d) *Certain remedial actions*—(1) *General rule.* The provisions of § 1.142–2(e) apply to failures to properly use proceeds that occur on or after August 13, 2004 and may be applied by issuers to failures to properly use proceeds that occur on or after May 14, 2004, provided that the bonds are subject to § 1.142–2.

(2) *Special rule for allocations of nonqualified bonds.* For purposes of § 1.142–2(e)(2), in addition to the allocation methods permitted in § 1.142–2(e)(2), an issuer may treat bonds with the longest maturities (determined on a bond-by-bond basis) as the nonqualified bonds, but only with respect to failures to properly use proceeds that occur on

or after May 14, 2004, with respect to bonds sold before August 13, 2004.

[T.D. 8712, 62 FR 2302, Jan. 16, 1997, as amended by T.D. 9150, 69 FR 50066, Aug. 13, 2004]

§ 1.142–0 Table of contents.

This section lists the captioned paragraphs contained in §§ 1.142–1 through 1.142–3.

[T.D. 8712, 62 FR 2302, Jan. 16, 1997, as amended by T.D. 9150, 69 FR 50066, Aug. 13, 2004]

§ 1.142–1 Exempt facility bonds.

(a) *Overview.* Interest on a private activity bond is not excludable from gross income under section 103(a) unless the bond is a qualified bond. Under section 141(e)(1)(A), an exempt facility bond issued under section 142 may be a qualified bond.

Under section 142(a), an exempt facility bond is any bond issued as a part of an issue using 95 percent or more of the proceeds for certain exempt facilities.

(b) *Scope.* Sections 1.142–0 through 1.142–3 apply for purposes of the rules for exempt facility bonds under section 142, except that, with respect to net proceeds that have been spent, § 1.142–2 does not apply to bonds issued under section 142(d) (relating to bonds issued to provide qualified residential rental projects) and section 142(f) (2) and (4) (relating to bonds issued to provide local furnishing of electric energy or gas).

(c) *Effective dates.* For effective dates of §§ 1.142–0 through 1.142–2, see § 1.141–16.

[T.D. 8712, 62 FR 2302, Jan. 16, 1997]

§ 1.142–2 Remedial actions.

(a) *General rule.* If less than 95 percent of the net proceeds of an exempt facility bond are actually used to provide an exempt facility, and for no other purpose, the issue will be treated as meeting the use of proceeds requirement of section 142(a) if the issue meets the condition of paragraph (b) of this section and the issuer takes the remedial action described in paragraph (c) of this section.

(b) *Reasonable expectations requirement.* The issuer must have reasonably expected on the issue date that 95 percent of the net proceeds of the issue would be used to provide an exempt facility and for no other purpose for the entire term of the bonds (disregarding any redemption provisions). To meet this condition the amount of the issue must have been based on reasonable estimates about the cost of the facility.

(c) *Redemption or defeasance*—(1) *In general.* The requirements of this paragraph (c) are met if all of the nonqualified bonds of the issue are redeemed on the earliest call date after the date on which the failure to properly use the proceeds occurs under paragraph (d) of this section. Proceeds of tax-exempt bonds (other than those described in paragraph (d)(1) of this section) must not be used for this purpose. If the bonds are not redeemed within 90 days of the date on which the failure to properly use proceeds occurs, a defeasance escrow must be established for those bonds within 90 days of that date.

(2) *Notice of defeasance.* The issuer must provide written notice to the Commissioner of the establishment of the defeasance escrow within 90 days of the date the escrow is established.

(3) *Special limitation.* The establishment of a defeasance escrow does not satisfy the requirements of this paragraph (c) if the period between the issue date and the first call date is more than 10½ years.

(4) *Special rule for dispositions of personal property.* For dispositions of personal property exclusively for cash, the

requirements of this paragraph (c) are met if the issuer expends the disposition proceeds within 6 months of the date of the disposition to acquire replacement property for the same qualifying purpose of the issue under section 142.

(5) *Definitions.* For purposes of paragraph (c)(4) of this section, *disposition proceeds* means disposition proceeds as defined in §1.141–12(c).

(d) *When a failure to properly use proceeds occurs*—(1) *Proceeds not spent.* For net proceeds that are not spent, a failure to properly use proceeds occurs on the earlier of the date on which the issuer reasonably determines that the financed facility will not be completed or the date on which the financed facility is placed in service.

(2) *Proceeds spent.* For net proceeds that are spent, a failure to properly use proceeds occurs on the date on which an action is taken that causes the bonds not to be used for the qualifying purpose for which the bonds were issued.

(e) *Nonqualified bonds*—(1) *Amount of nonqualified bonds.* For purposes of this section, the nonqualified bonds are a portion of the outstanding bonds in an amount that, if the remaining bonds were issued on the date on which the failure to properly use the proceeds occurs, at least 95 percent of the net proceeds of the remaining bonds would be used to provide an exempt facility. If no proceeds have been spent to provide an exempt facility, all of the outstanding bonds are nonqualified bonds.

(2) *Allocation of nonqualified bonds.* Allocations of nonqualified bonds must be made on a pro rata basis, except that an issuer may treat any bonds of an issue as the nonqualified bonds so long as—

(i) The remaining weighted average maturity of the issue, determined as of the date on which the nonqualified bonds are redeemed or defeased (determination date), and excluding from the determination the nonqualified bonds redeemed or defeased by the issuer to meet the requirements of paragraph (c) of this section, is not greater than

(ii) The remaining weighted average maturity of the issue, determined as of the determination date, but without regard to the redemption or defeasance of any bonds (including the nonqualified bonds) occurring on the determination date.

[T.D. 8712, 62 FR 2302, Jan. 16, 1997, as amended by T.D. 9150, 69 FR 50067, Aug. 13, 2004]

§ 1.142–3 Refunding Issues. [Reserved]

§ 1.142–4 Use of proceeds to provide a facility.

(a) *In general.* [Reserved]

(b) *Reimbursement allocations.* If an expenditure for a facility is paid before the issue date of the bonds to provide that facility, the facility is described in section 142(a) only if the expenditure meets the requirements of §1.150–2 (relating to reimbursement allocations). For purposes of this paragraph (b), if the proceeds of an issue are used to pay principal of or interest on an obligation other than a State or local bond (for example, temporary construction financing of the conduit borrower), that issue is not a refunding issue, and, thus, §1.150–2(g) does not apply.

(c) *Limitation on use of facilities by substantial users*—(1) *In general.* If the original use of a facility begins before the issue date of the bonds to provide the facility, the facility is not described in section 142(a) if any person that was a substantial user of the facility at any time during the 5-year period before the issue date or any related person to that user receives (directly or indirectly) 5 percent or more of the proceeds of the issue for the user's interest in the facility and is a substantial user of the facility at any time during the 5-year period after the issue date, unless—

(i) An official intent for the facility is adopted under §1.150–2 within 60 days after the date on which acquisition, construction, or reconstruction of that facility commenced; and

(ii) For an acquisition, no person that is a substantial user or related person after the acquisition date was also a substantial user more than 60 days before the date on which the official intent was adopted.

(2) *Definitions.* For purposes of paragraph (c)(1) of this section, *substantial user* has the meaning used in section 147(a)(1), *related person* has the meaning used in section 144(a)(3), and a user

that is a governmental unit within the meaning of § 1.103–1 is disregarded.

(d) *Effective date*—(1) *In general*. This section applies to bonds sold on or after July 8, 1997. See § 1.103–8(a)(5) for rules applicable to bonds sold before that date.

(2) *Elective retroactive application*. An issuer may apply this section to any bond sold before July 8, 1997.

[T.D. 8718, 62 FR 25506, May 9, 1997]

§ 1.142(a)(5)–1 Exempt facility bonds: Sewage facilities.

(a) *In general*. Under section 103(a), a private activity bond is a tax-exempt bond only if it is a qualified bond. A qualified bond includes an exempt facility bond, defined as any bond issued as part of an issue 95 percent or more of the net proceeds of which are used to provide a facility specified in section 142. One type of facility specified in section 142(a) is a sewage facility. This section defines the term *sewage facility* for purposes of section 142(a).

(b) *Definitions*—(1) *Sewage facility defined*. A sewage facility is property—

(i) Except as provided in paragraphs (b)(2) and (d) of this section, used for the secondary treatment of wastewater; however, for property treating wastewater reasonably expected to have an average daily raw wasteload concentration of biochemical oxygen demand (BOD) that exceeds 350 milligrams per liter as oxygen (measured at the time the influent enters the facility) (the *BOD limit*), this paragraph (b)(1)(i) applies only to the extent the treatment is for wastewater having an average daily raw wasteload concentration of BOD that does not exceed the BOD limit;

(ii) Used for the preliminary and/or primary treatment of wastewater but only to the extent used in connection with secondary treatment (without regard to the BOD limit described in paragraph (b)(1)(i) of this section);

(iii) Used for the advanced or tertiary treatment of wastewater but only to the extent used in connection with and after secondary treatment;

(iv) Used for the collection, storage, use, processing, or final disposal of—

(A) Wastewater, which property is necessary for such preliminary, primary, secondary, advanced, or tertiary treatment; or

(B) Sewage sludge removed during such preliminary, primary, secondary, advanced, or tertiary treatment (without regard to the BOD limit described in paragraph (b)(1)(i) of this section);

(v) Used for the treatment, collection, storage, use, processing, or final disposal of septage (without regard to the BOD limit described in paragraph (b)(1)(i) of this section); and

(vi) Functionally related and subordinate to property described in this paragraph (b)(1), such as sewage disinfection property.

(2) *Special rules and exceptions*—(i) *Exception to BOD limit*. A facility treating wastewater with an average daily raw wasteload concentration of BOD exceeding the BOD limit will not fail to qualify as a sewage facility described in paragraph (b)(1) of this section to the extent that the failure to satisfy the BOD limit results from the implementation of a federal, state, or local water conservation program (for example, a program designed to promote water use efficiency that results in BOD concentrations beyond the BOD limit).

(ii) *Anti-abuse rule for BOD limit*. A facility does not satisfy the BOD limit if there is any intentional manipulation of the BOD level to circumvent the BOD limit (for example, increasing the volume of water in the wastewater before the influent enters the facility with the intention of reducing the BOD level).

(iii) *Authority of Commissioner*. In appropriate cases upon application to the Commissioner, the Commissioner may determine that facilities employing technologically advanced or innovative treatment processes qualify as sewage facilities if it is demonstrated that these facilities perform functions that are consistent with the definition of sewage facilities described in paragraph (b)(1) of this section.

(3) *Other applicable definitions*—(i) *Advanced or tertiary treatment* means the treatment of wastewater after secondary treatment. Advanced or tertiary treatment ranges from biological treatment extensions to physical-chemical separation techniques such as denitrification, ammonia stripping,

carbon adsorption, and chemical precipitation.

(ii) *Nonconventional pollutants* are any pollutants that are not listed in 40 CFR 401.15, 401.16, or appendix A to part 423.

(iii) *Preliminary treatment* means treatment that removes large extraneous matter from incoming wastewater and renders the incoming wastewater more amenable to subsequent treatment and handling.

(iv) *Pretreatment* means a process that preconditions wastewater to neutralize or remove toxic, priority, or nonconventional pollutants that could adversely affect sewers or inhibit a preliminary, primary, secondary, advanced, or tertiary treatment operation.

(v) *Primary treatment* means treatment that removes material that floats or will settle, usually by screens or settling tanks.

(vi) *Priority pollutants* are those pollutants listed in appendix A to 40 CFR part 423.

(vii) *Secondary treatment* means the stage in sewage treatment in which a bacterial process (or an equivalent process) consumes the organic parts of wastes, usually by trickling filters or an activated sludge process.

(viii) *Sewage sludge* is defined in 40 CFR 122.2 and includes septage.

(ix) *Toxic pollutants* are those pollutants listed in 40 CFR 401.15.

(c) *Other property not included in the definition of a sewage facility.* Property other than property described in paragraph (b)(1) of this section is not a sewage facility. Thus, for example, property is not a sewage facility, or functionally related and subordinate property, if the property is used for pretreatment of wastewater (whether or not this treatment is necessary to perform preliminary, primary, secondary, advanced, or tertiary treatment), or the related collection, storage, use, processing, or final disposal of the wastewater. In addition, property used to treat, process, or use wastewater subsequent to the time the wastewater can be discharged into navigable waters, as defined in 33 U.S.C. 1362, is not a sewage facility.

(d) *Allocation of costs.* In the case of property that has both a use described in paragraph (b)(1) of this section (a sewage treatment function) and a use other than sewage treatment, only the portion of the cost of the property allocable to the sewage treatment function is taken into account as an expenditure to provide sewage facilities. The portion of the cost of property allocable to the sewage treatment function is determined by allocating the cost of that property between the property's sewage treatment function and any other uses by any method which, based on all the facts and circumstances, reasonably reflects a separation of costs for each use of the property.

(e) *Effective date*—(1) *In general.* This section applies to issues of bonds issued after February 21, 1995.

(2) *Refundings.* In the case of a refunding bond issued to refund a bond to which this section does not apply, the issuer need not apply this section to that refunding bond. This paragraph (e)(2) applies only if the weighted average maturity of the refunding bonds, as described in section 147(b), is not greater than the remaining weighted average maturity of the refunded bonds.

[T.D. 8576, 59 FR 66163, Dec. 23, 1994, as amended by T.D. 9546, Aug. 19, 2011]

§ 1.142(a)(6)–1 Exempt facility bonds: solid waste disposal facilities.

(a) *In general.* This section defines the term solid waste disposal facility for purposes of section 142(a)(6).

(b) *Solid waste disposal facility.* The term *solid waste disposal facility* means a facility to the extent that the facility—

(1) Processes solid waste (as defined in paragraph (c) of this section) in a qualified solid waste disposal process (as defined in paragraph (d) of this section);

(2) Performs a preliminary function (as defined in paragraph (f) of this section); or

(3) Is functionally related and subordinate (within the meaning of § 1.103–8(a)(3)) to a facility described in paragraph (b)(1) or (b)(2) of this section.

(c) *Solid waste*—(1) *In general.* Except to the extent excluded under paragraph (c)(2) of this section, for purposes of section 142(a)(6), the term *solid waste* means garbage, refuse, and other solid material derived from any agricultural, commercial, consumer, governmental, or industrial operation or activity if the material meets the requirements of both paragraph (c)(1)(i) and paragraph (c)(1)(ii) of this section. For purposes of this section, material is solid if it is solid at ambient temperature and pressure.

(i) *Used material or residual material*. Material meets the requirements of this paragraph (c)(1)(i) if it is either used material (as defined in paragraph (c)(1)(i)(A)) of this section or residual material (as defined in paragraph (c)(1)(i)(B) of this section).

(A) *Used material*. The term *used material* means any material that is a product of any agricultural, commercial, consumer, governmental, or industrial operation or activity, or a component of any such product or activity, and that has been used previously. Used material also includes animal waste produced by animals from a biological process.

(B) *Residual material*. The term *residual material* means material that meets the requirements of this paragraph (c)(1)(i)(B). The material must be a residual byproduct or excess raw material that results from or remains after the completion of any agricultural, commercial, consumer, governmental, or industrial production process or activity or from the provision of any service. In the case of multiple processes constituting an integrated manufacturing or industrial process, the material must result from or remain after the completion of such integrated process. As of the issue date of the bonds used to finance the solid waste disposal facility, the material must be reasonably expected to have a fair market value that is lower than the value of all of the products made in that production process or lower than the value of the service that produces such residual material.

(ii) *Reasonably expected introduction into a qualified solid waste disposal process*. Material meets the requirements of this paragraph (c)(1)(ii) if it is reasonably expected by the person who generates, purchases, or otherwise acquires it to be introduced within a reasonable time after such generation, purchase or acquisition into a qualified solid waste disposal process described in paragraph (d) of this section.

(2) *Exclusions from solid waste*. The following materials do not constitute solid waste:

(i) *Virgin material*. Except to the extent that virgin material constitutes an input to a final disposal process or residual material, solid waste excludes any virgin material. The term *virgin material* means material that has not been processed into an agricultural, commercial, consumer, governmental, or industrial product, or a component of any such product. Further, for this purpose, material continues to be virgin material after it has been grown, harvested, mined, or otherwise extracted from its naturally occurring location and cleaned, divided into component elements, modified, or enhanced, as long as further processing is required before it becomes an agricultural, commercial, consumer, or industrial product, or a component of any such product.

(ii) *Solids within liquids and liquid waste*. Solid waste excludes any solid or dissolved material in domestic sewage or other significant pollutant in water resources, such as silt, dissolved or suspended solids in industrial waste water effluents, dissolved materials in irrigation return flows or other common water pollutants, and liquid or gaseous waste.

(iii) *Precious metals*. Except to the extent that a precious metal constitutes an input to a final disposal process and/or an unrecoverable trace of the particular precious metal, solid waste excludes gold, silver, ruthenium, rhodium, palladium, osmium, iridium, platinum, gallium, rhenium, and any other precious metal material as may be identified by the Internal Revenue Service in future public administrative guidance.

(iv) *Hazardous material*. Solid waste excludes any hazardous material that must be disposed of at a facility that is subject to final permit requirements under subtitle C of title II of the Solid Waste Disposal Act as in effect on the date of the enactment of the Tax Reform Act of 1986 (which is October 22, 1986). See section 142(h)(1) of the Internal Revenue Code for the definition of qualified hazardous waste facilities.

(v) *Radioactive material.* Solid waste excludes any radioactive material subject to regulation under the Nuclear Regulatory Act (10 CFR 1.1 *et seq.*), as in effect on the issue date of the bonds.

(d) *Qualified solid waste disposal process.* The term *qualified solid waste disposal process* means the processing of solid waste in a final disposal process (as defined in paragraph (d)(1) of this section), an energy conversion process (as defined in paragraph (d)(2) of this section), or a recycling process (as defined in paragraph (d)(3) of this section). Absent an express restriction to the contrary in this section, a qualified solid waste disposal process may employ any biological, engineering, industrial, or technological method.

(1) *Final disposal process.* The term *final disposal process* means the placement of solid waste in a landfill (including, for this purpose, the spreading of solid waste over land in an environmentally compliant and safe manner with no intent to remove such solid waste), the incineration of solid waste without capturing any useful energy, or the containment of solid waste with a reasonable expectation as of the date of issue of the bonds that the containment will continue indefinitely and that the solid waste has no current or future beneficial use.

(2) *Energy conversion process.* The term *energy conversion process* means a thermal, chemical, or other process that is applied to solid waste to create and capture synthesis gas, heat, hot water, steam, or other useful energy. The energy conversion process begins at the point of the first application of such process. The energy conversion process ends at the point at which the useful energy is first created, captured, or incorporated into the form of synthesis gas, heat, hot water, or other useful energy and before any transfer or distribution of such synthesis gas, heat, hot water or other useful energy, regardless of whether such synthesis gas, heat, hot water, or other useful energy constitutes a first useful product within the meaning of paragraph (e) of this section.

(3) *Recycling process*—(i) *In general.* The term *recycling process* means reconstituting, transforming, or otherwise processing solid waste into a useful product. The recycling process begins at the point of the first application of a process to reconstitute or transform the solid waste into a useful product, such as decontamination, melting, repulping, shredding, or other processing of the solid waste to accomplish this purpose. The recycling process ends at the point of completion of production of the first useful product from the solid waste.

(ii) *Refurbishment, repair, or similar activities.* The term *recycling process* does not include refurbishment, repair, or similar activities. The term *refurbishment* means the breakdown and reassembly of a product if such activity is done on a product-by-product basis and if the finished product contains more than 30 percent of its original materials or components.

(e) *First useful product.* The term *first useful product* means the first product produced from the processing of solid waste in a solid waste disposal process that is useful for consumption in agricultural, consumer, commercial, governmental, or industrial operation or activity and that could be sold for such use, whether or not actually sold. A useful product includes both a product useful to an individual consumer as an ultimate end-use consumer product and a product useful to an industrial user as a material or input for processing in some stage of a manufacturing or production process to produce a different end-use consumer product. The determination of whether a useful product has been produced may take into account operational constraints that affect the point in production when a useful product reasonably can be extracted or isolated and sold independently. For this purpose, the costs of extracting, isolating, storing, and transporting the product to a market may only be taken into account as operational constraints if the product is not to be used as part of an integrated manufacturing or industrial process in the same location as that in which the product is produced.

(f) *Preliminary function.* A *preliminary function* is a function to collect, separate, sort, store, treat, process, disassemble, or handle solid waste that is preliminary to and directly related to a qualified solid waste disposal process.

(g) *Mixed-use facilities*—(1) *In general.* If a facility is used for both a qualified solid waste disposal function (including a qualified solid waste disposal process or a preliminary function) and a nonqualified function (a mixed-use facility), then the costs of the facility allocable to the qualified solid waste disposal function are determined using any reasonable method, based on all the facts and circumstances. See §1.103–8(a)(1) for allocation rules on amounts properly allocable to an exempt facility. Facilities qualify as functionally related and subordinate to a qualified solid waste disposal function only to the extent that they are functionally related and subordinate to the portion of the mixed-use facility that is used for one or more qualified solid waste disposal functions (including a qualified solid waste disposal process or a preliminary function).

(2) *Mixed inputs*—(i) *In general.* Except as otherwise provided in paragraph (g)(2)(ii) of this section, for each facility (or a portion of a mixed-use facility) performing a qualified solid waste disposal process or a preliminary function, the percentage of the costs of the property used for such process that are allocable to a qualified solid waste disposal process or a preliminary function cannot exceed the average annual percentage of solid waste processed in that qualified solid waste disposal process or that preliminary function while the issue is outstanding. The annual percentage of solid waste processed in that qualified solid waste disposal process or preliminary function for any year is the percentage, by weight or volume, of the total materials processed in that qualified solid waste disposal process or preliminary function that constitute solid waste for that year.

(ii) *Special rule for mixed-input processes if at least 65 percent of the materials processed are solid waste*—(A) *In general.* Except as otherwise provided in paragraph (g)(2)(ii)(B) of this section, for each facility (or a portion of a mixed-use facility) performing a qualified solid waste disposal process or preliminary function, if the annual percentage of solid waste processed in that qualified solid waste disposal process or preliminary function for each year that the issue is outstanding (beginning with the date such facility is placed in service within the meaning of §1.150–2(c)) equals at least 65 percent of the materials processed in that qualified solid waste disposal process or preliminary function, then all of the costs of the property used for such process are treated as allocable to a qualified solid waste disposal process. The annual percentage of solid waste processed in such qualified solid waste disposal process or preliminary function for any year is the percentage, by weight or volume, of the total materials processed in that qualified solid waste disposal process or preliminary function that constitute solid waste for that year.

(B) *Special rule for extraordinary events.* In the case of an extraordinary event that is beyond the control of the operator of a solid waste disposal facility (such as a natural disaster, strike, major utility disruption, or governmental intervention) and that causes a solid waste disposal facility to be unable to meet the 65 percent test under paragraph (g)(2)(ii)(A) of this section for a particular year, the percentage of solid waste processed for that year equals—

(*1*) The sum of the amount of solid waste processed in the solid waste disposal facility for the year affected by the extraordinary event and the amount of solid waste processed in the solid waste disposal facility during the following two years in excess of the amount required to meet the general 65 percent threshold for the facility during each of such two years; divided by

(*2*) The total materials processed in the solid waste disposal facility during the year affected by the extraordinary event. If the resulting measure of solid waste processed for the year affected by the extraordinary event equals at least 65 percent, then the facility is treated as meeting the requirements of the 65 percent test under paragraph (g)(2)(ii)(A) of this section for such year.

(iii) *Facilities functionally related and subordinate to mixed-input facilities.* Except to the extent that facilities are functionally related and subordinate to a mixed-input facility that meets the 65 percent test under paragraph (g)(2)(ii) of this section, facilities qualify as functionally related and subordinate to a mixed-input facility only to the extent that they are functionally related and subordinate to the qualified portion of the mixed-input facility that is used for one or more qualified solid waste disposal functions (including a qualified solid waste disposal process or a preliminary function).

(h) *Examples.* The following examples illustrate the application of this section:

Example 1. Nonqualified Unused Material—Cloth. Company A takes wool and weaves it into cloth and then sells the cloth to a manufacturer to manufacture clothing. The cloth is material that has not been used previously as a product of or otherwise used in an agricultural, commercial, consumer, governmental, or industrial operation or activity, or as a component of any such product or activity. Accordingly, the cloth is not solid waste.

Example 2. Residual Material—Waste Coal. Company B mines coal. Some of the ore mined is a low quality byproduct of coal mining commonly known as waste coal, which cannot be converted to energy under a normal energy-production process because the BTU content is too low. Waste coal has the lowest fair market value of any product produced in Company B's coal mining process. Waste coal is solid waste because it is residual material within the meaning of paragraph (c)(1)(i)(B) of this section and Company B reasonably expects to introduce the waste coal into a solid waste disposal process.

Example 3. Virgin Material—Logs. Company C cuts down trees and sells the logs to another company, which further processes the logs into lumber. In order to facilitate shipping, Company C cuts the trees into uniform logs. The trees are not solid waste because they are virgin material within the meaning of paragraph (c)(2)(i) of this section that are not being introduced into a final disposal process within the meaning of paragraph (d)(1) of this section. The division of such trees into uniform logs does not change the status of the trees as virgin material.

Example 4. Qualified Solid Waste Disposal Process—Landfill. Company D plans to construct a landfill. The landfill will not be subject to the final permit requirements under subtitle C of title II of the Solid Waste Disposal Act (as in effect on the date of enactment of the Tax Reform Act of 1986). As of the issue date, Company D expects that the landfill will be filled entirely with material that will qualify as solid waste within the meaning of paragraph (c) of this section. Placing solid waste into a landfill is a qualified solid waste disposal process. The landfill is a qualified solid waste disposal facility.

Example 5. Qualified Solid Waste Disposal Process—Recycling Tires. Company E owns a facility that converts used tires into roadbed material. The used tires are used material within the meaning of paragraph (c)(1)(i)(A) of this section that qualifies as solid waste. Between the introduction of the old tires into the roadbed manufacturing process and the completion of the roadbed material, the facility does not create any interim useful products. The process for the manufacturing of the roadbed material from the old tires is a qualified solid waste disposal process as a recycling process and the facility that converts the tires into roadbed material is a qualified solid waste disposal facility. This conclusion would be the same if the recycling process took place at more than one plant.

Example 6. Qualified Solid Waste Disposal Process—Energy Conversion Process. Company F receives solid waste from a municipal garbage collector. Company F burns that solid waste in an incinerator to remove exhaust gas and to produce heat. Company F further processes the heat in a heat exchanger to produce steam. Company F further processes the steam to generate electricity. The energy conversion process ends with the production of steam. The facilities used to burn the solid waste and to capture the steam as useful energy are qualified solid waste disposal facilities because they process solid waste in an energy conversion process. The generating facilities used to process the steam further to generate electricity are not engaged in the energy conversion process and are not qualified solid waste disposal facilities.

Example 7. Nonqualified Refurbishment. Company G purchases used cars and restores them. This restoration process includes disassembly, cleaning, and repairing of the cars. Parts that cannot be repaired are replaced. The restored cars contain at least 30 percent of the original parts. While the cars are used material, the refurbishing process is not a qualified solid waste disposal process. Accordingly, Company G's facility is not a qualified solid waste disposal facility.

Example 8. Qualified Solid Waste Disposal Facility—First Useful Product Rule—Paper Recycling. (i) Company H employs an integrated process to re-pulp discarded magazines, clean the pulp, and produce retail paper towel products. Operational constraints on Company H's process do not allow for reasonable extraction, isolation, and sale of the cleaned paper pulp independently without degradation of the pulp. Company H further processes the paper pulp into large industrial-sized rolls of paper which are approximately 12 feet in diameter. At this point in the process, Company H could either sell such industrial-sized rolls of paper to another company for further processing to produce retail paper products or it could produce those retail products itself. In general, paper pulp is a useful product that is bought and sold on the market as a material for input into manufacturing or production processes. The discarded magazines are used material within the meaning of paragraph (c)(1)(i)(A) of this section. Company H's facility is engaged in a recycling process within the meaning of paragraph (d)(3) of this section to the extent that it repulps and cleans the discarded magazines generally and further to the extent that it produces industrial-sized rolls of paper under the particular circumstances here. Specifically, taking into account the operational constraints on Company H's facility that limit its ability reasonably to extract, isolate, and sell the paper pulp independently, the first useful products within the meaning of paragraph (e) of this section from Company H's recycling process are the industrial-sized rolls of paper. The portion of Company H's facility that processes the discarded magazines and produces industrial-sized rolls of paper is a qualified solid waste disposal facility, and the portion of Company H's facility that further processes the industrial-sized rolls of paper into retail paper towels is not a qualified solid waste facility.

(ii) The facts are the same as in paragraph (i) of this *Example 8*, except that Company H is able reasonably to extract the cleaned paper pulp from the process without degradation of the pulp and to sell the cleaned paper pulp at its dock for a price that exceeds its costs of extracting the pulp from the process. Therefore, the paper pulp is the first useful product within the meaning of paragraph (e) of this section. As a result, the portion of Company H's facility that processes the discarded magazines is a qualified solid waste disposal facility, and the portion of Company H's facility that produces industrial-sized rolls of paper is not a qualified solid waste disposal facility. If, however, the only reasonable way Company H could sell the pulp was to transport the pulp to a distant market, then the costs of storing and transporting the pulp to the market may be taken into account in determining whether the pulp is the first useful product.

Example 9. Preliminary Function—Energy Conversion Process. (i) Company I owns a paper mill. At the mill, logs from nearby timber operations are processed through a machine that removes bark. The stripped logs are used to manufacture paper. The stripped bark has the lowest fair market value of any product produced from the paper mill. The stripped bark falls onto a conveyor belt that transports the bark to a storage bin that is used to store the bark briefly until Company I feeds the bark into a boiler. The conveyor belt and storage bin are used only for these purposes. The boiler is used only to create steam by burning the bark, and the steam is used to generate electricity. The stripped bark is solid waste because it is residual material within the meaning of paragraph (c)(1)(i)(B) of this section and Company I expects to introduce the bark into an energy conversion process within a reasonable period of time. The creation of steam from the stripped bark is an energy conversion process that starts with the incineration of the stripped bark. The energy conversion process is a qualified solid waste disposal process. The conveyor belt performs a collection activity that is preliminary and that is directly related to the solid waste disposal function. The storage bin performs a storage function that is preliminary and that is directly related to the solid waste disposal function. Thus, the conveyor belt and storage bin are solid waste disposal facilities. The bark removal process is not a preliminary function because it is not directly related to the energy conversion process and it does not become so related merely because it results in material that is solid waste.

(ii) The facts are the same as in paragraph (i) of this *Example 9*, except that the stripped bark represents only 55 percent by weight and volume of the materials that are transported by the conveyor belt. The remaining 45 percent of the materials transported by the conveyor belt are not solid waste and these other materials are sorted from the conveyor belt by a sorting machine immediately before the stripped bark arrives at the storage bin. Fifty-five percent of the costs of the conveyor belt and the sorting machine are allocable to solid waste disposal functions.

Example 10. Preliminary Function—Final Disposal Process. Company J owns a waste transfer station and uses it to collect, sort, and process solid waste. Company J uses its trucks to haul the solid waste to the nearest landfill. At least 65 percent by weight and volume of the material brought to the transfer station is solid waste. The waste transfer station and the trucks perform functions that are preliminary and directly related to the solid waste disposal function of the landfill. Thus, the waste transfer station and the trucks qualify as solid waste disposal facilities.

Example 11. Mixed-Input Facility. Company K owns an incinerator financed by an issue and uses the incinerator exclusively to burn coal and other solid material to create steam. Each year while the issue is outstanding, 40 percent by volume and 45 percent by weight of the solid material that Company K processes in the conversion process is coal. The remainder of the solid material is either used material or residual material within the meaning of paragraph (c)(1)(i) of this section. Sixty percent of the costs of the property used to perform the energy conversion process are allocable to a solid waste disposal function.

(i) *Effective/Applicability Dates*—(1) *In general*. Except as otherwise provided in this paragraph (i), this section applies to bonds to which section 142 applies that are sold on or after October 18, 2011.

(2) *Elective retroactive application*. Issuers may apply this section, in whole, but not in part, to outstanding bonds to which section 142 applies and which were sold before October 18, 2011.

(3) *Certain refunding bonds*. An issuer need not apply this section to bonds that are issued in a current refunding to refund bonds to which this section does not apply if the weighted average maturity of the refunding bonds is no longer than the remaining weighted average maturity of the refunded bonds.

[T.D. 9546, 76 FR 51881, Aug. 19, 2011; 76 FR 55255, Sept. 7, 2011]

§ 1.142(f)(4)–1 Manner of making election to terminate tax-exempt bond financing.

(a) *Overview*. Section 142(f)(4) permits a person engaged in the local furnishing of electric energy or gas (a local furnisher) that uses facilities financed with exempt facility bonds under section 142(a)(8) and that expands its service area in a manner inconsistent with the requirements of sections 142(a)(8) and (f) to make an election to ensure that those bonds will continue to be treated as exempt facility bonds. The election must meet the requirements of paragraphs (b) and (c) of this section.

(b) *Time for making election*—(1) *In general*. An election under section 142(f)(4)(B) must be filed with the Internal Revenue Service on or before 90 days after the date of the service area expansion that causes bonds to cease to meet the requirements of sections 142(a)(8) and (f).

(2) *Date of service area expansion*. For the purposes of this section, the date of the service area expansion is the first date on which the local furnisher is authorized to collect revenue for the provision of service in the expanded area.

(c) *Manner of making election*. An election under section 142(f)(4)(B) must be captioned "ELECTION TO TERMINATE TAX-EXEMPT BOND FINANCING", must be signed under penalties of perjury by a person who has authority to sign on behalf of the local furnisher, and must contain the following information—

(1) The name of the local furnisher;

(2) The tax identification number of the local furnisher;

(3) The complete address of the local furnisher;

(4) The date of the service area expansion;

(5) Identification of each bond issue subject to the election, including the complete name of each issue, the tax identification number of each issuer, the report number of the information return filed under section 149(e) for each issue, the issue date of each issue, the CUSIP number (if any) of the bond with the latest maturity of each issue, the issue price of each issue, the adjusted issue price of each issue as of the date of the election, the earliest date on which the bonds of each issue may be redeemed, and the principal amount of bonds of each issue to be redeemed on the earliest redemption date;

(6) A statement that the local furnisher making the election agrees to the conditions stated in section 142(f)(4)(B); and

(7) A statement that each issuer of the bonds subject to the election has received written notice of the election.

(d) *Effect on section 150(b)*. Except as provided in paragraph (e) of this section, if a local furnisher files an election within the period specified in paragraph (b) of this section, section 150(b) does not apply to bonds identified in the election during and after that period.

(e) *Effect of failure to meet agreements*. If a local furnisher fails to meet any of the conditions stated in an election pursuant to paragraph (c)(6) of this section, the election is invalid.

(f) *Corresponding provisions of the Internal Revenue Code of 1954*. Section 103(b)(4)(E) of the Internal Revenue Code of 1954 set forth corresponding requirements for the exclusion from gross income of the interest on bonds issued for facilities for the local furnishing of electric energy or gas. For the purposes of this section any reference to sections 142(a)(8) and (f) of the Internal Revenue Code of 1986 includes a reference to the corresponding portion of section 103(b)(4)(E) of the Internal Revenue Code of 1954.

(g) *Effective dates.* This section applies to elections made on or after January 19, 2001.

[T.D. 8941, 66 FR 4671, Jan. 18, 2001]

§ 1.143(g)–1 Requirements related to arbitrage.

(a) *In general.* Under section 143, for an issue to be an issue of qualified mortgage bonds or qualified veterans' mortgage bonds (together, mortgage revenue bonds), the requirements of section 143(g) must be satisfied. An issue satisfies the requirements of section 143(g) only if such issue meets the requirements of paragraph (b) of this section and, in the case of an issue 95 percent or more of the net proceeds of which are to be used to provide residences for veterans, such issue also meets the requirements of paragraph (c) of this section. The requirements of section 143(g) and this section are applicable in addition to the requirements of section 148 and §§ 1.148–0 through 1.148–11.

(b) *Effective rate of mortgage interest not to exceed bond yield by more than 1.125 percentage points*—(1) *Maximum yield.* An issue shall be treated as meeting the requirements of this paragraph (b) only if the excess of the effective rate of interest on the mortgages financed by the issue, over the yield on the issue, is not greater over the term of the issue than 1.125 percentage points.

(2) *Effective rate of interest.* (i) In determining the effective rate of interest on any mortgage for purposes of this paragraph (b), there shall be taken into account all fees, charges, and other amounts borne by the mortgagor that are attributable to the mortgage or to the bond issue. Such amounts include points, commitment fees, origination fees, servicing fees, and prepayment penalties paid by the mortgagor.

(ii) Items that shall be treated as borne by the mortgagor and shall be taken into account in calculating the effective rate of interest also include—

(A) All points, commitment fees, origination fees, or similar charges borne by the seller of the property; and

(B) The excess of any amounts received from any person other than the mortgagor by any person in connection with the acquisition of the mortgagor's interest in the property over the usual and reasonable acquisition costs of a person acquiring like property when owner-financing is not provided through the use of mortgage revenue bonds.

(iii) The following items shall not be treated as borne by the mortgagor and shall not be taken into account in calculating the effective rate of interest—

(A) Any expected rebate of arbitrage profit under paragraph (c) of this section; and

(B) Any application fee, survey fee, credit report fee, insurance charge or similar settlement or financing cost to the extent such amount does not exceed amounts charged in the area in cases when owner-financing is not provided through the use of mortgage revenue bonds. For example, amounts paid for Federal Housing Administration, Veterans' Administration, or similar private mortgage insurance on an individual's mortgage, or amounts paid for pool mortgage insurance on a pool of mortgages, are not taken into account so long as such amounts do not exceed the amounts charged in the area with respect to a similar mortgage, or pool of mortgages, that is not financed with mortgage revenue bonds. For this purpose, amounts paid for pool mortgage insurance include amounts paid to an entity (for example, the Government National Mortgage Association, the Federal National Mortgage Association (FNMA), the Federal Home Loan Mortgage Corporation, or other mortgage insurer) to directly guarantee the pool of mortgages financed with the bonds, or to guarantee a pass-through security backed by the pool of mortgages financed with the bonds.

(C) The following example illustrates the provisions of this paragraph (b)(2)(iii):

Example. Housing Authority X issues bonds intended to be qualified mortgage bonds under section 143(a). At the time the bonds are issued, X enters into an agreement with a group of mortgage lending institutions (lenders) under which the lenders agree to originate and service mortgages that meet certain specified requirements. After originating a specified amount of mortgages, each lender issues a ''pass-though security'' (each, a PTS) backed by the mortgages and sells the PTS to X. Under the terms of the PTS, the lender pays X an amount equal to the regular monthly payments on the mortgages (less certain fees), whether or not received by the lender (plus any prepayments and liquidation proceeds in the event of a foreclosure or other disposition of any mortgages). FNMA guarantees the timely payment of principal and interest on each PTS. From the payments received from each mortgagor, the lender pays a fee to FNMA for its guarantee of the PTS. The amounts paid to FNMA do not exceed the amounts charged in the area with respect to a similar pool of mortgages that is not financed with mortgage revenue bonds. Under this paragraph (b)(2)(iii), the fees for the guarantee provided by FNMA are an insurance charge because the guarantee is pool mortgage insurance. Because the amounts charged for the guarantee do not exceed the amounts charged in the area with respect to a similar pool of mortgages that is not financed with mortgage revenue bonds, the amounts charged for the guarantee are not taken into account in computing the effective rate of interest on the mortgages financed with X's bonds.

(3) *Additional rules.* To the extent not inconsistent with the Tax Reform Act of 1986, Public Law 99–514 (the 1986 Act), or subsequent law, § 6a.103A–2(i)(2) (other than paragraphs (i)(2)(i) and (i)(2)(ii)(A) through (C)) of this chapter applies to provide additional rules relating to compliance with the requirement that the effective rate of mortgage interest not exceed the bond yield by more than 1.125 percentage points.

(c) *Arbitrage and investment gains to be used to reduce costs of owner-financing.* As provided in section 143(g)(3), certain earnings on nonpurpose investments must either be paid or credited to mortgagors, or paid to the United States, in certain circumstances. To the extent not inconsistent with the 1986 Act or subsequent law, § 6a.103A–2(i)(4) of this chapter applies to provide guidance relating to compliance with this requirement.

(d) *Effective dates*—(1) *In general.* Except as otherwise provided in this section, § 1.143(g)–1 applies to bonds sold on or after May 23, 2005, that are subject to section 143.

(2) *Permissive retroactive application in whole.* Except as provided in paragraph (d)(4) of this section, issuers may apply § 1.143(g)–1, in whole, but not in part, to bonds sold before May 23, 2005, that are subject to section 143.

(3) *Bonds subject to the Internal Revenue Code of 1954.* Except as provided in paragraph (d)(4) of this section and subject to the applicable effective dates for the corresponding statutory provisions, an issuer may apply § 1.143(g)–1, in whole, but not in part, to bonds that are subject to section 103A(i) of the Internal Revenue Code of 1954.

(4) *Special rule for pre-July 1, 1993 bonds.* To the extent that an issuer applies this section to bonds issued before July 1, 1993, § 6a.103A–2(i)(3) of this chapter also applies to the bonds.

[T.D. 9204, 70 FR 29449, May 23, 2005]

§ 1.144–0 Table of contents.

This section lists the captioned paragraphs contained in §§ 1.144–1 and 1.144–2.

[T.D. 8712, 62 FR 2303, Jan. 16, 1997]

§ 1.144–1 Qualified small issue bonds, qualified student loan bonds, and qualified redevelopment bonds.

(a) *Overview.* Interest on a private activity bond is not excludable from gross income under section 103(a) unless the bond is a qualified bond. Under section 141(e)(1)(D), a qualified small issue bond issued under section 144(a) may be a qualified bond. Under section 144(a), any qualified small issue bond is any bond issued as a part of an issue 95 percent or more of the proceeds of which are to be used to provide certain manufacturing facilities or certain depreciable farm property and which meets other requirements. Under section 141(e)(1)(F) a qualified redevelopment bond issued under section 144(c) is a qualified bond. Under section 144(c), a qualified redevelopment bond is any bond issued as a part of an issue 95 percent or more of the net proceeds of which are to be used for one or more redevelopment purposes and which meets certain other requirements.

(b) *Scope.* Sections 1.144–0 through 1.144–2 apply for purposes of the rules for small issue bonds under section 144(a) and qualified redevelopment bonds under section 144(c), except that § 1.144–2 does not apply to the requirements for qualified small issue bonds under section 144(a)(4) (relating to the limitation on capital expenditures) or under section 144(a)(10) (relating to the aggregate limit of tax-exempt bonds per taxpayer).

(c) *Effective dates.* For effective dates of §§ 1.144–0 through 1.144–2, see § 1.141–16.

[T.D. 8712, 62 FR 2303, Jan. 16, 1997]

§ 1.144–2 Remedial actions.

The remedial action rules of § 1.142–2 apply to qualified small issue bonds issued under section 144(a) and to qualified redevelopment bonds issued under section 144(c), for this purpose treating those bonds as exempt facility bonds and the qualifying purposes for those bonds as exempt facilities.

[T.D. 8712, 62 FR 2303, Jan. 16, 1997]

§ 1.145–0 Table of contents.

This section lists the captioned paragraphs contained in §§ 1.145–1 and 1.145–2.

[T.D. 8712, 62 FR 2303, Jan. 16, 1997, as amended by T.D. 9234, 70 FR 75035, Dec. 19, 2005]

§ 1.145–1 Qualified 501(c)(3) bonds.

(a) *Overview.* Interest on a private activity bond is not excludable from gross income under section 103(a) unless the bond is a qualified bond. Under section 141(e)(1)(G), a qualified 501(c)(3) bond issued under section 145 is a qualified bond. Under section 145, a qualified 501(c)(3) bond is any bond issued as a part of an issue that satisfies the requirements of sections 145(a) through (d).

(b) *Scope.* Sections 1.145–0 through 1.145–2 apply for purposes of section 145(a).

(c) *Effective dates.* For effective dates of §§ 1.145–0 through 1.145–2, see § 1.141–15.

[T.D. 8712, 62 FR 2303, Jan. 16, 1997]

§ 1.145–2 Application of private activity bond regulations.

(a) *In general.* Except as provided in this section, §§ 1.141–0 through 1.141–15 apply to section 145(a). For example, under this section, § 1.141–1, and § 1.141–2, an issue ceases to be an issue of qualified 501(c)(3) bonds if the issuer or a conduit borrower 501(c)(3) organization takes a deliberate action, subsequent to the issue date, that causes the issue to fail to comply with the requirements of sections 141(e) and 145 (such as an action that results in revocation of exempt status of the 501(c)(3) organization).

(b) *Modification of private business tests.* In applying §§ 1.141–0 through 1.141–15 to section 145(a)—

(1) References to governmental persons include 501(c)(3) organizations with respect to their activities that do not constitute unrelated trades or businesses under section 513(a);

(2) References to ''10 percent'' and ''proceeds'' in the context of the private business use test and the private security or payment test mean ''5 percent'' and ''net proceeds''; and

(3) References to the private business use test in §§ 1.141–2 and 1.141–12 include the ownership test of section 145(a)(1).

(c) *Exceptions*—(1) *Certain provisions relating to governmental programs.* The following provisions do not apply to section 145: § 1.141–2(d)(4) (relating to the special rule for dispositions of personal property in the ordinary course of an established governmental program) and § 1.141–2(d)(5) (relating to the special rule for general obligation bond programs that finance a large number of separate purposes).

(2) *Costs of issuance.* Section 1.141–3(g)(6) does not apply to section 145(a)(2) to the extent that it provides that costs of issuance are allocated ratably among the other purposes for

which the proceeds are used. For purposes of section 145(a)(2), costs of issuance are treated as private business use.

(d) *Issuance costs financed by prior issue.* Solely for purposes of applying the private business use test to a refunding issue under § 1.141–13, the use of proceeds of the prior issue (or any earlier issue in a series of refundings) to pay issuance costs of the prior issue (or the earlier issue) is treated as a government use.

[T.D. 8712, 62 FR 2303, Jan. 16, 1997, as amended by T.D. 9234, 70 FR 75035, Dec. 19, 2005]

§ 1.147–0 Table of contents.

This section lists the captioned paragraphs contained in §§ 1.147–1 and 1.147–2.

[T.D. 8712, 62 FR 2304, Jan. 16, 1997]

§ 1.147–1 Other requirements applicable to certain private activity bonds.

(a) *Overview.* Interest on a private activity bond is not excludable from gross income under section 103(a) unless the bond is a qualified bond. Under section 147, certain requirements must be met for a private activity bond to qualify as a qualified bond.

(b) *Scope.* Sections 1.147–0 through 1.147–2 apply for purposes of the rules in section 147 for qualified private activity bonds that permit use of proceeds to acquire land for environmental purposes (section 147(c)(3)), permit use of proceeds for certain rehabilitations (section 147(d) (2) and (3)), prohibit use of proceeds to finance skyboxes, airplanes, gambling establishments and similar facilities (section 147(e)), and require public approval (section 147(f)), but not for the rules limiting use of proceeds to acquire land or existing property under sections 147(c) (1) and (2), and (d)(1).

(c) *Effective dates.* For effective dates of §§ 1.147–0 through 1.147–2, see § 1.141–16.

[T.D. 8712, 62 FR 2304, Jan. 16, 1997]

§ 1.147–2 Remedial actions.

The remedial action rules of § 1.142–2 apply to the rules in section 147 for qualified private activity bonds that permit use of proceeds to acquire land for environmental purposes (section 147(c)(3)), permit use of proceeds for certain rehabilitations (section 147(d) (2) and (3)), prohibit use of proceeds to finance skyboxes, airplanes, gambling establishments and similar facilities (section 147(e)), and require public approval (section 147(f)), for this purpose treating those private activity bonds subject to the rules under section 147 as exempt facility bonds and the qualifying purposes for those bonds as exempt facilities.

[T.D. 8712, 62 FR 2304, Jan. 16, 1997]

§ 1.147(b)–1 Bond maturity limitation-treatment of working capital.

Section 147(b) does not apply to proceeds of a private activity bond issue used to finance working capital expenditures.

[T.D. 8476, 58 FR 33515, June 18, 1993]

§ 1.148–0 Scope and table of contents.

(a) *Overview.* Under section 103(a), interest on certain obligations issued by States and local governments is excludable from the gross income of the owners. Section 148 was enacted to minimize the arbitrage benefits from investing gross proceeds of tax-exempt bonds in higher yielding investments and to remove the arbitrage incentives to issue more bonds, to issue bonds earlier, or to leave bonds outstanding longer than is otherwise reasonably necessary to accomplish the governmental purposes for which the bonds were issued. To accomplish these purposes, section 148 restricts the direct and indirect investment of bond proceeds in higher yielding investments and requires that certain earnings on higher yielding investments be rebated to the United States. Violation of these provisions causes the bonds in the issue to become *arbitrage bonds,* the interest on which is not excludable from the gross income of the owners under section 103(a). The regulations in §§ 1.148–1 through 1.148–11 apply in a manner consistent with these purposes.

(b) *Scope*. Sections 1.148–1 through 1.148–11 apply generally for purposes of the arbitrage restrictions on State and local bonds under section 148.

(c) *Table of contents*. This paragraph (c) lists the table of contents for §§ 1.148–1, 1.148–2, 1.148–3, 1.148–4, 1.148–5, 1.148–6, 1.148–7, 1.148–8, 1.148–9, 1.148–10 and 1.148–11.

(h) Safe harbor for establishing fair market value for guaranteed investment contracts and investments purchased for a yield restricted defeasance escrow.
(i) Special rule for certain broker's commissions and similar fees.
(j) Certain prepayments.

[T.D. 8476, 58 FR 33515, June 18, 1993, as amended by T.D. 8538, 59 FR 24041, May 10, 1994; T.D. 8718, 62 FR 25506, May 9, 1997; T.D. 9085, 68 FR 45775, Aug. 4, 2003; T.D. 9097, 68 FR 69022, Dec. 11, 2003]

§ 1.148–1 Definitions and elections.

(a) *In general.* The definitions in this section and the definitions under section 150 apply for purposes of section 148 and §§ 1.148–1 through 1.148–11.

(b) *Certain definitions.* The following definitions apply:

Accounting method means both the overall method used to account for gross proceeds of an issue (e.g., the cash method or a modified accrual method) and the method used to account for or allocate any particular item within that overall accounting method (e.g., accounting for investments, expenditures, allocations to and from different sources, and particular items of the foregoing).

Annuity contract means annuity contract as defined in section 72.

Available amount means available amount as defined in § 1.148–6(d)(3)(iii).

Bona fide debt service fund means a fund, which may include proceeds of an issue, that—

(1) Is used primarily to achieve a proper matching of revenues with principal and interest payments within each bond year; and

(2) Is depleted at least once each bond year, except for a reasonable carryover amount not to exceed the greater of:

(i) the earnings on the fund for the immediately preceding bond year; or

(ii) one-twelfth of the principal and interest payments on the issue for the immediately preceding bond year.

Bond year means, in reference to an issue, each 1-year period that ends on the day selected by the issuer. The first and last bond years may be short periods. If no day is selected by the issuer before the earlier of the final maturity date of the issue or the date that is 5 years after the issue date, bond years end on each anniversary of the issue date and on the final maturity date.

Capital project or capital projects means all capital expenditures, plus related working capital expenditures to which the de minimis rule under § 1.148–6(d)(3)(ii)(A) applies, that carry out the governmental purposes of an issue. For example, a capital project may include capital expenditures for one or more buildings, plus related start-up operating costs.

Commingled fund means any fund or account containing both gross proceeds of an issue and amounts in excess of $25,000 that are not gross proceeds of that issue if the amounts in the fund or account are invested and accounted for collectively, without regard to the source of funds deposited in the fund or account. An open-end regulated investment company under section 851, however, is not a commingled fund.

Computation date means each date on which the rebate amount for an issue is computed under § 1.148–3(e).

Computation period means the period between computation dates. The first computation period begins on the issue date and ends on the first computation date. Each succeeding computation period begins on the date immediately following the computation date and ends on the next computation date.

Consistently applied means applied uniformly within a fiscal period and between fiscal periods to account for gross proceeds of an issue and any amounts that are in a commingled fund.

De minimis amount means—

(1) In reference to original issue discount (as defined in section 1273(a)(1)) or premium on an obligation—

(i) An amount that does not exceed 2 percent multiplied by the stated redemption price at maturity; plus

(ii) Any original issue premium that is attributable exclusively to reasonable underwriters' compensation; and

(2) In reference to market discount (as defined in section 1278(a)(2)(A)) or premium on an obligation, an amount that does not exceed 2 percent multiplied by the stated redemption price at maturity.

Economic accrual method (also known as the *constant interest method* or *actuarial method*) means the method of computing yield that is based on the compounding of interest at the end of each compounding period.

Fair market value means fair market value as defined in § 1.148–5(d)(6).

Fixed rate investment means any investment whose yield is fixed and determinable on the issue date.

Fixed yield bond means any bond whose yield is fixed and determinable on the issue date using the assumptions and rules provided in § 1.148–4(b).

Fixed yield issue means any issue if each bond that is part of the issue is a fixed yield bond.

Gross proceeds means any proceeds and replacement proceeds of an issue.

Guaranteed investment contract includes any nonpurpose investment that has specifically negotiated withdrawal or reinvestment provisions and a specifically negotiated interest rate, and also includes any agreement to supply investments on two or more future dates (e.g., a forward supply contract).

Higher yielding investments means higher yielding investments as defined in section 148(b)(1).

Investment means any investment property as defined in sections 148(b)(2) and 148(b)(3), and any other tax-exempt bond.

Investment proceeds means any amounts actually or constructively received from investing proceeds of an issue.

Investment-type property is defined in paragraph (e) of this section.

Issue price means, except as otherwise provided, issue price as defined in sections 1273 and 1274. Generally, the issue price of bonds that are publicly offered is the first price at which a substantial amount of the bonds is sold to the public. Ten percent is a substantial amount. The public does not include bond houses, brokers, or similar persons or organizations acting in the capacity of underwriters or wholesalers. The issue price does not change if part of the issue is later sold at a different price. The issue price of bonds that are not substantially identical is determined separately. The issue price of bonds for which a bona fide public offering is made is determined as of the sale date based on reasonable expectations regarding the initial public offering price. If a bond is issued for property, the applicable Federal tax-exempt rate is used in lieu of the Federal rate in determining the issue price under section 1274. The issue price of bonds may not exceed their fair market value as of the sale date.

Issuer generally means the entity that actually issues the issue, and, unless the context or a provision clearly requires otherwise, each conduit borrower of the issue. For example, rules imposed on issuers to account for gross proceeds of an issue apply to a conduit borrower to account for any gross proceeds received under a purpose investment. Provisions regarding elections, filings, liability for the rebate amount, and certifications of reasonable expectations apply only to the actual issuer.

Multipurpose issue means an issue the proceeds of which are used for two or more separate purposes determined in accordance with § 1.148–9(h).

Net sale proceeds means sale proceeds, less the portion of those sale proceeds invested in a reasonably required reserve or replacement fund under section 148(d) and as part of a minor portion under section 148(e).

Nonpurpose investment means any investment property, as defined in section 148(b), that is not a purpose investment.

Payment means a payment as defined in § 1.148–3(d) for purposes of computing the rebate amount, and a payment as defined in § 1.148–5(b) for purposes of computing the yield on an investment.

Plain par bond means a qualified tender bond or a bond—

(1) Issued with not more than a de minimis amount of original issue discount or premium;

(2) Issued for a price that does not include accrued interest other than preissuance accrued interest;

(3) That bears interest from the issue date at a single, stated, fixed rate or that is a variable rate debt instrument under section 1275, in each case with interest unconditionally payable at least annually; and

(4) That has a lowest stated redemption price that is not less than its outstanding stated principal amount.

Plain par investment means an investment that is an obligation—

(1) Issued with not more than a de minimis amount of original issue discount or premium, or, if acquired on a

date other than the issue date, acquired with not more than a de minimis amount of market discount or premium;

(2) Issued for a price that does not include accrued interest other than pre-issuance accrued interest;

(3) That bears interest from the issue date at a single, stated, fixed rate or that is a variable rate debt instrument under section 1275, in each case with interest unconditionally payable at least annually; and

(4) That has a lowest stated redemption price that is not less than its outstanding stated principal amount.

Pre-issuance accrued interest means amounts representing interest that accrued on an obligation for a period not greater than one year before its issue date but only if those amounts are paid within one year after the issue date.

Proceeds means any sale proceeds, investment proceeds, and transferred proceeds of an issue. Proceeds do not include, however, amounts actually or constructively received with respect to a purpose investment that are properly allocable to the immaterially higher yield under §1.148–2(d) or section 143(g) or to qualified administrative costs recoverable under §1.148–5(e).

Program investment means a purpose investment that is part of a governmental program in which—

(1) The program involves the origination or acquisition of purpose investments;

(2) At least 95 percent (90 percent for qualified student loans under section 144(b)(1)(A)) of the cost of the purpose investments acquired under the program represents one or more loans to a substantial number of persons representing the general public, States or political subdivisions, 501(c)(3) organizations, persons who provide housing and related facilities, or any combination of the foregoing;

(3) At least 95 percent of the receipts from the purpose investments are used to pay principal, interest, or redemption prices on issues that financed the program, to pay or reimburse administrative costs of those issues or of the program, to pay or reimburse anticipated future losses directly related to the program, to finance additional purpose investments for the same general purposes of the program, or to redeem and retire governmental obligations at the next earliest possible date of redemption;

(4) The program documents prohibit any obligor on a purpose investment financed by the program or any related party to that obligor from purchasing bonds of an issue that finance the program in an amount related to the amount of the purpose investment acquired from that obligor; and

(5) The issuer has not waived the right to treat the investment as a program investment.

Purpose investment means an investment that is acquired to carry out the governmental purpose of an issue.

Qualified administrative costs means qualified administrative costs as defined in §1.148–5(e).

Qualified guarantee means a qualified guarantee as defined in §1.148–4(f).

Qualified hedge means a qualified hedge as defined in §1.148–4(h)(2).

Reasonable expectations or reasonableness. An issuer's expectations or actions are reasonable only if a prudent person in the same circumstances as the issuer would have those same expectations or take those same actions, based on all the objective facts and circumstances. Factors relevant to a determination of reasonableness include the issuer's history of conduct concerning stated expectations made in connection with the issuance of obligations, the level of inquiry by the issuer into factual matters, and the existence of covenants, enforceable by bondholders, that require implementation of specific expectations. For a conduit financing issue, factors relevant to a determination of reasonableness include the reasonable expectations of the conduit borrower, but only if, under the circumstances, it is reasonable and prudent for the issuer to rely on those expectations.

Rebate amount means 100 percent of the amount owed to the United States under section 148(f)(2), as further described in §1.148–3.

Receipt means a receipt as defined in §1.148–3(d) for purposes of computing the rebate amount, and a receipt as defined in §1.148–5(b) for purposes of computing yield on an investment.

Refunding escrow means one or more funds established as part of a single transaction or a series of related transactions, containing proceeds of a refunding issue and any other amounts to provide for payment of principal or interest on one or more prior issues. For this purpose, funds are generally not so established solely because of—

(1) The deposit of proceeds of an issue and replacement proceeds of the prior issue in an escrow more than 6 months apart, or

(2) The deposit of proceeds of completely separate issues in an escrow.

Replacement proceeds is defined in paragraph (c) of this section.

Restricted working capital expenditures means working capital expenditures that are subject to the proceeds-spent-last rule in §1.148–6(d)(3)(i) and are ineligible for any exception to that rule.

Sale proceeds means any amounts actually or constructively received from the sale of the issue, including amounts used to pay underwriters' discount or compensation and accrued interest other than pre-issuance accrued interest. Sale proceeds also include, but are not limited to, amounts derived from the sale of a right that is associated with a bond, and that is described in §1.148–4(b)(4). See also §1.148–4(h)(5) treating amounts received upon the termination of certain hedges as sale proceeds.

Stated redemption price means the redemption price of an obligation under the terms of that obligation, including any call premium.

Transferred proceeds means transferred proceeds as defined in §1.148–9 (or the applicable corresponding provision of prior law).

Unconditionally payable means payable under terms in which—

(1) Late payment or nonpayment results in a significant penalty to the borrower or reasonable remedies to the lender, and

(2) It is reasonably certain on the issue date that the payment will actually be made.

Value means value determined under §1.148–4(e) for a bond, and value determined under §1.148–5(d) for an investment.

Variable yield bond means any bond that is not a fixed yield bond.

Variable yield issue means any issue that is not a fixed yield issue.

Yield means yield computed under §1.148–4 for an issue, and yield computed under §1.148–5 for an investment.

Yield restricted means required to be invested at a yield that is not materially higher than the yield on the issue under section 148(a) and §1.148–2.

(c) *Definition of replacement proceeds*—(1) *In general.* Amounts are replacement proceeds of an issue if the amounts have a sufficiently direct nexus to the issue or to the governmental purpose of the issue to conclude that the amounts would have been used for that governmental purpose if the proceeds of the issue were not used or to be used for that governmental purpose. For this purpose, governmental purposes include the expected use of amounts for the payment of debt service on a particular date. The mere availability or preliminary earmarking of amounts for a governmental purpose, however, does not in itself establish a sufficient nexus to cause those amounts to be replacement proceeds. Replacement proceeds include, but are not limited to, sinking funds, pledged funds, and other replacement proceeds described in paragraph (c)(4) of this section, to the extent that those funds or amounts are held by or derived from a substantial beneficiary of the issue. A substantial beneficiary of an issue includes the issuer and any related party to the issuer, and, if the issuer is not a state, the state in which the issuer is located. A person is not a substantial beneficiary of an issue solely because it is a guarantor under a qualified guarantee.

(2) *Sinking fund. Sinking fund* includes a debt service fund, redemption fund, reserve fund, replacement fund, or any similar fund, to the extent reasonably expected to be used directly or indirectly to pay principal or interest on the issue.

(3) *Pledged fund*—(i) *In general.* A *pledged fund* is any amount that is directly or indirectly pledged to pay principal or interest on the issue. A pledge need not be cast in any particular form but, in substance, must provide reasonable assurance that the amount will be available to pay principal or interest on the issue, even if

the issuer encounters financial difficulties. A pledge to a guarantor of an issue is an indirect pledge to secure payment of principal or interest on the issue. A pledge of more than 50 percent of the outstanding stock of a corporation that is a conduit borrower of the issue is not treated as a pledge for this purpose, unless the corporation is formed or availed of to avoid the creation of replacement proceeds.

(ii) *Negative pledges.* An amount is treated as pledged to pay principal or interest on an issue if it is held under an agreement to maintain the amount at a particular level for the direct or indirect benefit of the bondholders or a guarantor of the bonds. An amount is not treated as pledged under this paragraph (c)(3)(ii), however, if—

(A) The issuer or a substantial beneficiary may grant rights in the amount that are superior to the rights of the bondholders or the guarantor; or

(B) The amount does not exceed reasonable needs for which it is maintained, the required level is tested no more frequently than every 6 months, and the amount may be spent without any substantial restriction other than a requirement to replenish the amount by the next testing date.

(4) *Other replacement proceeds*—(i) *Bonds outstanding longer than necessary*—(A) *In general.* Replacement proceeds arise to the extent that the issuer reasonably expects as of the issue date that—

(*1*) The term of an issue will be longer than is reasonably necessary for the governmental purposes of the issue, and

(*2*) There will be available amounts during the period that the issue remains outstanding longer than necessary. Whether an issue is outstanding longer than necessary is determined under §1.148–10. Replacement proceeds are created under this paragraph (c)(4)(i)(A) at the beginning of each fiscal year during which an issue remains outstanding longer than necessary in an amount equal to available amounts of the issuer as of that date.

(B) *Safe harbor against creation of replacement proceeds.* As a safe harbor, replacement proceeds do not arise under paragraph (c)(4)(i)(A) of this section—

(*1*) For the portion of an issue that is to be used to finance restricted working capital expenditures, if that portion is not outstanding longer than 2 years;

(*2*) For the portion of an issue (including a refunding issue) that is to be used to finance or refinance capital projects, if that portion has a weighted average maturity that does not exceed 120 percent of the average reasonably expected economic life of the financed capital projects, determined in the same manner as under section 147(b); or

(*3*) For the portion of an issue that is a refunding issue, if that portion has a weighted average maturity that does not exceed the remaining weighted average maturity of the prior issue, and the issue of which the prior issue is a part satisfies paragraph (c)(4)(i)(B) (*1*) or (*2*) of this section.

(ii) *Bonds financing a working capital reserve*—(A) *In general.* Except as otherwise provided in paragraph (c)(4)(ii)(B) of this section, replacement proceeds arise to the extent a working capital reserve is, directly or indirectly, financed with the proceeds of the issue (regardless of the expenditure of proceeds of the issue). Thus, for example, if an issuer that does not maintain a working capital reserve borrows to fund a working capital reserve, the issuer will have replacement proceeds. To determine the amount of a working capital reserve maintained, an issuer may use the average amount maintained as a working capital reserve during annual periods of at least 1 year, the last of which ends within 1 year before the issue date. For example, the amount of a working capital reserve may be computed using the average of the beginning or ending monthly balances of the amount maintained as a reserve (net of unexpended gross proceeds) during the 1 year period preceding the issue date.

(B) *Exception to creation of replacement proceeds.* Replacement proceeds do not arise under paragraph (c)(4)(ii)(A) of this section with respect to an issue—

(*1*) All of the net proceeds of which are spent within 6 months of the issue date under section 148(f)(4)(B)(iii)(I); or

(*2*) That is not subject to the rebate requirement under the exception provided by section 148(f)(4)(D).

(d) *Elections.* Except as otherwise provided, any required elections must be made in writing, and, once made, may not be revoked without the permission of the Commissioner.

(e) *Investment-type property*—(1) *In general.* Investment-type property includes any property, other than property described in section 148(b)(2)(A), (B), (C) or (E), that is held principally as a passive vehicle for the production of income. For this purpose, production of income includes any benefit based on the time value of money.

(2) *Prepayments*—(i) *In general*—(A) *Generally.* Except as otherwise provided in this paragraph (e)(2), a prepayment for property or services, including a prepayment for property or services that is made after the date that the contract to buy the property or services is entered into, also gives rise to investment-type property if a principal purpose for prepaying is to receive an investment return from the time the prepayment is made until the time payment otherwise would be made. A prepayment does not give rise to investment-type property if—

(*1*) Prepayments on substantially the same terms are made by a substantial percentage of persons who are similarly situated to the issuer but who are not beneficiaries of tax-exempt financing;

(*2*) The prepayment is made within 90 days of the reasonably expected date of delivery to the issuer of all of the property or services for which the prepayment is made; or

(*3*) The prepayment meets the requirements of paragraph (e)(2)(iii)(A) or (B) of this section.

(B) *Example.* The following example illustrates an application of this paragraph (e)(2)(i):

Example. Prepayment after contract is executed.

In 1998, City A enters into a ten-year contract with Company Y. Under the contract, Company Y is to provide services to City A over the term of the contract and in return City A will pay Company Y for its services as they are provided. In 2004, City A issues bonds to finance a lump sum payment to Company Y in satisfaction of City A's obligation to pay for Company Y's services to be provided over the remaining term of the contract. The use of bond proceeds to make the lump sum payment constitutes a prepayment for services under paragraph (e)(2)(i) of this section, even though the payment is made after the date that the contract is executed.

(ii) *Customary prepayments.* The determination of whether a prepayment satisfies paragraph (e)(2)(i)(A)(*1*) of this section is generally made based on all the facts and circumstances. In addition, a prepayment is deemed to satisfy paragraph (e)(2)(i)(A)(*1*) of this section if—

(A) The prepayment is made for—

(*1*) Maintenance, repair, or an extended warranty with respect to personal property (for example, automobiles or electronic equipment); or

(*2*) Updates or maintenance or support services with respect to computer software; and

(B) The same maintenance, repair, extended warranty, updates or maintenance or support services, as applicable, are regularly provided to nongovernmental persons on the same terms.

(iii) *Certain prepayments to acquire a supply of natural gas or electricity*—(A) *Natural gas prepayments.* A prepayment meets the requirements of this paragraph (e)(2)(iii)(A) if—

(*1*) It is made by or for one or more utilities that are owned by a governmental person, as defined in §1.141–1(b) (each of which is referred to in this paragraph (e)(2)(iii)(A) as the issuing municipal utility), to purchase a supply of natural gas; and

(*2*) At least 90 percent of the prepaid natural gas financed by the issue is used for a qualifying use. Natural gas is used for a qualifying use if it is to be—

(*i*) Furnished to retail gas customers of the issuing municipal utility who are located in the natural gas service area of the issuing municipal utility, provided, however, that gas used to produce electricity for sale shall not be included under this paragraph (e)(2)(iii)(A)(*2*)(*i*);

(*ii*) Used by the issuing municipal utility to produce electricity that will be furnished to retail electric customers of the issuing municipal utility who are located in the electricity service area of the issuing municipal utility;

(*iii*) Used by the issuing municipal utility to produce electricity that will be sold to a utility that is owned by a governmental person and furnished to retail electric customers of the purchaser who are located in the electricity service area of the purchaser;

(*iv*) Sold to a utility that is owned by a governmental person if the requirements of paragraph (e)(2)(iii)(A)(*2*)(*i*), (*ii*) or (*iii*) of this section are satisfied by the purchaser (treating the purchaser as the issuing municipal utility); or

(*v*) Used to fuel the pipeline transportation of the prepaid gas supply acquired in accordance with this paragraph (e)(2)(iii)(A).

(B) *Electricity prepayments.* A prepayment meets the requirements of this paragraph (e)(2)(iii)(B) if—

(*1*) It is made by or for one or more utilities that are owned by a governmental person (each of which is referred to in this paragraph (e)(2)(iii)(B) as the issuing municipal utility) to purchase a supply of electricity; and

(*2*) At least 90 percent of the prepaid electricity financed by the issue is used for a qualifying use. Electricity is used for a qualifying use if it is to be—

(*i*) Furnished to retail electric customers of the issuing municipal utility who are located in the electricity service area of the issuing municipal utility; or

(*ii*) Sold to a utility that is owned by a governmental person and furnished to retail electric customers of the purchaser who are located in the electricity service area of the purchaser.

(C) *Service area.* For purposes of this paragraph (e)(2)(iii), the service area of a utility owned by a governmental person consists of—

(*1*) Any area throughout which the utility provided, at all times during the 5-year period ending on the issue date—

(*i*) In the case of a natural gas utility, natural gas transmission or distribution service; and

(*ii*) In the case of an electric utility, electricity distribution service; and

(*2*) Any area recognized as the service area of the utility under state or Federal law.

(D) *Retail customer.* For purposes of this paragraph (e)(2)(iii), a retail customer is a customer that purchases natural gas or electricity, as applicable, other than for resale.

(E) *Commodity swaps.* A prepayment does not fail to meet the requirements of this paragraph (e)(2)(iii) by reason of any commodity swap contract that may be entered into between the issuer and an unrelated party (other than the gas or electricity supplier), or between the gas or electricity supplier and an unrelated party (other than the issuer), so long as each swap contract is an independent contract. A swap contract is an independent contract if the obligation of each party to perform under the swap contract is not dependent on performance by any person (other than the other party to the swap contract) under another contract (for example, a gas or electricity supply contract or another swap contract); provided, however, that a commodity swap contract will not fail to be an independent contract solely because the swap contract may terminate in the event of a failure of a gas or electricity supplier to deliver gas or electricity for which the swap contract is a hedge.

(F) *Remedial action.* Issuers may apply principles similar to the rules of §1.141–12, including §1.141–12(d) (relating to redemption or defeasance of nonqualified bonds) and §1.141–12(e) (relating to alternative use of disposition proceeds), to cure a violation of paragraph (e)(2)(iii)(A)(*2*) or (e)(2)(iii)(B)(*2*) of this section. For this purpose, the amount of nonqualified bonds is determined in the same manner as for output contracts taken into account under the private business tests, including the principles of §1.141–7(d), treating nonqualified sales of gas or electricity under this paragraph (e)(2)(iii) as satisfying the benefits and burdens test under §1.141–7(c)(1).

(iv) *Additional prepayments as permitted by the Commissioner.* The Commissioner may, by published guidance, set forth additional circumstances in which a prepayment does not give rise to investment-type property.

[T.D. 8476, 58 FR 33517, June 18, 1993; 58 FR 44452, Aug. 23, 1993, as amended by T.D. 8538, 59 FR 24041, May 10, 1994; T.D. 8718, 62 FR 25507, May 9, 1997; T.D. 9085, 68 FR 45775, Aug. 4, 2003]

§ 1.148–2 General arbitrage yield restriction rules.

(a) *In general.* Under section 148(a), the direct or indirect investment of the gross proceeds of an issue in higher yielding investments causes the bonds of the issue to be arbitrage bonds. The investment of proceeds in higher yielding investments, however, during a temporary period described in paragraph (e) of this section, as part of a reasonably required reserve or replacement fund described in paragraph (f) of this section, or as part of a minor portion described in paragraph (g) of this section does not cause the bonds of the issue to be arbitrage bonds. Bonds are not arbitrage bonds under this section as a result of an inadvertent, insubstantial error.

(b) *Reasonable expectations*—(1) *In general.* Except as provided in paragraph (c) of this section, the determination of whether an issue consists of arbitrage bonds under section 148(a) is based on the issuer's reasonable expectations as of the issue date regarding the amount and use of the gross proceeds of the issue.

(2) *Certification of expectations*—(i) *In general.* An officer of the issuer responsible for issuing the bonds must, in good faith, certify the issuer's expectations as of the issue date. The certification must state the facts and estimates that form the basis for the issuer's expectations. The certification is evidence of the issuer's expectations, but does not establish any conclusions of law or any presumptions regarding either the issuer's actual expectations or their reasonableness.

(ii) *Exceptions to certification requirement.* An issuer is not required to make a certification for an issue under paragraph (b)(2)(i) of this section if—

(A) The issuer reasonably expects as of the issue date that there will be no unspent gross proceeds after the issue date, other than gross proceeds in a bona fide debt service fund (e.g., equipment lease financings in which the issuer purchases equipment in exchange for an installment payment note); or

(B) The issue price of the issue does not exceed $1,000,000.

(c) *Intentional acts.* The taking of any deliberate, intentional action by the issuer or person acting on its behalf after the issue date in order to earn arbitrage causes the bonds of the issue to be arbitrage bonds if that action, had it been expected on the issue date, would have caused the bonds to be arbitrage bonds. An intent to violate the requirements of section 148 is not necessary for an action to be intentional.

(d) *Materially higher yielding investments*—(1) *In general.* The yield on investments is materially higher than the yield on the issue to which the investments are allocated if the yield on the investments over the term of the issue exceeds the yield on the issue by an amount in excess of the applicable definition of *materially higher* set forth in paragraph (d)(2) of this section. If yield restricted investments in the same class are subject to different definitions of *materially higher*, the applicable definition of *materially higher* that produces the lowest permitted yield applies to all the investments in the class. The yield on the issue is determined under §1.148–4. The yield on investments is determined under §1.148–5.

(2) *Definitions of materially higher yield*—(i) *General rule for purpose and nonpurpose investments.* For investments that are not otherwise described in this paragraph (d)(2), materially higher means one-eighth of 1 percentage point.

(ii) *Refunding escrows and replacement proceeds.* For investments in a refunding escrow or for investments allocable to replacement proceeds, materially higher means one-thousandth of 1 percentage point.

(iii) *Program investments.* For program investments that are not described in paragraph (d)(2)(iv) of this section, materially higher means 1 and one-half percentage points.

(iv) *Student loans.* For qualified student loans that are program investments, materially higher means 2 percentage points.

(v) *Tax-exempt investments.* For investments that are tax-exempt bonds and are not investment property under section 148(b)(3), no yield limitation applies.

(3) *Mortgage loans.* Qualified mortgage loans that satisfy the requirements of section 143(g) are treated as

meeting the requirements of this paragraph (d).

(e) *Temporary periods*—(1) *In general.* During the temporary periods set forth in this paragraph (e), the proceeds and replacement proceeds of an issue may be invested in higher yielding investments without causing bonds in the issue to be arbitrage bonds. This paragraph (e) does not apply to refunding issues (see §1.148–9).

(2) *General 3-year temporary period for capital projects and qualified mortgage loans*—(i) *In general.* The net sale proceeds and investment proceeds of an issue reasonably expected to be allocated to expenditures for capital projects qualify for a temporary period of 3 years beginning on the issue date (the *3-year temporary period).* The 3-year temporary period also applies to the proceeds of qualified mortgage bonds and qualified veterans' mortgage bonds by substituting *qualified mortgage loans* in each place that *capital projects* appears in this paragraph (e)(2). The 3-year temporary period applies only if the issuer reasonably expects to satisfy the expenditure test, the time test, and the due diligence test. These rules apply separately to each conduit loan financed by an issue (other than qualified mortgage loans), with the expenditure and time tests measured from the issue date of the issue.

(A) *Expenditure test.* The expenditure test is met if at least 85 percent of the net sale proceeds of the issue are allocated to expenditures on the capital projects by the end of the 3-year temporary period.

(B) *Time test.* The time test is met if the issuer incurs within 6 months of the issue date a substantial binding obligation to a third party to expend at least 5 percent of the net sale proceeds of the issue on the capital projects. An obligation is not binding if it is subject to contingencies within the issuer's or a related party's control.

(C) *Due diligence test.* The due diligence test is met if completion of the capital projects and the allocation of the net sale proceeds of the issue to expenditures proceed with due diligence.

(ii) *5-year temporary period.* In the case of proceeds expected to be allocated to a capital project involving a substantial amount of construction expenditures (as defined in §1.148–7), a 5-year temporary period applies in lieu of the 3-year temporary period if the issuer satisfies the requirements of paragraph (e)(2)(i) of this section applied by substituting ''5 years'' in each place that ''3 years'' appears, and both the issuer and a licensed architect or engineer certify that the longer period is necessary to complete the capital project.

(3) *Temporary period for restricted working capital expenditures*—(i) *General rule.* The proceeds of an issue that are reasonably expected to be allocated to restricted working capital expenditures within 13 months after the issue date qualify for a temporary period of 13 months beginning on the issue date. Paragraph (e)(2) of this section contains additional temporary period rules for certain working capital expenditures that are treated as part of a capital project.

(ii) *Longer temporary period for certain tax anticipation issues.* If an issuer reasonably expects to use tax revenues arising from tax levies for a single fiscal year to redeem or retire an issue, and the issue matures by the earlier of 2 years after the issue date or 60 days after the last date for payment of those taxes without interest or penalty, the temporary period under paragraph (e)(3)(i) of this section is extended until the maturity date of the issue.

(4) *Temporary period for pooled financings*—(i) *In general.* Proceeds of a pooled financing issue reasonably expected to be used to finance purpose investments qualify for a temporary period of 6 months while held by the issuer before being loaned to a conduit borrower. Any otherwise available temporary period for proceeds held by a conduit borrower, however, is reduced by the period of time during which those proceeds were held by the issuer before being loaned. For example, if the proceeds of a pooled financing issue loaned to a conduit borrower would qualify for a 3-year temporary period, and the proceeds are held by the issuer for 5 months before being loaned to the conduit borrower, the proceeds qualify for only an additional 31-month temporary period after being loaned to the conduit borrower. Except as provided in paragraph (e)(4)(iv) of this section,

this paragraph (e)(4) does not apply to any qualified mortgage bond or qualified veterans' mortgage bond under section 143.

(ii) *Loan repayments*—(A) *Amount held by the issuer.* The temporary period under this paragraph (e)(4) for proceeds from the sale or repayment of any loan that are reasonably expected to be used to make or finance new loans is 3 months.

(B) *Amounts re-loaned to conduit borrowers.* Any temporary period for proceeds held by a conduit borrower under a new loan from amounts described in paragraph (e)(4)(ii)(A) of this section is determined by treating the date the new loan is made as the issue date and by reducing the temporary period by the period the amounts were held by the issuer following the last repayment.

(iii) *Construction issues.* If all or a portion of a pooled financing issue qualifies as a construction issue under §1.148–7(b)(6), paragraph (e)(4)(i) of this section is applied by substituting "2 years" for "6 months."

(iv) *Amounts re-loaned for qualified mortgage loans.* The temporary period under this paragraph (e)(4) for proceeds from the sale, prepayment, or repayment of any qualified mortgage loan that are reasonably expected to be used to make or finance new qualified mortgage loans is 3 years.

(5) *Temporary period for replacement proceeds*—(i) *In general.* Except as otherwise provided, replacement proceeds qualify for a temporary period of 30 days beginning on the date that the amounts are first treated as replacement proceeds.

(ii) *Temporary period for bona fide debt service funds.* Amounts in a bona fide debt service fund for an issue qualify for a temporary period of 13 months. If only a portion of a fund qualifies as a bona fide debt service fund, only that portion qualifies for this temporary period.

(6) *Temporary period for investment proceeds.* Except as otherwise provided in this paragraph (e), investment proceeds qualify for a temporary period of 1 year beginning on the date of receipt.

(7) *Other amounts.* Gross proceeds not otherwise eligible for a temporary period described in this paragraph (e) qualify for a temporary period of 30 days beginning on the date of receipt.

(f) *Reserve or replacement funds*—(1) *General 10 percent limitation on funding with sale proceeds.* An issue consists of arbitrage bonds if sale proceeds of the issue in excess of 10 percent of the stated principal amount of the issue are used to finance any reserve or replacement fund, without regard to whether those sale proceeds are invested in higher yielding investments. If an issue has more than a de minimis amount of original issue discount or premium, the issue price (net of pre-issuance accrued interest) is used to measure the 10-percent limitation in lieu of stated principal amount. This rule does not limit the use of amounts other than sale proceeds of an issue to fund a reserve or replacement fund.

(2) *Exception from yield restriction for reasonably required reserve or replacement funds*—(i) *In general.* The investment of amounts that are part of a reasonably required reserve or replacement fund in higher yielding investments will not cause an issue to consist of arbitrage bonds. A reasonably required reserve or replacement fund may consist of all or a portion of one or more funds, however labelled, derived from one or more sources. Amounts in a reserve or replacement fund in excess of the amount that is reasonably required are not part of a reasonably required reserve or replacement fund.

(ii) *Size limitation.* The amount of gross proceeds of an issue that qualifies as a reasonably required reserve or replacement fund may not exceed an amount equal to the least of 10 percent of the stated principal amount of the issue, the maximum annual principal and interest requirements on the issue, or 125 percent of the average annual principal and interest requirements on the issue. If an issue has more than a de minimis amount of original issue discount or premium, the issue price of the issue (net of pre-issuance accrued interest) is used to measure the 10 percent limitation in lieu of its stated principal amount. For a reserve or replacement fund that secures more than one issue (e.g. a parity reserve fund), the size limitation may be measured on an aggregate basis.

(iii) *Valuation of investments.* Investments in a reasonably required reserve or replacement fund may be valued in any reasonable, consistently applied manner that is permitted under § 1.148–5.

(iv) *150 percent debt service limitation on investment in nonpurpose investments for certain private activity bonds.* Section 148(d)(3) contains additional limits on the amount of gross proceeds of an issue of private activity bonds, other than qualified 501(c)(3) bonds, that may be invested in higher yielding nonpurpose investments without causing the bonds to be arbitrage bonds. For purposes of these rules, *initial temporary period* means the temporary periods under paragraphs (e)(2), (e)(3), and (e)(4) of this section and under § 1.148–9(d)(2)(i), (ii), and (iii).

(3) *Certain parity reserve funds.* The limitation contained in paragraph (f)(1) of this section does not apply to an issue if the master legal document authorizing the issuance of the bonds (e.g., a master indenture) was adopted before August 16, 1986, and that document—

(i) Requires a reserve or replacement fund in excess of 10 percent of the sale proceeds, but not more than maximum annual principal and interest requirements;

(ii) Is not amended after August 31, 1986 (other than to permit the issuance of additional bonds as contemplated in the master legal document); and

(iii) Provides that bonds having a parity of security may not be issued by or on behalf of the issuer for the purposes provided under the document without satisfying the reserve fund requirements of the indenture.

(g) *Minor portion.* Under section 148(e), a bond of an issue is not an arbitrage bond solely because of the investment in higher yielding investments of gross proceeds of the issue in an amount not exceeding the lesser of—

(1) 5 percent of the sale proceeds of the issue; or

(2) $100,000.

(h) *Certain waivers permitted.* On or before the issue date, an issuer may elect to waive the right to invest in higher yielding investments during any temporary period under paragraph (e) of this section or as part of a reasonably required reserve or replacement fund under paragraph (f) of this section. At any time, an issuer may waive the right to invest in higher yielding investments as part of a minor portion under paragraph (g) of this section.

[T.D. 8476, 58 FR 33520, June 18, 1993; 58 FR 44452, Aug. 23, 1993, as amended by T.D. 8538, 59 FR 24042, May 10, 1994; T.D. 8718, 62 FR 25507, May 9, 1997]

§ 1.148–3 General arbitrage rebate rules.

(a) *In general.* Section 148(f) requires that certain earnings on nonpurpose investments allocable to the gross proceeds of an issue be paid to the United States to prevent the bonds in the issue from being arbitrage bonds. The arbitrage that must be rebated is based on the difference between the amount actually earned on nonpurpose investments and the amount that would have been earned if those investments had a yield equal to the yield on the issue.

(b) *Definition of rebate amount.* As of any date, the rebate amount for an issue is the excess of the future value, as of that date, of all receipts on nonpurpose investments over the future value, as of that date, of all payments on nonpurpose investments.

(c) *Computation of future value of a payment or receipt.* The future value of a payment or receipt at the end of any period is determined using the economic accrual method and equals the value of that payment or receipt when it is paid or received (or treated as paid or received), plus interest assumed to be earned and compounded over the period at a rate equal to the yield on the issue, using the same compounding interval and financial conventions used to compute that yield.

(d) *Payments and receipts*—(1) *Definition of payments.* For purposes of this section, payments are—

(i) Amounts actually or constructively paid to acquire a nonpurpose investment (or treated as paid to a commingled fund);

(ii) For a nonpurpose investment that is first allocated to an issue on a date after it is actually acquired (e.g., an investment that becomes allocable to transferred proceeds or to replacement proceeds) or that becomes subject to the rebate requirement on a date after it is actually acquired (e.g., an investment allocated to a reasonably required reserve or replacement fund for a construction issue at the end of the 2-year spending period), the value of that investment on that date;

(iii) For a nonpurpose investment that was allocated to an issue at the end of the preceding computation period, the value of that investment at the beginning of the computation period;

(iv) On the last day of each bond year during which there are amounts allocated to gross proceeds of an issue that are subject to the rebate requirement, and on the final maturity date, a computation credit of $1,000; and

(v) Yield reduction payments on nonpurpose investments made pursuant to § 1.148–5(c).

(2) *Definition of receipts.* For purposes of this section, receipts are—

(i) Amounts actually or constructively received from a nonpurpose investment (including amounts treated as received from a commingled fund), such as earnings and return of principal;

(ii) For a nonpurpose investment that ceases to be allocated to an issue before its disposition or redemption date (e.g., an investment that becomes allocable to transferred proceeds of another issue or that ceases to be allocable to the issue pursuant to the universal cap under § 1.148–6) or that ceases to be subject to the rebate requirement on a date earlier than its disposition or redemption date (e.g., an investment allocated to a fund initially subject to the rebate requirement but that subsequently qualifies as a bona fide debt service fund), the value of that nonpurpose investment on that date; and

(iii) For a nonpurpose investment that is held at the end of a computation period, the value of that investment at the end of that period.

(3) *Special rules for commingled funds.* Section 1.148–6(e) provides special rules to limit certain of the required determinations of payments and receipts for investments of a commingled fund.

(e) *Computation dates*—(1) *In general.* For a fixed yield issue, an issuer may treat any date as a computation date. For a variable yield issue, an issuer:

(i) May treat the last day of any bond year ending on or before the latest date on which the first rebate amount is required to be paid under paragraph (f) of this section (the *first required payment date*) as a computation date but may not change that treatment after the first payment date; and

(ii) After the first required payment date, must consistently treat either the end of each bond year or the end of each fifth bond year as computation dates and may not change these computation dates after the first required payment date.

(2) *Final computation date.* The date that an issue is discharged is the final computation date. For an issue retired within 3 years of the issue date, however, the final computation date need not occur before the end of 8 months after the issue date or during the period in which the issuer reasonably expects that any of the spending exceptions under § 1.148–7 will apply to the issue.

(f) *Amount of required rebate installment payment*—(1) *Amount of interim rebate payments.* The first rebate installment payment must be made for a computation date that is not later than 5 years after the issue date. Subsequent rebate installment payments must be made for a computation date that is not later than 5 years after the previous computation date for which an installment payment was made. A rebate installment payment must be in an amount that, when added to the future value, as of the computation date, of previous rebate payments made for the issue, equals at least 90 percent of the rebate amount as of that date.

(2) *Amount of final rebate payment.* For the final computation date, a final rebate payment must be paid in an amount that, when added to the future value of previous rebate payments made for the issue, equals 100 percent of the rebate amount as of that date.

(3) *Future value of rebate payments.* The future value of a rebate payment is determined under paragraph (c) of this section. This value is computed by taking into account recoveries of overpayments.

(g) *Time and manner of payment.* Each rebate payment must be paid no later than 60 days after the computation date to which the payment relates. Any rebate payment paid within this 60-day period may be treated as paid on the computation date to which it relates. A rebate payment is paid when it is filed with the Internal Revenue Service at the place or places designated by the Commissioner. A payment must be accompanied by the form provided by the Commissioner for this purpose.

(h) *Penalty in lieu of loss of tax exemption*—(1) *In general.* The failure to pay the correct rebate amount when required will cause the bonds of the issue to be arbitrage bonds, unless the Commissioner determines that the failure was not caused by willful neglect and the issuer promptly pays a penalty to the United States. If no bond of the issue is a private activity bond (other than a qualified 501(c)(3) bond), the penalty equals 50 percent of the rebate amount not paid when required to be paid, plus interest on that amount. Otherwise, the penalty equals 100 percent of the rebate amount not paid when required to be paid, plus interest on that amount.

(2) *Interest on underpayments.* Interest accrues at the underpayment rate under section 6621, beginning on the date the correct rebate amount is due and ending on the date 10 days before it is paid.

(3) *Waivers of the penalty.* The penalty is automatically waived if the rebate amount that the issuer failed to pay plus interest is paid within 180 days after discovery of the failure, unless, the Commissioner determines that the failure was due to willful neglect, or the issue is under examination by the Commissioner at any time during the period beginning on the date the failure first occurred and ending on the date 90 days after the receipt of the rebate amount. Generally, extensions of this 180-day period and waivers of the penalty in other cases will be granted by the Commissioner only in unusual circumstances. For purposes of this paragraph (h)(3), willful neglect does not include a failure that is attributable solely to the permissible retroactive selection of a short first bond year if the rebate amount that the issuer failed to pay is paid within 60 days of the selection of that bond year.

(4) *Application to alternative penalty under §1.148–7.* Paragraphs (h) (1), (2), and (3) of this section apply to failures to pay penalty payments under §1.148–7 (*alternative penalty amounts*) by substituting *alternative penalty amounts* for *rebate amount* and *the last day of each spending period* for *computation date.*

(i) *Recovery of overpayment of rebate*—(1) *In general.* An issuer may recover an overpayment for an issue of tax-exempt bonds by establishing to the satisfaction of the Commissioner that the overpayment occurred. An overpayment is the excess of the amount paid to the United States for an issue under section 148 over the sum of the rebate amount for the issue as of the most recent computation date and all amounts that are otherwise required to be paid under section 148 as of the date the recovery is requested.

(2) *Limitations on recovery.* (i) An overpayment may be recovered only to the extent that a recovery on the date that it is first requested would not result in an additional rebate amount if that date were treated as a computation date.

(ii) Except for overpayments of penalty in lieu of rebate under section 148(f)(4)(C)(vii) and §1.148–7(k), an overpayment of less than $5,000 may not be recovered before the final computation date.

(j) *Examples.* The provisions of this section may be illustrated by the following examples.

Example 1. Calculation and payment of rebate for a fixed yield issue. (i) *Facts.* On January 1, 1994, City *A* issues a fixed yield issue and invests all the sale proceeds of the issue ($49 million). There are no other gross proceeds. The issue has a yield of 7.0000 percent per year compounded semiannually (computed on a 30 day month/360 day year basis). City *A* receives amounts from the investment and immediately expends them for the governmental purpose of the issue as follows:

Date	Amount
2/1/94	$3,000,000
5/1/94	5,000,000
1/1/95	5,000,000
9/1/95	20,000,000
3/1/96	22,000,000

(ii) *First computation date.* (A) City *A* chooses January 1, 1999, as its first computation date. This date is the latest date that may be used to compute the first required rebate installment payment. The rebate amount as of this date is computed by determining the future value of the receipts and the payments for the investment. The compounding interval is each 6-month (or shorter) period and the 30 day month/360 day year basis is used because these conventions were used to compute yield on the issue. The future value of these amounts, plus the computation credit, as of January 1, 1999, is:

Date	Receipts (payments)	FV (7.0000 percent)
1/1/94	($49,000,000)	($69,119,339)
2/1/94	3,000,000	4,207,602
5/1/94	5,000,000	6,893,079
1/1/95	5,000,000	6,584,045
1/1/95	(1,000)	(1,317)
9/1/95	20,000,000	25,155,464
1/1/96	(1,000)	1,229)
3/1/96	22,000,000	26,735,275
1/1/97	(1,000)	(1,148)
Rebate amount (1/01/99)	....	452,432

(B) City *A* pays 90 percent of the rebate amount ($407,189) to the United States within 60 days of January 1, 1999.

(iii) *Second computation date.* (A) On the next required computation date, January 1, 2004, the future value of the payments and receipts is:

Date	Receipts (payments)	FV (7.0000 percent)
1/1/99	$452,432	$638,200
Rebate amount (1/01/04)	....	638,200

(B) As of this computation date, the future value of the payment treated as made on January 1, 1999, is $574,380, which equals at least 90 percent of the rebate amount as of this computation date ($638,200 × 0.9), and thus no additional rebate payment is due as of this date.

(iv) *Final computation date.* (A) On January 1, 2009, City *A* redeems all the bonds, and thus this date is the final computation date. The future value of the receipts and payments as of this date is:

Date	Receipts (payments)	FV (7.0000 percent)
1/1/04	$638,200	$900,244
1/1/09	(1,000)	(1,000)
Rebate amount (1/01/09)	....	899,244

(B) As of this computation date, the future value of the payment made on January 1, 1999, is $810,220 and thus an additional rebate payment of $89,024 is due. This payment reflects the future value of the 10 percent unpaid portion, and thus would not be owed had the issuer paid the full rebate amount as of any prior computation date.

Example 2. Calculation and payment of rebate for a variable yield issue. (i) *Facts.* On July 1, 1994, City *B* issues a variable yield issue and invests all of the sale proceeds of the issue ($30 million). There are no other gross proceeds. As of July 1, 1999, there are nonpurpose investments allocated to the issue. Prior to July 1, 1999, City *B* receives amounts from nonpurpose investments and immediately expends them for the governmental purpose of the issue as follows:

Date	Amount
8/1/1994	$5,000,000
7/1/1995	8,000,000
12/1/1995	17,000,000
7/1/1999	650,000

(ii) *First computation date.* (A) City *B* treats the last day of the fifth bond year (July 1, 1999) as a computation date. The yield on the variable yield issue during the first computation period (the period beginning on the issue date and ending on the first computation date) is 6.0000 percent per year compounded semiannually. The value of the nonpurpose investments allocated to the issue as of July 1, 1999, is $3 million. The rebate amount as of July 1, 1999, is computed by determining the future value of the receipts and the payments for the nonpurpose investments. The compounding interval is each 6-month (or shorter) period and the 30 day month/360 day year basis is used because these conventions were used to compute yield on the issue. The future value of these amounts and of the computation date credits as of July 1, 1999, is:

Date	Receipts (payments)	FV (6.0000 percent)
7/1/1994	($30,000,000)	($40,317,491)
8/1/1994	5,000,000	6,686,560
7/1/1995	(1,000)	(1,267)
7/1/1995	8,000,000	10,134,161
12/1/1995	17,000,000	21,011,112
7/1/1996	(1,000)	(1,194)
7/1/1997	(1,000)	(1,126)
7/1/1998	(1,000)	(1,061)
7/1/1999	3,000,000	3,000,000
7/1/1999	650,000	650,000
7/1/1999	(1,000)	(1,000)
Rebate amount (7/01/1999)		1,158,694

(B) City *B* pays 90 percent of the rebate amount ($1,042,824.60) to the United States within 60 days of July 1, 1999.

(iii) *Next computation date.* (A) On July 1, 2004, City *B* redeems all of the bonds. Thus, the next computation date is July 1, 2004. On July 30, 1999, City *B* chose to compute rebate for periods following the first computation period by treating the end of each fifth bond year as a computation date. The yield during the second computation period is 5.0000 percent per year compounded semiannually. The computation of the rebate amount as of this date reflects the value of the nonpurpose investments allocated to the issue at the end of the prior computation period. On July 1, 2004, City *B* sells those nonpurpose investments for $3,925,000 and expends that amount for the governmental purpose of the issue.

(B) As of July 1, 2004, the future value of the rebate amount computed as of July 1, 1999, and of all other payments and receipts is:

Date	Receipts (payments)	FV (5.0000 percent)
7/1/1999	$1,158,694	$1,483,226
7/1/1999	(3,000,000)	(3,840,254)
7/1/2000	(1,000)	(1,218)
7/1/2001	(1,000)	(1,160)
7/1/2002	(1,000)	(1,104)
7/1/2003	(1,000)	(1,051)
7/1/2004	(2,000)	(2,000)
7/1/2004	3,925,000	3,925,000
		1,561,439

(C) As of this computation date, the future value of the payment made on July 1, 1999, is $1,334,904 and thus an additional rebate payment of $226,535 is due.

(D) If the yield during the second computation period were, instead, 7.0000 percent, the rebate amount computed as of July 1, 1999, would be $1,320,891. The future value of the payment made on July 1, 1999, would be $1,471,007, and, therefore, City B would have overpaid the rebate amount by $150,116.

(k) *Bona fide debt service fund exception.* Under section 148(f)(4)(A), the rebate requirement does not apply to amounts in certain bona fide debt service funds. An issue with an average annual debt service that is not in excess of $2,500,000 may be treated as satisfying the $100,000 limitation in section 148(f)(4)(A)(ii).

[T.D. 8476, 58 FR 33522, June 18, 1993; 58 FR 44452, Aug. 23, 1993, as amended by T.D. 8538, 59 FR 24042, May 10, 1994; T.D. 8476, 59 FR 24350, May 11, 1994; T.D. 8718, 62 FR 25507, May 9, 1997]

§ 1.148–4 Yield on an issue of bonds.

(a) *In general.* The yield on an issue of bonds is used to apply investment yield restrictions under section 148(a) and to compute rebate liability under section 148(f). Yield is computed under the economic accrual method using any consistently applied compounding interval of not more than one year. A short first compounding interval and a short last compounding interval may be used. Yield is expressed as an annual percentage rate that is calculated to at least four decimal places (e.g., 5.2525 percent). Other reasonable, standard financial conventions, such as the 30 days per month/360 days per year convention, may be used in computing yield but must be consistently applied. The yield on an issue that would be a purpose investment (absent section 148(b)(3)(A)) is equal to the yield on the conduit financing issue that financed that purpose investment. The Commissioner may permit issuers of qualified mortgage bonds or qualified student loan bonds to use a single yield for two or more issues.

(b) *Computing yield on a fixed yield issue*—(1) *In general*—(i) *Yield on an issue.* The yield on a fixed yield issue is the discount rate that, when used in computing the present value as of the issue date of all unconditionally payable payments of principal, interest, and fees for qualified guarantees on the issue and amounts reasonably expected to be paid as fees for qualified guarantees on the issue, produces an amount equal to the present value, using the same discount rate, of the aggregate issue price of bonds of the issue as of the issue date. Further, payments include certain amounts properly allocable to a qualified hedge. Yield on a fixed yield issue is computed as of the issue date and is not affected by subsequent unexpected events, except to the extent provided in paragraphs (b)(4) and (h)(3) of this section.

(ii) *Yield on a bond.* Yield on a fixed yield bond is computed in the same manner as yield on a fixed yield issue.

(2) *Yield on certain fixed yield bonds subject to mandatory or contingent early redemption*—(i) *In general.* The yield on a fixed yield issue that includes a bond subject to mandatory early redemption or expected contingent redemption is computed by treating that bond as redeemed on its reasonably expected early redemption date for an amount equal to its value on that date. Reasonable expectations are determined on the issue date. A bond is subject to mandatory early redemption if it is unconditionally payable in full before its final maturity date. A bond is subject to a contingent redemption if it must be, or is reasonably expected to be, redeemed prior to final maturity upon

the occurrence of a contingency. A contingent redemption is taken into account only if the contingency is reasonably expected to occur, in which case the date of occurrence of the contingency must be reasonably estimated. For example, if bonds are reasonably expected to be redeemed early using excess revenues from general or special property taxes or benefit assessments or similar amounts, the reasonably expected redemption schedule is used to determine yield. For purposes of this paragraph (b)(2)(i), excess proceeds calls for issues for which the requirements of §1.148–2(e) (2) or (3) are satisfied, calamity calls, and refundings do not cause a bond to be subject to early redemption. The value of a bond is determined under paragraph (e) of this section.

(ii) *Substantially identical bonds subject to mandatory early redemption.* If substantially identical bonds of an issue are subject to specified mandatory redemptions prior to final maturity (e.g., a mandatory sinking fund redemption requirement), yield on that issue is computed by treating those bonds as redeemed in accordance with the redemption schedule for an amount equal to their value. Generally, bonds are substantially identical if the stated interest rate, maturity, and payment dates are the same. In computing the yield on an issue containing bonds described in this paragraph (b)(2)(ii), each of those bonds must be treated as redeemed at its present value, unless the stated redemption price at maturity of the bond does not exceed the issue price of the bond by more than one-fourth of one percent multiplied by the product of the stated redemption price at maturity and the number of years to the weighted average maturity date of the substantially identical bonds, in which case each of those bonds must be treated as redeemed at its outstanding stated principal amount, plus accrued, unpaid interest. Weighted average maturity is determined by taking into account the mandatory redemption schedule.

(3) *Yield on certain fixed yield bonds subject to optional early redemption*—(i) *In general.* If a fixed yield bond is subject to optional early redemption and is described in paragraph (b)(3)(ii) of this section, the yield on the issue containing the bond is computed by treating the bond as redeemed at its stated redemption price on the optional redemption date that would produce the lowest yield on the issue.

(ii) *Fixed yield bonds subject to special yield calculation rule.* A fixed yield bond is described in this paragraph (b)(3)(ii) only if it—

(A) Is subject to optional redemption within five years of the issue date, but only if the yield on the issue computed by assuming all bonds in the issue subject to redemption within 5 years of the issue date are redeemed at maturity is more than one-eighth of one percentage point higher than the yield on that issue computed by assuming all bonds subject to optional redemption within 5 years of the issue date are redeemed at the earliest date for their redemption;

(B) Is issued at an issue price that exceeds the stated redemption price at maturity by more than one-fourth of one percent multiplied by the product of the stated redemption price at maturity and the number of complete years to the first optional redemption date for the bond; or

(C) Bears interest at increasing interest rates (*i.e.*, a *stepped coupon bond*).

(4) *Yield recomputed upon transfer of certain rights associated with the bond.* For purposes of §1.148–3, as of the date of any transfer, waiver, modification, or similar transaction (collectively, a *transfer*) of any right that is part of the terms of a bond or is otherwise associated with a bond (e.g., a redemption right), in a transaction that is separate and apart from the original sale of the bond, the issue is treated as if it were retired and a new issue issued on the date of the transfer (*reissued*). The redemption price of the retired issue and the issue price of the new issue equal the aggregate values of all the bonds of the issue on the date of the transfer. In computing yield on the new issue, any amounts received by the issuer as consideration for the transfer are taken into account.

(5) *Special aggregation rule treating certain bonds as a single fixed yield bond.* Two variable yield bonds of an issue are treated in the aggregate as a single fixed yield bond if—

(i) Aggregate treatment would result in the single bond being a fixed yield bond; and

(ii) The terms of the bonds do not contain any features that could distort the aggregate fixed yield from what the yield would be if a single fixed yield bond were issued. For example, if an issue contains a bond bearing interest at a floating rate and a related bond bearing interest at a rate equal to a fixed rate minus that floating rate, those two bonds are treated as a single fixed yield bond only if neither bond may be redeemed unless the other bond is also redeemed at the same time.

(6) *Examples.* The provisions of this paragraph (b) may be illustrated by the following examples.

Example 1. No early call—(i) *Facts.* On January 1, 1994, City *A* issues an issue consisting of four identical fixed yield bonds. The stated final maturity date of each bond is January 1, 2004, and no bond is subject to redemption before this date. Interest is payable on January 1 of each year at a rate of 6.0000 percent per year on the outstanding principal amount. The total stated principal amount of the bonds is $20 million. The issue price of the bonds $20,060,000.

(ii) *Computation.* The yield on the issue is computed by treating the bonds as retired at the stated maturity under the general rule of §1.148–4(b)(1). The bonds are treated as redeemed for their stated redemption prices. The yield on the issue is 5.8731 percent per year compounded semiannually, computed as follows:

Date	Payments	PV (5.8731 percent)
1/1/1995	$1,200,000	$1,132,510
1/1/1996	1,200,000	1,068,816
1/1/1997	1,200,000	1,008,704
1/1/1998	1,200,000	951,973
1/1/1999	1,200,000	898,433
1/1/2000	1,200,000	847,903
1/1/2001	1,200,000	800,216
1/1/2002	1,200,000	755,210
1/1/2003	1,200,000	712,736
1/1/2004	21,200,000	11,883,498
		20,060,000

Example 2. Mandatory calls. (i) *Facts.* The facts are the same as in *Example 1.* In this case, however, the bonds are subject to mandatory sinking fund redemption on January 1 of each year, beginning January 1, 2001. On each sinking fund redemption date, one of the bonds is chosen by lottery and is required to be redeemed at par plus accrued interest.

(ii) *Computation.* Because the bonds are subject to specified redemptions, yield on the issue is computed by treating the bonds as redeemed in accordance with the redemption schedule under §1.148–4(b)(2)(ii). Because the bonds are not sold at a discount, the bonds are treated as retired at their stated redemption prices. The yield on the issue is 5.8678 percent per year compounded semiannually, computed as follows:

Date	Payments	PV (5.8678 percent)
1/1/1995	$1,200,000	$1,132,569
1/1/1996	1,200,000	1,068,926
1/1/1997	1,200,000	1,008,860
1/1/1998	1,200,000	952,169
1/1/1999	1,200,000	898,664
1/1/2000	1,200,000	848,166
1/1/2001	6,200,000	4,135,942
1/1/2002	5,900,000	3,714,650
1/1/2003	5,600,000	3,327,647
1/1/2004	5,300,000	2,972,407
		$20,060,000

Example 3. Optional early call. (i) *Facts.* On January 1, 1994, City *C* issues an issue consisting of three bonds. Each bond has a stated principal amount of $10 million dollars and is issued for par. Bond *X* bears interest at 5 percent per year and matures on January 1, 1999. Bond *Y* bears interest at 6 percent per year and matures on January 1, 2002. Bond *Z* bears interest at 7 percent per year and matures on January 1, 2004. Bonds *Y* and *Z* are callable by the issuer at par plus accrued interest after December 31, 1998.

(ii) *Computation.* (A) The yield on the issue computed as if each bond is outstanding to its maturity is 6.0834 percent per year compounded semiannually, computed as follows:

Date	Payments	PV (6.0834 percent)
1/1/1995	$1,800,000	$1,695,299
1/1/1996	1,800,000	1,596,689
1/1/1997	1,800,000	1,503,814
1/1/1998	1,800,000	1,416,342
1/1/1999	11,800,000	8,744,830
1/1/2000	1,300,000	907,374
1/1/2001	1,300,000	854,595
1/1/2002	11,300,000	6,996,316
1/1/2003	700,000	408,190
1/1/2004	10,700,000	5,876,551
		30,000,000

(B) The yield on the issue computed as if all bonds are called at the earliest date for redemption is 5.9126 percent per year compounded semiannually, computed as follows:

Date	Payments	PV (5.9126 percent)
1/1/1995	$1,800,000	$1,698,113
1/1/1996	1,800,000	1,601,994
1/1/1997	1,800,000	1,511,315
1/1/1998	1,800,000	1,425,769
1/1/1999	31,800,000	23,762,809
		30,000,000

(C) Because the yield on the issue computed by assuming all bonds in the issue subject to redemption within 5 years of the issue date are redeemed at maturity is more than one-eighth of one percentage point higher than the yield on the issue computed by assuming all bonds subject to optional redemption within 5 years of the issue date are redeemed at the earliest date for their redemption, each bond is treated as redeemed on the date that would produce the lowest yield for the issue. The lowest yield on the issue would result from a redemption of all the bonds on January 1, 1999. Thus, the yield on the issue is 5.9126 percent per year compounded semiannually.

(c) *Computing yield on a variable yield issue*—(1) *In general.* The yield on a variable yield issue is computed separately for each computation period. The yield for each computation period is the discount rate that, when used in computing the present value as of the first day of the computation period of all the payments of principal and interest and fees for qualified guarantees that are attributable to the computation period, produces an amount equal to the present value, using the same discount rate, of the aggregate issue price (or deemed issue price, as determined in paragraph (c)(2)(iv) of this section) of the bonds of the issue as of the first day of the computation period. The yield on a variable yield bond is computed in the same manner as the yield on a variable yield issue. Except as provided in paragraph (c)(2) of this section, yield on any fixed yield bond in a variable yield issue is computed in the same manner as the yield on a fixed yield issue as provided in paragraph (b) of this section.

(2) *Payments on bonds included in yield for a computation period*—(i) *Payments in general.* The payments on a bond that are attributable to a computation period include any amounts actually paid during the period for principal on the bond. Payments also include any amounts paid during the current period both for interest accruing on the bond during the current period and for interest accruing during the prior period that was included in the deemed issue price of the bond as accrued unpaid interest at the start of the current period under this paragraph (c)(2). Further, payments include any amounts properly allocable to fees for a qualified guarantee of the bond for the period and to any amounts properly allocable to a qualified hedge for the period.

(ii) *Payments at actual redemption.* If a bond is actually redeemed during a computation period, an amount equal to the greater of its value on the redemption date or the actual redemption price is a payment on the actual redemption date.

(iii) *Payments for bonds outstanding at end of computation period.* If a bond is outstanding at the end of a computation period, a payment equal to the bond's value is taken into account on the last day of that period.

(iv) *Issue price for bonds outstanding at beginning of next computation period.* A bond outstanding at the end of a computation period is treated as if it were immediately reissued on the next day for a deemed issue price equal to the value from the day before as determined under paragraph (c)(2)(iii) of this section.

(3) *Example.* The provisions of this paragraph (c) may be illustrated by the following example.

Example. On January 1, 1994, City *A* issues an issue of identical plain par bonds in an aggregate principal amount of $1,000,000. The bonds pay interest at a variable rate on each June 1 throughout the term of the issue. The entire principal amount of the bonds plus accrued, unpaid interest is payable on the final maturity date of January 1, 2000. No bond year is selected. On June 1, 1994, 1995, 1996, 1997, and 1998, interest in the amounts of $30,000, $55,000, $57,000, $56,000, and $45,000 is paid on the bonds. From June 1, 1998, to January 1, 1999, $30,000 of interest accrues on the bonds. From January 1, 1999, to June 1, 1999, another $35,000 of interest accrues. On June 1, 1999, the issuer actually pays $65,000 of interest. On January 1, 2000, $1,000,000 of principal and $38,000 of accrued interest are paid. The payments for the computation period starting on the issue date and ending on January 1, 1999, include all annual interest payments paid from the issue date to June 1, 1998. Because the issue is outstanding on January 1, 1999, it is treated as redeemed on that date for amount equal to its value ($1,000,000 plus accrued, unpaid interest of $30,000 under paragraph (e)(1) of this section). Thus, $1,030,000 is treated as paid on January 1, 1999. The issue is then treated as reissued on January 1, 1999, for $1,030,000. The payments for the next computation period starting on January 1, 1999, and ending on January 1, 2000, include the interest actually paid on the bonds during that period ($65,000 on June 1, 1999, plus $38,000 paid on January 1, 2000). Because the issue was actually redeemed on January 1, 2000, an amount equal to its stated redemption price is also treated as paid on January 1, 2000.

(d) *Conversion from variable yield issue to fixed yield issue.* For purposes of determining yield under this section, as of the first day on which a variable yield issue would qualify as a fixed yield issue if it were newly issued on that date (a *conversion date*), that issue is treated as if it were reissued as a fixed yield issue on the conversion date. The redemption price of the variable yield issue and the issue price of the fixed yield issue equal the aggregate values of all the bonds on the conversion date. Thus, for example, for plain par bonds (e.g., tender bonds), the deemed issue price would be the outstanding principal amount, plus accrued unpaid interest. If the conversion date occurs on a date other than a computation date, the issuer may continue to treat the issue as a variable yield issue until the next computation date, at which time it must be treated as converted to a fixed yield issue.

(e) *Value of bonds*—(1) *Plain par bonds.* Except as otherwise provided, the value of a plain par bond is its outstanding stated principal amount, plus accrued unpaid interest. The value of a plain par bond that is actually redeemed or treated as redeemed is its stated redemption price on the redemption date, plus accrued, unpaid interest.

(2) *Other bonds.* The value of a bond other than a plain par bond on a date is its present value on that date. The present value of a bond is computed under the economic accrual method taking into account all the unconditionally payable payments of principal, interest, and fees for a qualified guarantee to be paid on or after that date and using the yield on the bond as the discount rate, except that for purposes of §1.148–6(b)(2) (relating to the universal cap), these values may be determined by consistently using the yield on the issue of which the bonds are a part. To determine yield on fixed yield bonds, see paragraph (b)(1) of this section. The rules contained in paragraphs (b)(2) and (b)(3) of this section apply for this purpose. In the case of bonds described in paragraph (b)(2)(ii) of this section, the present value of those bonds on any date is computed using the yield to the final maturity date of those bonds as the discount rate. In determining the present value of a variable yield bond under this paragraph (e)(2), the initial interest rate on the bond established by the interest index or other interest rate setting mechanism is used to determine the interest payments on that bond.

(f) *Qualified guarantees*—(1) *In general.* Fees properly allocable to payments for a qualified guarantee for an issue (as determined under paragraph (f)(6) of this section) are treated as additional interest on that issue under section 148. A guarantee is a qualified guarantee if it satisfies each of the requirements of paragraphs (f)(2) through (f)(4) of this section.

(2) *Interest savings.* As of the date the guarantee is obtained, the issuer must reasonably expect that the present value of the fees for the guarantee will be less than the present value of the expected interest savings on the issue as a result of the guarantee. For this purpose, present value is computed using the yield on the issue, determined with regard to guarantee payments, as the discount rate.

(3) *Guarantee in substance.* The arrangement must create a guarantee in substance. The arrangement must impose a secondary liability that unconditionally shifts substantially all of the credit risk for all or part of the payments, such as payments for principal and interest, redemption prices, or tender prices, on the guaranteed bonds. Reasonable procedural or administrative requirements of the guarantee do not cause the guarantee to be conditional. In the case of a guarantee against failure to remarket a qualified tender bond, commercially reasonable limitations based on credit risk, such as limitations on payment in the event of default by the primary obligor or the bankruptcy of a long-term credit guarantor, do not cause the guarantee to be conditional. The guarantee may be in any form. The guarantor may not be a co-obligor. Thus, the guarantor must not expect to make any payments other than under a direct-pay letter of credit or similar arrangement for which the guarantor will be reimbursed immediately. The guarantor and any

related parties together must not use more than 10 percent of the proceeds of the portion of the issue allocable to the guaranteed bonds.

(4) *Reasonable charge*—(i) *In general.* Fees for a guarantee must not exceed a reasonable, arm's-length charge for the transfer of credit risk. In complying with this requirement, the issuer may not rely on the representations of the guarantor.

(ii) *Fees for services other than transfer of credit risk must be separately stated.* A fee for a guarantee must not include any payment for any direct or indirect services other than the transfer of credit risk, unless the compensation for those other services is separately stated, reasonable, and excluded from the guarantee fee. Fees for the transfer of credit risk include fees for the guarantor's overhead and other costs relating to the transfer of credit risk. For example, a fee includes payment for services other than transfer of credit risk if—

(A) It includes payment for the cost of underwriting or remarketing bonds or for the cost of insurance for casualty to bond-financed property;

(B) It is refundable upon redemption of the guaranteed bond before the final maturity date and the amount of the refund would exceed the portion of the fee that had not been earned; or

(C) The requirements of §1.148–2(e)(2) (relating to temporary periods for capital projects) are not satisfied, and the guarantor is not reasonably assured that the bonds will be repaid if the project to be financed is not completed.

(5) *Guarantee of purpose investments.* Except for guarantees of qualified mortgage loans and qualified student loans, a guarantee of payments on a purpose investment is a qualified guarantee of the issue if all payments on the purpose investment reasonably coincide with payments on the related bonds and the payments on the purpose investment are unconditionally payable no more than 6 months before the corresponding interest payment and 12 months before the corresponding principal payments on the bonds. This paragraph (f)(5) only applies if, in addition to satisfying the other requirements of this paragraph (f), the guarantee is, in substance, a guarantee of the bonds allocable to that purpose investment and to no other bonds except for bonds that are equally and ratably secured by purpose investments of the same conduit borrower.

(6) *Allocation of qualified guarantee payments*—(i) *In general.* Payments for a qualified guarantee must be allocated to bonds and to computation periods in a manner that properly reflects the proportionate credit risk for which the guarantor is compensated. Proportionate credit risk for bonds that are not substantially identical may be determined using any reasonable, consistently applied method. For example, this risk may be based on the ratio of the total principal and interest paid and to be paid on a guaranteed bond to the total principal and interest paid and to be paid on all bonds of the guaranteed issue. An allocation method generally is not reasonable, for example, if a substantial portion of the fee is allocated to the construction portion of the issue and a correspondingly insubstantial portion is allocated to the later years covered by the guarantee. Reasonable letter of credit *set up* fees may be allocated ratably during the initial term of the letter of credit. Upon an early redemption of a variable yield bond, fees otherwise allocable to the period after the redemption are allocated to remaining outstanding bonds of the issue or, if none remain outstanding, to the period before the redemption.

(ii) *Safe harbor for allocation of qualified guarantee fees for variable yield issues.* An allocation of non-level payments for a qualified guarantee for variable yield bonds is treated as meeting the requirements of paragraph (f)(6)(i) of this section if, for each bond year for which the guarantee is in effect, an equal amount (or for any short bond year, a proportionate amount of the equal amount) is treated as paid as of the beginning of that bond year. The present value of the annual amounts must equal the fee for the guarantee allocated to that bond, with present value computed as of the first day the guarantee is in effect by using as the discount rate the yield on the variable yield bonds covered by the guarantee, determined without regard to any fee allocated under this paragraph (f)(6)(ii).

(7) *Refund or reduction of guarantee payments.* If as a result of an investment of proceeds of a refunding issue in a refunding escrow, there will be a reduction in, or refund of, payments for a guarantee (*savings*), the savings must be treated as a reduction in the payments on the refunding issue.

(g) *Yield on certain mortgage revenue and student loan bonds.* For purposes of section 148 and this section, section 143(g)(2)(C)(ii) applies to the computation of yield on an issue of qualified mortgage bonds or qualified veterans' mortgage bonds. For purposes of applying section 148 and section 143(g) with respect to purpose investments allocable to a variable yield issue of qualified mortgage bonds, qualified veterans' mortgage bonds, or qualified student loan bonds that is reasonably expected as of the issue date to convert to a fixed yield issue, the yield may be computed over the term of the issue, and, if the yield is so computed, paragraph (d) of this section does not apply to the issue. As of any date, the yield over the term of the issue is based on—

(1) With respect to any bond of the issue that has not converted to a fixed and determinable yield on or before that date, the actual amounts paid or received to that date and the amounts that are reasonably expected (as of that date) to be paid or received with respect to that bond over the remaining term of the issue (taking into account prepayment assumptions under section 143(g)(2)(B)(iv), if applicable); and

(2) With respect to any bond of the issue that has converted to a fixed and determinable yield on or before that date, the actual amounts paid or received before that bond converted, if any, and the amount that was reasonably expected (on the date that bond converted) to be paid or received with respect to that bond over the remaining term of the issue (taking into account prepayment assumptions under section 143(g)(2)(B)(iv), if applicable).

(h) *Qualified hedging transactions*—(1) *In general.* Payments made or received by an issuer under a qualified hedge (as defined in paragraph (h)(2) of this section) relating to bonds of an issue are taken into account (as provided in paragraph (h)(3) of this section) to determine the yield on the issue. Except as provided in paragraphs (h)(4) and (h)(5)(ii)(E) of this section, the bonds to which a qualified hedge relates are treated as variable yield bonds from the issue date of the bonds. This paragraph (h) applies solely for purposes of sections 143(g), 148, and 149(d).

(2) *Qualified hedge defined.* Except as provided in paragraph (h)(5) of this section, the term *qualified hedge* means a contract that satisfies each of the following requirements:

(i) *Hedge*—(A) *In general.* The contract is entered into primarily to modify the issuer's risk of interest rate changes with respect to a bond (a hedge). For example, the contract may be an interest rate swap, an interest rate cap, a futures contract, a forward contract, or an option.

(B) *Special rule for fixed rate issues.* If the contract modifies the issuer's risk of interest rate changes with respect to a bond that is part of an issue that, absent the contract, would be a fixed rate issue, the contract must be entered into—

(*1*) No later than 15 days after the issue date (or the deemed issue date under paragraph (d) of this section) of the issue; or

(*2*) No later than the expiration of a qualified hedge with respect to bonds of that issue that satisfies paragraph (h)(2)(i)(B)(*1*) of this section; or

(*3*) No later than the expiration of a qualified hedge with respect to bonds of that issue that satisfies either paragraph (h)(2)(i)(B)(*2*) of this section or this paragraph (h)(2)(i)(B)(*3*).

(C) *Contracts with certain acquisition payments.* If a hedge provider makes a single payment to the issuer (e.g., a payment for an off-market swap) in connection with the acquisition of a contract, the issuer may treat a portion of that contract as a hedge provided—

(*1*) The hedge provider's payment to the issuer and the issuer's payments under the contract in excess of those that it would make if the contract bore rates equal to the on-market rates for the contract (determined as of the date the parties enter into the contract) are separately identified in a certification of the hedge provider; and

(*2*) The payments described in paragraph (h)(2)(i)(C)(*1*) of this section are not treated as payments on the hedge.

(ii) *No significant investment element*—(A) *In general.* The contract does not contain a significant investment element. Except as provided in paragraph (h)(2)(ii)(B) of this section, a contract contains a significant investment element if a significant portion of any payment by one party relates to a conditional or unconditional obligation by the other party to make a payment on a different date. Examples of contracts that contain a significant investment element are a debt instrument held by the issuer; an interest rate swap requiring any payments other than periodic payments, within the meaning of §1.446–3 (periodic payments) (e.g., a payment for an off-market swap or prepayment of part or all of one leg of a swap); and an interest rate cap requiring the issuer's premium for the cap to be paid in a single, up-front payment.

(B) *Special level payment rule for interest rate caps.* An interest rate cap does not contain a significant investment element if—

(*1*) All payments to the issuer by the hedge provider are periodic payments;

(*2*) The issuer makes payments for the cap at the same time as periodic payments by the hedge provider must be made if the specified index (within the meaning of §1.446–3) of the cap is above the strike price of the cap; and

(*3*) Each payment by the issuer bears the same ratio to the notional principal amount (within the meaning of §1.446–3) that is used to compute the hedge provider's payment, if any, on that date.

(iii) *Parties.* The contract is entered into between the issuer or the political subdivision on behalf of which the issuer issues the bonds (collectively referred to in this paragraph (h) as the *issuer*) and a provider that is not a related party (the *hedge provider*).

(iv) *Hedged bonds.* The contract covers, in whole or in part, all of one or more groups of substantially identical bonds in the issue (*i.e.*, all of the bonds having the same interest rate, maturity, and terms). Thus, for example, a qualified hedge may include a hedge of all or a pro rata portion of each interest payment on the variable rate bonds in an issue for the first 5 years following their issuance. For purposes of this paragraph (h), unless the context clearly requires otherwise, *hedged bonds* means the specific bonds or portions thereof covered by a hedge.

(v) *Interest based contract.* The contract is primarily interest based. A contract is not primarily interest based unless—

(A) The hedged bond, without regard to the contract, is either a fixed rate bond, a variable rate debt instrument within the meaning of §1.1275–5 provided the rate is not based on an objective rate other than a qualified inverse floating rate or a qualified inflation rate, a tax-exempt obligation described in §1.1275–4(d)(2), or an inflation-indexed debt instrument within the meaning of §1.1275–7; and

(B) As a result of treating all payments on (and receipts from) the contract as additional payments on (and receipts from) the hedged bond, the resulting bond would be substantially similar to either a fixed rate bond, a variable rate debt instrument within the meaning of §1.1275–5 provided the rate is not based on an objective rate other than a qualified inverse floating rate or a qualified inflation rate, a tax-exempt obligation described in §1.1275–4(d)(2), or an inflation-indexed debt instrument within the meaning of §1.1275–7. For this purpose, differences that would not prevent the resulting bond from being substantially similar to another type of bond include a difference between the index used to compute payments on the hedged bond and the index used to compute payments on the hedge where one index is substantially the same, but not identical to, the other; the difference resulting from the payment of a fixed premium for a cap (e.g., payments for a cap that are made in other than level installments); and the difference resulting from the allocation of a termination payment where the termination was not expected as of the date the contract was entered into.

(vi) *Payments closely correspond.* The payments received by the issuer from the hedge provider under the contract correspond closely in time to either the specific payments being hedged on the hedged bonds or specific payments required to be made pursuant to the bond documents, regardless of the hedge, to a sinking fund, debt service fund, or similar fund maintained for the issue of which the hedged bond is a part.

(vii) *Source of payments.* Payments to the hedge provider are reasonably expected to be made from the same source of funds that, absent the hedge, would be reasonably expected to be used to pay principal and interest on the hedged bonds.

(viii) *Identification.* The contract must be identified by the actual issuer on its books and records maintained for the hedged bonds not later than 3 days after the date on which the issuer and the hedge provider enter into the contract. The identification must specify the hedge provider, the terms of the contract, and the hedged bonds. The identification must contain sufficient detail to establish that the requirements of this paragraph (h)(2) and, if applicable, paragraph (h)(4) of this section are satisfied. In addition, the existence of the hedge must be noted on the first form relating to the issue of which the hedged bonds are a part that is filed with the Internal Revenue Service on or after the date on which the contract is identified pursuant to this paragraph (h)(2)(viii).

(3) *Accounting for qualified hedges*—(i) *In general.* Except as otherwise provided in paragraph (h)(4) of this section, payments made or received by the issuer under a qualified hedge are treated as payments made or received, as appropriate, on the hedged bonds that are taken into account in determining the yield on those bonds. These payments are reasonably allocated to the hedged bonds in the period to which the payments relate, as determined under paragraph (h)(3)(iii) of this section. Payments made or received by the issuer include payments deemed made or received when a contract is terminated or deemed terminated under this paragraph (h)(3). Payments reasonably allocable to the modification of risk of interest rate changes and to the hedge provider's overhead under this paragraph (h) are included as payments made or received under a qualified hedge.

(ii) *Exclusions from hedge.* If any payment for services or other items under the contract is not expressly treated by paragraph (h)(3)(i) of this section as a payment under the qualified hedge, the payment is not a payment with respect to a qualified hedge.

(iii) *Timing and allocation of payments.* Except as provided in paragraphs (h)(3)(iv) and (h)(5) of this section, payments made or received by the issuer under a qualified hedge are taken into account in the same period in which those amounts would be treated as income or deductions under §1.446–4 (without regard to §1.446–4(a)(2)(iv)) and are adjusted as necessary to reflect the end of a computation period and the start of a new computation period.

(iv) *Termination payments*—(A) *Termination defined.* A termination of a qualified hedge includes any sale or other disposition of the hedge by the issuer or the acquisition by the issuer of an offsetting hedge. A deemed termination occurs when the hedged bonds are redeemed or when a hedge ceases to be a qualified hedge of the hedged bonds. In the case of an assignment by a hedge provider of its remaining rights and obligations under the hedge to a third party or a modification of the hedging contract, the assignment or modification is treated as a termination with respect to the issuer only if it results in a deemed exchange of the hedge and a realization event under section 1001 to the issuer.

(B) *General rule.* A payment made or received by an issuer to terminate a qualified hedge, including loss or gain realized or deemed realized, is treated as a payment made or received on the hedged bonds, as appropriate. The payment is reasonably allocated to the remaining periods originally covered by the terminated hedge in a manner that reflects the economic substance of the hedge.

(C) *Special rule for terminations when bonds are redeemed.* Except as otherwise provided in this paragraph (h)(3)(iv)(C) and in paragraph (h)(3)(iv)(D) of this section, when a qualified hedge is deemed terminated because the hedged bonds are redeemed, the fair market value of the qualified hedge on the redemption date is treated as a termination payment made or received on that date. When hedged bonds are redeemed, any payment received by the issuer on termination of a hedge, including a termination payment or a deemed termination payment, reduces, but not below zero, the interest payments made by the issuer on the hedged bonds in the computation period ending on the termination date. The remainder of the payment, if any, is reasonably allocated over the bond years in the immediately preceding computation period or periods to the extent necessary to eliminate the excess.

(D) *Special rules for refundings.* To the extent that the hedged bonds are redeemed using the proceeds of a refunding issue, the termination payment is accounted for under paragraph (h)(3)(iv)(B) of this section by treating it as a payment on the refunding issue, rather than the hedged bonds. In addition, to the extent that the refunding issue is redeemed during the period to which the termination payment has been allocated to that issue, paragraph (h)(3)(iv)(C) of this section applies to the termination payment by treating it as a payment on the redeemed refunding issue.

(E) *Safe harbor for allocation of certain termination payments.* A payment to terminate a qualified hedge does not result in that hedge failing to satisfy the applicable provisions of paragraph (h)(3)(iv)(B) of this section if the payment is allocated in accordance with this paragraph (h)(3)(iv)(E). For an issue that is a variable yield issue after termination of a qualified hedge, an amount must be allocated to each date on which the hedge provider's payment, if any, would have been made had the hedge not been terminated. The amounts allocated to each date must bear the same ratio to the notional principal amount (within the meaning of §1.446–3) that would have been used to compute the hedge provider's payment, if any, on that date, and the sum of the present values of those amounts must equal the present value of the termination payment. Present value is computed as of the day the qualified hedge is terminated, using the yield on the hedged bonds, determined without regard to the termination payment. The yield used for this purpose is computed for the period beginning on the first date the qualified hedge is in effect and ending on the date the qualified hedge is terminated. On the other hand, for an issue that is a fixed yield issue after termination of a qualified hedge, the termination payment is taken into account as a single payment on the date it is paid.

(4) *Certain variable yield bonds treated as fixed yield bonds*—(i) *In general.* Except as otherwise provided in this paragraph (h)(4), if the issuer of variable yield bonds enters into a qualified hedge, the hedged bonds are treated as fixed yield bonds paying a fixed interest rate if:

(A) *Maturity.* The term of the hedge is equal to the entire period during which the hedged bonds bear interest at variable interest rates, and the issuer does not reasonably expect that the hedge will be terminated before the end of that period.

(B) *Payments closely correspond.* Payments to be received under the hedge correspond closely in time to the hedged portion of payments on the hedged bonds. Hedge payments received within 15 days of the related payments on the hedged bonds generally so correspond.

(C) *Aggregate payments fixed.* Taking into account all payments made and received under the hedge and all payments on the hedged bonds (*i.e.*, after netting all payments), the issuer's aggregate payments are fixed and determinable as of a date not later than 15 days after the issue date of the hedged bonds. Payments on bonds are treated as fixed for purposes of this paragraph (h)(4)(i)(C) if payments on the bonds are based, in whole or in part, on one interest rate, payments on the hedge are based, in whole or in part, on a second interest rate that is substantially the same as, but not identical to, the first interest rate and payments on the bonds would be fixed if the two rates were identical. Rates are treated as substantially the same if they are reasonably expected to be substantially the same throughout the term of the hedge. For example, an objective 30-day tax-exempt variable rate index or other objective index may be substantially the same as an issuer's individual 30-day interest rate.

(ii) *Accounting.* Except as otherwise provided in this paragraph (h)(4)(ii), in determining yield on the hedged bonds, all the issuer's payments on the hedged bonds and all payments made and received on a hedge described in paragraph (h)(4)(i) of this section are taken into account. If payments on the bonds and payments on the hedge are based, in whole or in part, on variable interest rates that are substantially the same within the meaning of paragraph (h)(4)(i)(C) of this section (but not identical), yield on the issue is determined by treating the variable interest rates as identical. For example, if variable rate bonds bearing interest at a weekly rate equal to the rate necessary to remarket the bonds at par are hedged with an interest rate swap under which the issuer receives payments based on a short-term floating rate index that is substantially the same as, but not identical to, the weekly rate on the bonds, the interest payments on the bonds are treated as equal to the payments received by the issuer under the swap for purposes of computing the yield on the bonds.

(iii) *Effect of termination*—(A) *In general.* Except as otherwise provided in this paragraph (h)(4)(iii) and paragraph (h)(5) of this section, the issue of which the hedged bonds are a part is treated as if it were reissued as of the termination date of the qualified hedge covered by paragraph (h)(4)(i) of this section in determining yield on the hedged bonds for purposes of §1.148–3. The redemption price of the retired issue and the issue price of the new issue equal the aggregate values of all the bonds of the issue on the termination date. In computing the yield on the new issue for this purpose, any termination payment is accounted for under paragraph (h)(3)(iv) of this section, applied by treating the termination payment as made or received on the new issue under this paragraph (h)(4)(iii).

(B) *Effect of early termination.* Except as otherwise provided in this paragraph (h)(4)(iii), the general rules of paragraph (h)(4)(i) of this section do not apply in determining the yield on the hedged bonds for purposes of §1.148–3 if the hedge is terminated or deemed terminated within 5 years after the issue date of the issue of which the hedged bonds are a part. Thus, the hedged bonds are treated as variable yield bonds for purposes of §1.148–3 from the issue date.

(C) *Certain terminations disregarded.* This paragraph (h)(4)(iii) does not apply to a termination if, based on the facts and circumstances (e.g., taking into account both the termination and any qualified hedge that immediately replaces the terminated hedge), there is no change in the yield.

(5) *Contracts entered into before issue date of hedged bond*—(i) *In general.* A contract does not fail to be a hedge under paragraph (h)(2)(i) of this section solely because it is entered into before the issue date of the hedged bond. However, that contract must be one to which either paragraph (h)(5)(ii) or (h)(5)(iii) of this section applies.

(ii) *Contracts expected to be closed substantially contemporaneously with the issue date of hedged bond*—(A) *Application.* This paragraph (h)(5)(ii) applies to a contract if, on the date the contract is identified, the issuer reasonably expects to terminate or otherwise close (terminate) the contract substantially contemporaneously with the issue date of the hedged bond.

(B) *Contract terminated.* If a contract to which this paragraph (h)(5)(ii) applies is terminated substantially contemporaneously with the issue date of the hedged bond, the amount paid or received, or deemed to be paid or received, by the issuer in connection with the issuance of the hedged bond to terminate the contract is treated as an adjustment to the issue price of the hedged bond and as an adjustment to the sale proceeds of the hedged bond for purposes of section 148. Amounts paid or received, or deemed to be paid or received, before the issue date of the hedged bond are treated as paid or received on the issue date in an amount equal to the future value of the payment or receipt on that date. For this purpose, future value is computed using yield on the hedged bond without taking into account amounts paid or received (or deemed paid or received) on the contract.

(C) *Contract not terminated.* If a contract to which this paragraph (h)(5)(ii) applies is not terminated substantially contemporaneously with the issue date of the hedged bond, the contract is deemed terminated for its fair market value as of the issue date of the hedged bond. Once a contract has been deemed terminated pursuant to this paragraph (h)(5)(ii)(C), payments on and receipts from the contract are no longer taken into account under this paragraph (h) for purposes of determining yield on the hedged bond.

(D) *Relation to other requirements of a qualified hedge*. Payments made in connection with the issuance of a bond to terminate a contract to which this paragraph (h)(5)(ii) applies do not prevent the contract from satisfying the requirements of paragraph (h)(2)(vi) of this section.

(E) *Fixed yield treatment*. A bond that is hedged with a contract to which this paragraph (h)(5)(ii) applies does not fail to be a fixed yield bond if, taking into account payments on the contract and the payments to be made on the bond, the bond satisfies the definition of fixed yield bond. See also paragraph (h)(4) of this section.

(iii) *Contracts expected not to be closed substantially contemporaneously with the issue date of hedged bond*—(A) *Application*. This paragraph (h)(5)(iii) applies to a contract if, on the date the contract is identified, the issuer does not reasonably expect to terminate the contract substantially contemporaneously with the issue date of the hedge bond.

(B) *Contract terminated*. If a contract to which this paragraph (h)(5)(iii) applies is terminated in connection with the issuance of the hedged bond, the amount paid or received, or deemed to be paid or received, by the issuer to terminate the contract is treated as an adjustment to the issue price of the hedged bond and as an adjustment to the sale proceeds of the hedged bond for purposes of section 148.

(C) *Contract not terminated*. If a contract to which this paragraph (h)(5)(iii) applies is not terminated substantially contemporaneously with the issue date of the hedged bond, no payments with respect to the hedge made by the issuer before the issue date of the hedged bond are taken into account under this section.

(iv) *Identification*. The identification required under paragraph (h)(2)(viii) of this section must specify the reasonably expected governmental purpose, issue price, maturity, and issue date of the hedged bond, the manner in which interest is reasonably expected to be computed, and whether paragraph (h)(5)(ii) or (h)(5)(iii) of this section applies to the contract. If an issuer identifies a contract under this paragraph (h)(5)(iv) that would be a qualified hedge with respect to the anticipated bond, but does not issue the anticipated bond on the identified issue date, the contract is taken into account as a qualified hedge of any bond of the issuer that is issued for the identified governmental purpose within a reasonable interval around the identified issue date of the anticipated bond.

(6) *Authority of the Commissioner*. The Commissioner, by publication of a revenue ruling or revenue procedure (see § 601.601(d)(2) of this chapter), may specify contracts that, although they do not meet the requirements of paragraph (h)(2) of this section, are qualified hedges or, although they do not meet the requirements of paragraph (h)(4) of this section, cause the hedged bonds to be treated as fixed yield bonds.

[T.D. 8476, 58 FR 33524, June 18, 1993; 58 FR 44452, Aug. 23, 1993, as amended by T.D. 8538, 59 FR 24042, May 10, 1994; T.D. 8718, 62 FR 25507, May 9, 1997; T.D. 8838, 64 FR 48547, Sept. 7, 1999]

§ 1.148–5 Yield and valuation of investments.

(a) *In general*. This section provides rules for computing the yield and value of investments allocated to an issue for various purposes under section 148.

(b) *Yield on an investment*—(1) *In general*. Except as otherwise provided, the yield on an investment allocated to an issue is computed under the economic accrual method, using the same compounding interval and financial conventions used to compute the yield on the issue. The yield on an investment allocated to an issue is the discount rate that, when used in computing the present value as of the date the investment is first allocated to the issue of all unconditionally payable receipts from the investment, produces an amount equal to the present value of all unconditionally payable payments for the investment. For this purpose, *payments* means amounts to be actually or constructively paid to acquire the investment, and *receipts* means amounts to be actually or constructively received from the investment, such as earnings and return of principal. The yield on a variable rate investment is determined in a manner comparable to the determination of the yield on a variable rate issue. For an issue of qualified mortgage bonds, qualified veterans' mortgage bonds, or qualified student loan bonds on which interest is paid semiannually, all regular monthly loan payments to be received during a semiannual debt service period may be treated as received at the end of that period. In addition, for any conduit financing issue, payments made by the conduit borrower are not treated as paid until the conduit borrower ceases to receive the benefit of earnings on those amounts.

(2) *Yield on a separate class of investments*—(i) *In general.* For purposes of the yield restriction rules of section 148(a) and §1.148–2, yield is computed separately for each class of investments. For this purpose, in determining the yield on a separate class of investments, the yield on each individual investment within the class is blended with the yield on other individual investments within the class, whether or not held concurrently, by treating those investments as a single investment. The yields on investments that are not within the same class are not blended.

(ii) *Separate classes of investments.* Each of the following is a separate class of investments—

(A) Each category of yield restricted purpose investment and program investment that is subject to a different definition of *materially higher* under §1.148–2(d)(2);

(B) Yield-restricted nonpurpose investments; and

(C) All other nonpurpose investments;

(iii) *Permissive application of single investment rules to certain yield restricted investments for all purposes of section 148.* For all purposes of section 148, if an issuer reasonably expects as of the issue date to establish and maintain a sinking fund solely to reduce the yield on the investments in a refunding escrow, then the issuer may treat all of the yield restricted nonpurpose investments in the refunding escrow and that sinking fund as a single investment having a single yield, determined under this paragraph (b)(2). Thus, an issuer may not treat the nonpurpose investments in a reasonably required reserve fund and a refunding escrow as a single investment having a single yield under this paragraph (b)(2)(iii).

(iv) *Mandatory application of single investment rules for refunding escrows for all purposes of section 148.* For all purposes of section 148, in computing the yield on yield restricted investments allocable to proceeds (*i.e.*, sale proceeds, investment proceeds, and transferred proceeds) of a refunding issue that are held in one or more refunding escrows, the individual investments are treated as a single investment having a single yield, whether or not held concurrently. For example, this single investment includes both the individual investments allocable to sale and investment proceeds of a refunding issue that are held in one refunding escrow for a prior issue and the investments allocable to transferred proceeds of that refunding issue that are held in another refunding escrow.

(3) *Investments to be held beyond issue's maturity or beyond temporary period.* In computing the yield on investments allocable to an issue that are to be held beyond the reasonably expected redemption date of the issue, those investments are treated as sold for an amount equal to their value on that date. In computing the yield on investments that are held beyond an applicable temporary period under §1.148–2, for purposes of §1.148–2 those investments may be treated as purchased for an amount equal to their fair market value as of the end of the temporary period.

(4) *Consistent redemption assumptions on purpose investments.* The yield on purpose investments allocable to an issue is computed using the same redemption assumptions used to compute the yield on the issue. Yield on purpose investments allocable to an issue of qualified mortgage bonds and qualified

veterans' mortgage bonds must be determined in a manner that is consistent with, and using the assumptions required by, section 143(g)(2)(B).

(5) *Student loan special allowance payments included in yield.* Except as provided in §1.148–11(e), the yield on qualified student loans is computed by including as receipts any special allowance payments made by the Secretary of Education pursuant to section 438 of the Higher Education Act of 1965.

(c) *Yield reduction payments to the United States*—(1) *In general.* In determining the yield on an investment to which this paragraph (c) applies, any amount paid to the United States in accordance with this paragraph (c), including a rebate amount, is treated as a payment for that investment that reduces the yield on that investment.

(2) *Manner of payment*—(i) *In general.* Except as otherwise provided in paragraph (c)(2)(ii) of this section, an amount is paid under this paragraph (c) if it is paid to the United States at the same time and in the same manner as rebate amounts are required to be paid or at such other time or in such manner as the Commissioner may prescribe. For example, yield reduction payments must be made on or before the date of required rebate installment payments as described in §§1.148–3(f), (g), and (h). The provisions of §1.148–3(i) apply to payments made under this paragraph (c).

(ii) *Special rule for purpose investments.* For purpose investments allocable to an issue—

(A) No amounts are required to be paid to satisfy this paragraph (c) until the earlier of the end of the tenth bond year after the issue date of the issue or 60 days after the date on which the issue is no longer outstanding; and

(B) For payments made prior to the date on which the issue is retired, the issuer need not pay more than 75 percent of the amount otherwise required to be paid as of the date to which the payment relates.

(3) *Applicability of special yield reduction rule*—(i) *Covered investments.* This paragraph (c) applies to—

(A) Nonpurpose investments allocable to proceeds of an issue that qualified for one of the temporary periods available for capital projects, restricted working capital expenditures, pooled financings, or investment proceeds under §1.148–2(e)(2), (e)(3), (e)(4), or (e)(6), respectively;

(B) Investments allocable to a variable yield issue during any computation period in which at least 5 percent of the value of the issue is represented by variable yield bonds, unless the issue is an issue of hedge bonds (as defined in section 149(g)(3)(A));

(C) Nonpurpose investments allocable to transferred proceeds of—

(*1*) A current refunding issue to the extent necessary to reduce the yield on those investments to satisfy yield restrictions under section 148(a); or

(*2*) An advance refunding issue to the extent that investment of the refunding escrows allocable to the proceeds, other than transferred proceeds, of the refunding issue in zero-yielding nonpurpose investments is insufficient to satisfy yield restrictions under section 148(a);

(D) Purpose investments allocable to qualified student loans under a program described in section 144(b)(1)(A);

(E) Nonpurpose investments allocable to gross proceeds of an issue in a reasonably required reserve or replacement fund or in a fund that, except for its failure to satisfy the size limitation in §1.148–2(f)(2)(ii), would qualify as a reasonably required reserve or replacement fund, but only to the extent that—

(*1*) The value of the nonpurpose investments in the fund is not greater than 15 percent of the stated principal amount of the issue, as computed under §1.148–2(f)(2)(ii), or

(*2*) The amounts in the fund (other than investment earnings) are not reasonably expected to be used to pay debt service on the issue other than in connection with reductions in the amount required to be in that fund (e.g. a reserve fund for a revolving fund loan program);

(F) Nonpurpose investments allocated to replacement proceeds of a refunded issue as a result of the application of the universal cap to amounts in a refunding escrow (see §1.148–11(c)(1)(ii)); and

(G) Investments described in §1.148–11(f).

(ii) *Exception to yield reduction payments rule for advance refunding issues.* Paragraph (c)(1) of this section does not apply to investments allocable to gross proceeds of an advance refunding issue, other than—

(A) Transferred proceeds to which paragraph (c)(3)(i)(C) of this section applies;

(B) Replacement proceeds to which paragraph (c)(3)(i)(F) of this section applies; and

(C) Transferred proceeds to which paragraph (c)(3)(i)(E) of this section applies, but only to the extent necessary to satisfy yield restriction under section 148(a) on those proceeds treating all investments allocable to those proceeds as a separate class.

(d) *Value of investments*—(1) *In general.* Except as otherwise provided, the value of an investment (including a payment or receipt on the investment) on a date must be determined using one of the following valuation methods consistently for all purposes of section 148 to that investment on that date:

(i) *Plain par investment—outstanding principal amount.* A plain par investment may be valued at its outstanding stated principal amount, plus any accrued unpaid interest on that date.

(ii) *Fixed rate investment—present value.* A fixed rate investment may be valued at its present value on that date.

(iii) *Any investment—fair market value.* An investment may be valued at its fair market value on that date.

(2) *Mandatory valuation of yield restricted investments at present value.* Any yield restricted investment must be valued at present value. For example, a purpose investment or an investment allocable to gross proceeds in a refunding escrow after the expiration of the initial temporary period must be valued at present value. See, however, paragraph (b)(3) of this section.

(3) *Mandatory valuation of certain investments at fair market value*—(i) *In general.* Except as provided in paragraphs (d)(2), (d)(3)(ii), and (d)(4) of this section, an investment must be valued at fair market value on the date that it is first allocated to an issue or first ceases to be allocated to an issue as a consequence of a deemed acquisition or deemed disposition. For example, if an issuer deposits existing investments into a sinking fund for an issue, those investments must be valued at fair market value as of the date first deposited into the fund.

(ii) *Exception to fair market value requirement for transferred proceeds allocations, universal cap allocations, and commingled funds.* Paragraph (d)(3)(i) of this section does not apply if the investment is allocated from one issue to another issue as a result of the transferred proceeds allocation rule under §1.148–9(b) or the universal cap rule under §1.148–6(b)(2), provided that both issues consist exclusively of tax-exempt bonds. In addition, paragraph (d)(3)(i) of this section does not apply to investments in a commingled fund (other than a bona fide debt service fund) unless it is an investment being initially deposited in or withdrawn from a commingled fund described in §1.148–6(e)(5)(iii).

(4) *Special transition rule for transferred proceeds.* The value of a nonpurpose investment that is allocated to transferred proceeds of a refunding issue on a transfer date may not exceed the value of that investment on the transfer date used for purposes of applying the arbitrage restrictions to the refunded issue.

(5) *Definition of present value of an investment.* Except as otherwise provided, present value of an investment is computed under the economic accrual method, using the same compounding interval and financial conventions used to compute the yield on the issue. The present value of an investment on a date is equal to the present value of all unconditionally payable receipts to be received from and payments to be paid for the investment after that date, using the yield on the investment as the discount rate.

(6) *Definition of fair market value*—(i) *In general.* The fair market value of an investment is the price at which a willing buyer would purchase the investment from a willing seller in a bona fide, arm's-length transaction. Fair market value generally is determined on the date on which a contract to purchase or sell the nonpurpose investment becomes binding (*i.e.*, the trade date rather than the settlement date). Except as otherwise provided in this

paragraph (d)(6), an investment that is not of a type traded on an established securities market, within the meaning of section 1273, is rebuttably presumed to be acquired or disposed of for a price that is not equal to its fair market value. The fair market value of a United States Treasury obligation that is purchased directly from the United States Treasury is its purchase price.

(ii) *Safe harbor for establishing fair market value for certificates of deposit.* This paragraph (d)(6)(ii) applies to a certificate of deposit that has a fixed interest rate, a fixed payment schedule, and a substantial penalty for early withdrawal. The purchase price of such a certificate of deposit is treated as its fair market value on the purchase date if the yield on the certificate of deposit is not less than—

(A) The yield on reasonably comparable direct obligations of the United States; and

(B) The highest yield that is published or posted by the provider to be currently available from the provider on reasonably comparable certificates of deposit offered to the public.

(iii) *Safe harbor for establishing fair market value for guaranteed investment contracts and investments purchased for a yield restricted defeasance escrow.* The purchase price of a guaranteed investment contract and the purchase price of an investment purchased for a yield restricted defeasance escrow will be treated as the fair market value of the investment on the purchase date if all of the following requirements are satisfied:

(A) The issuer makes a bona fide solicitation for the purchase of the investment. A bona fide solicitation is a solicitation that satisfies all of the following requirements:

(*1*) The bid specifications are in writing and are timely forwarded to potential providers.

(*2*) The bid specifications include all material terms of the bid. A term is material if it may directly or indirectly affect the yield or the cost of the investment.

(*3*) The bid specifications include a statement notifying potential providers that submission of a bid is a representation that the potential provider did not consult with any other potential provider about its bid, that the bid was determined without regard to any other formal or informal agreement that the potential provider has with the issuer or any other person (whether or not in connection with the bond issue), and that the bid is not being submitted solely as a courtesy to the issuer or any other person for purposes of satisfying the requirements of paragraph (d)(6)(iii)(B)(*1*) or (*2*) of this section.

(*4*) The terms of the bid specifications are commercially reasonable. A term is commercially reasonable if there is a legitimate business purpose for the term other than to increase the purchase price or reduce the yield of the investment. For example, for solicitations of investments for a yield restricted defeasance escrow, the hold firm period must be no longer than the issuer reasonably requires.

(*5*) For purchases of guaranteed investment contracts only, the terms of the solicitation take into account the issuer's reasonably expected deposit and drawdown schedule for the amounts to be invested.

(*6*) All potential providers have an equal opportunity to bid. For example, no potential provider is given the opportunity to review other bids (*i.e.*, a last look) before providing a bid.

(*7*) At least three reasonably competitive providers are solicited for bids. A reasonably competitive provider is a provider that has an established industry reputation as a competitive provider of the type of investments being purchased.

(B) The bids received by the issuer meet all of the following requirements:

(*1*) The issuer receives at least three bids from providers that the issuer solicited under a bona fide solicitation meeting the requirements of paragraph (d)(6)(iii)(A) of this section and that do not have a material financial interest in the issue. A lead underwriter in a negotiated underwriting transaction is deemed to have a material financial interest in the issue until 15 days after the issue date of the issue. In addition, any entity acting as a financial advisor with respect to the purchase of the investment at the time the bid specifications are forwarded to potential providers has a material financial interest in the issue. A provider that is a related party to a provider that has a material financial interest in the issue is deemed to have a material financial interest in the issue.

(*2*) At least one of the three bids described in paragraph (d)(6)(iii)(B)(*1*) of this section is from a reasonably competitive provider, within the meaning of paragraph (d)(6)(iii)(A)(*7*) of this section.

(*3*) If the issuer uses an agent to conduct the bidding process, the agent did not bid to provide the investment.

(C) The winning bid meets the following requirements:

(*1*) *Guaranteed investment contracts.* If the investment is a guaranteed investment contract, the winning bid is the highest yielding bona fide bid (determined net of any broker's fees).

(*2*) *Other investments.* If the investment is not a guaranteed investment contract, the following requirements are met:

(*i*) The winning bid is the lowest cost bona fide bid (including any broker's fees). The lowest cost bid is either the lowest cost bid for the portfolio or, if the issuer compares the bids on an investment-by-investment basis, the aggregate cost of a portfolio comprised of the lowest cost bid for each investment. Any payment received by the issuer from a provider at the time a guaranteed investment contract is purchased (e.g., an escrow float contract) for a yield restricted defeasance escrow under a bidding procedure meeting the requirements of this paragraph (d)(6)(iii) is taken into account in determining the lowest cost bid.

(*ii*) The lowest cost bona fide bid (including any broker's fees) is not greater than the cost of the most efficient portfolio comprised exclusively of State and Local Government Series Securities from the United States Department of the Treasury, Bureau of Public Debt. The cost of the most efficient portfolio of State and Local Government Series Securities is to be determined at the time that bids are required to be submitted pursuant to the terms of the bid specifications.

(*iii*) If State and Local Government Series Securities from the United States Department of the Treasury, Bureau of Public Debt are not available for purchase on the day that bids are required to be submitted pursuant to terms of the bid specifications because sales of those securities have been suspended, the cost comparison of paragraph (d)(6)(iii) (C)(*2*)(*ii*) of this section is not required.

(D) The provider of the investments or the obligor on the guaranteed investment contract certifies the administrative costs that it pays (or expects to pay, if any) to third parties in connection with supplying the investment.

(E) The issuer retains the following records with the bond documents until three years after the last outstanding bond is redeemed:

(*1*) For purchases of guaranteed investment contracts, a copy of the contract, and for purchases of investments other than guaranteed investment contracts, the purchase agreement or confirmation.

(*2*) The receipt or other record of the amount actually paid by the issuer for the investments, including a record of any administrative costs paid by the issuer, and the certification under paragraph (d)(6)(iii)(D) of this section.

(*3*) For each bid that is submitted, the name of the person and entity submitting the bid, the time and date of the bid, and the bid results.

(*4*) The bid solicitation form and, if the terms of the purchase agreement or the guaranteed investment contract deviated from the bid solicitation form or a submitted bid is modified, a brief statement explaining the deviation and stating the purpose for the deviation. For example, if the issuer purchases a portfolio of investments for a yield restricted defeasance escrow and, in order to satisfy the yield restriction requirements of section 148, an investment in the winning bid is replaced with an investment with a lower yield, the issuer must retain a record of the substitution and how the price of the substitute investment was determined. If the issuer replaces an investment in the winning bid portfolio with another investment, the purchase price of the new investment is not covered by the safe harbor unless the investment is bid under a bidding procedure meeting the requirements of this paragraph (d)(6)(iii).

(*5*) For purchases of investments other than guaranteed investment contracts, the cost of the most efficient portfolio of State and Local Government Series Securities, determined at the time that the bids were required to be submitted pursuant to the terms of the bid specifications.

(e) *Administrative costs of investments*—(1) *In general*. Except as otherwise provided in this paragraph (e), an allocation of gross proceeds of an issue to a payment or a receipt on an investment is not adjusted to take into account any costs or expenses paid, directly or indirectly, to purchase, carry, sell, or retire the investment (administrative costs). Thus, these administrative costs generally do not increase the payments for, or reduce the receipts from, investments.

(2) *Qualified administrative costs on nonpurpose investments*—(i) *In general*. In determining payments and receipts on nonpurpose investments, qualified administrative costs are taken into account. Thus, qualified administrative costs increase the payments for, or decrease the receipts from, the investments. Qualified administrative costs are reasonable, direct administrative costs, other than carrying costs, such as separately stated brokerage or selling commissions, but not legal and accounting fees, recordkeeping, custody, and similar costs. General overhead costs and similar indirect costs of the issuer such as employee salaries and office expenses and costs associated with computing the rebate amount under section 148(f) are not qualified administrative costs. In general, administrative costs are not reasonable unless they are comparable to administrative costs that would be charged for the same investment or a reasonably comparable investment if acquired with a source of funds other than gross proceeds of tax-exempt bonds.

(ii) *Special rule for administrative costs of nonpurpose investments in certain regulated investment companies and commingled funds*. Qualified administrative costs include all reasonable administrative costs, without regard to the limitation on indirect costs under paragraph (e)(2)(i) of this section, incurred by:

(A) *Regulated investment companies*. A publicly offered regulated investment company (as defined in section 67(c)(2)(B)); and

(B) *External commingled funds*. A widely held commingled fund in which no investor in the fund owns more than 10 percent of the beneficial interest in the fund. For purposes of this paragraph (e)(2)(ii)(B), a fund is treated as widely held only if, during the immediately preceding fixed, semiannual period chosen by the fund (e.g., semiannual periods ending June 30 and December 31), the fund had a daily average of more than 15 investors that were not related parties, and the daily average amount each investor had invested in the fund was not less than the lesser of $500,000 and 1 percent of the daily average of the total amount invested in the fund. For purposes of this paragraph (e)(2)(ii)(B), an investor will be treated as owning not more than 10 percent of the beneficial interest in the fund if, on the date of each deposit by the investor into the fund, the total amount the investor and any related parties have on deposit in the fund is not more than 10 percent of the total amount that all investors have on deposit in the fund. For purposes of the preceding sentence, the total amount that all investors have on deposit in the fund is equal to the sum of all deposits made by the investor and any related parties on the date of those deposits and the closing balance in the fund on the day before those deposits. If any investor in the fund owns more than 10 percent of the beneficial interest in the fund, the fund does not qualify under this paragraph (e)(2)(ii)(B) until that investor makes sufficient withdrawals from the fund to reduce its beneficial interest in the fund to 10 percent or less.

(iii) *Special rule for guaranteed investment contracts and investments purchased for a yield restricted defeasance escrow*—(A) *In general*. An amount paid for a broker's commission or similar fee with respect to a guaranteed investment contract or investments purchased for a yield restricted defeasance escrow is a qualified administrative cost if the fee is reasonable within the meaning of paragraph (e)(2)(i) of this section.

(B) *Safe harbor*—(*1*) *In general.* A broker's commission or similar fee with respect to the acquisition of a guaranteed investment contract or investments purchased for a yield restricted defeasance escrow is reasonable within the meaning of paragraph (e)(2)(i) of this section to the extent that—

(*i*) The amount of the fee that the issuer treats as a qualified administrative cost does not exceed the lesser of:

(*A*) $30,000 and

(*B*) 0.2% of the computational base or, if more, $3,000; and

(*ii*) For any issue, the issuer does not treat as qualified administrative costs more than $85,000 in brokers' commissions or similar fees with respect to all guaranteed investment contracts and investments for yield restricted defeasance escrows purchased with gross proceeds of the issue.

(*2*) *Computational base.* For purposes of paragraph (e)(2)(iii)(B)(*1*) of this section, computational base shall mean—

(*i*) For a guaranteed investment contract, the amount of gross proceeds the issuer reasonably expects, as of the date the contract is acquired, to be deposited in the guaranteed investment contract over the term of the contract, and

(*ii*) For investments (other than guaranteed investment contracts) to be deposited in a yield restricted defeasance escrow, the amount of gross proceeds initially invested in those investments.

(*3*) *Cost-of-living adjustment.* In the case of a calendar year after 2004, each of the dollar amounts in paragraph (e)(2)(iii)(B)(*1*) of this section shall be increased by an amount equal to—

(*i*) Such dollar amount; multiplied by

(*ii*) The cost-of-living adjustment determined under section 1(f)(3) for such calendar year by using the language ''calendar year 2003'' instead of ''calendar year 1992'' in section 1(f)(3)(B).

(*4*) *Rounding.* If any increase determined under paragraph (e)(2)(iii)(B)(*3*) of this section is not a multiple of $1,000, such increase shall be rounded to the nearest multiple thereof.

(*5*) *Applicable year for cost-of-living adjustment.* The cost-of-living adjustments under paragraph (e)(2)(iii)(B)(*3*) of this section shall apply to the safe harbor amounts under paragraph (e)(2)(iii)(B)(*1*) of this section based on the year the guaranteed investment contract or the investments for the yield restricted defeasance escrow, as applicable, are acquired.

(*6*) *Cost-of-living adjustment to determine remaining amount of per-issue safe harbor*—(i) *In general.* This paragraph (e)(2)(iii)(B)(*6*) applies to determine the portion of the safe harbor amount under paragraph (e)(2)(iii)(B)(1)(*ii*) of this section, as modified by paragraph (e)(2)(iii)(B)(*3*) of this section (the per-issue safe harbor), that is available (the remaining amount) for any year (the determination year) if the per-issue safe harbor was partially used in one or more prior years.

(*ii*) *Remaining amount of per-issue safe harbor.* The remaining amount of the per-issue safe harbor for any determination year is equal to the per-issue safe harbor for that year, reduced by the portion of the per-issue safe harbor used in one or more prior years.

(*iii*) *Portion of per-issue safe harbor used in prior years.* The portion of the per-issue safe harbor used in any prior year (the prior year) is equal to the total amount of broker's commissions or similar fees paid in connection with guaranteed investment contracts or investments for a yield restricted defeasance escrow acquired in the prior year that the issuer treated as qualified administrative costs for the issue, multiplied by a fraction the numerator of which is the per-issue safe harbor for the determination year and the denominator of which is the per-issue safe harbor for the prior year. See paragraph (e)(2)(iii)(C) *Example 2* of this section.

(C) *Examples.* The following examples illustrate the application of the safe harbor in paragraph (e)(2)(iii)(B) of this section:

Example 1. Multipurpose issue. In 2003, the issuer of a multipurpose issue uses brokers to acquire the following investments with gross proceeds of the issue: a guaranteed investment contract for amounts to be deposited in a construction fund (construction GIC), Treasury securities to be deposited in a yield restricted defeasance escrow (Treasury investments) and a guaranteed investment contract that will be used to earn a return on what otherwise would be idle cash balances from maturing investments in the yield restricted defeasance escrow (the float GIC). The issuer deposits $22,000,000 into the construction GIC and reasonably expects that no further deposits will be made over its term. The issuer uses $8,040,000 of the proceeds to purchase the Treasury investments. The issuer reasonably expects that it will make aggregate deposits of $600,000 to the float GIC over its term. The brokers' fees are $30,000 for the construction GIC, $16,080 for the Treasury investments and $3,000 for the float GIC. The issuer has not previously treated any brokers' commissions or similar fees as qualified administrative costs. The issuer may claim all $49,080 in brokers' fees for these investments as qualified administrative costs because the fees do not exceed the safe harbors in paragraph (e)(2)(iii)(B) of this section. Specifically, each of the brokers' fees equals the lesser of $30,000 and 0.2% of the computational base (or, if more, $3,000) (*i.e.*, lesser of $30,000 and 0.2% × $22,000,000 for the construction GIC; lesser of $30,000 and 0.2% × $8,040,000 for the Treasury investments; and lesser of $30,000 and $3,000 for the float GIC). In addition, the total amount of brokers' fees claimed by the issuer as qualified administrative costs ($49,080) does not exceed the per-issue safe harbor of $85,000.

Example 2. Cost-of-living adjustment. In 2003, an issuer issues bonds and uses gross proceeds of the issue to acquire two guaranteed investment contracts. The issuer pays a total of $50,000 in brokers' fees for the two guaranteed investment contracts and treats these fees as qualified administrative costs. In a year subsequent to 2003 (Year Y), the issuer uses gross proceeds of the issue to acquire two additional guaranteed investment contracts, paying a total of $20,000 in broker's fees for the two guaranteed investment contracts, and treats those fees as qualified administrative costs. For Year Y, applying the cost-of-living adjustment under paragraph (e)(2)(iii)(B)(*3*) of this section, the safe harbor dollar limits under paragraph (e)(2)(iii)(B)(*1*) of this section are $3,000, $32,000 and $90,000. The remaining amount of the per-issue safe harbor for Year Y is $37,059 ($90,000–[$50,000 × $90,000/$85,000]). The broker's fees in Year Y do not exceed the per-issue safe harbor under paragraph (e)(2)(iii)(B)(*1*)(*ii*) (as modified by paragraph (e)(2)(iii)(B)(*3*)) of this section because the broker's fees do not exceed the remaining amount of the per-issue safe harbor determined under paragraph (e)(2)(iii)(B)(*6*) of this section for Year Y. In a year subsequent to Year Y (Year Z), the issuer uses gross proceeds of the issue to acquire an additional guaranteed investment contract, pays a broker's fee of $15,000 for the guaranteed investment contract, and treats the broker's fee as a qualified administrative cost. For Year Z, applying the cost-of-living adjustment under paragraph (e)(2)(iii)(B)(*3*) of this section, the safe harbor dollar limits under paragraph (e)(2)(iii)(B)(*1*) of this section are $3,000, $33,000 and $93,000. The remaining amount of the per-issue safe harbor for Year Z is $17,627 ($93,000—[($50,000 × $93,000/$85,000) + ($20,000 × $93,000/$90,000)]). The broker's fee incurred in Year Z does not exceed the per-issue safe harbor under paragraph (e)(2)(iii)(B)(*1*)(*ii*) (as modified by paragraph (e)(2)(iii)(B)(*3*)) of this section because the broker's fee does not exceed the remaining amount of the per-issue safe harbor determined under paragraph (e)(2)(iii)(B)(*6*) of this section for Year Z. See paragraph (e)(2)(iii)(B)(*6*) of this section.

(3) *Qualified administrative costs on purpose investments*—(i) *In general.* In determining payments and receipts on purpose investments, qualified administrative costs described in this paragraph (e)(3) paid by the conduit borrower are taken into account. Thus, these costs increase the payments for, or decrease the receipts from, the purpose investments. This rule applies even if those payments merely reimburse the issuer. Although the actual payments by the conduit borrower may be made at any time, for this purpose, a pro rata portion of each payment made by a conduit borrower is treated as a reimbursement of reasonable administrative costs, if the present value of those payments does not exceed the present value of the reasonable administrative costs paid by the issuer, using the yield on the issue as the discount rate.

(ii) *Definition of qualified administrative costs of purpose investments*—(A) *In general.* Except as otherwise provided in this paragraph (e)(3)(ii), qualified administrative costs of a purpose investment means—

(*1*) Costs or expenses paid, directly or indirectly, to purchase, carry, sell, or retire the investment; and

(*2*) Costs of issuing, carrying, or repaying the issue, and any underwriters' discount.

(B) *Limitation on program investments.* For a program investment, qualified administrative costs include only those costs described in paragraph (e)(3)(ii)(A)(*2*) of this section.

[T.D. 8476, 58 FR 33529, June 18, 1993; 58 FR 44452, Aug. 23, 1993, as amended by T.D. 8538, 59 FR 24044, May 10, 1994; T.D. 8718, 62 FR 25511, May 9, 1997; T.D. 8801, 63 FR 71751, Dec. 30, 1998; T.D. 9097, 68 FR 69022, Dec. 11, 2003]

§ 1.148–6 General allocation and accounting rules.

(a) *In general*—(1) *Reasonable accounting methods required.* An issuer may use any reasonable, consistently applied accounting method to account for gross proceeds, investments, and expenditures of an issue.

(2) *Bona fide deviations from accounting method.* An accounting method does not fail to be reasonable and consistently applied solely because a different accounting method is used for a bona fide governmental purpose to consistently account for a particular item. Bona fide governmental purposes may include special State law restrictions imposed on specific funds or actions to avoid grant forfeitures.

(3) *Absence of allocation and accounting methods.* If an issuer fails to maintain books and records sufficient to establish the accounting method for an issue and the allocation of the proceeds of that issue, the rules of this section are applied using the specific tracing method. This paragraph (a)(3) applies to bonds issued on or after May 16, 1997.

(b) *Allocation of gross proceeds to an issue*—(1) *One-issue rule and general ordering rules.* Except as otherwise provided, amounts are allocable to only one issue at a time as gross proceeds, and if amounts simultaneously are proceeds of one issue and replacement proceeds of another issue, those amounts are allocable to the issue of which they are proceeds. Amounts cease to be allocated to an issue as proceeds only when those amounts are allocated to an expenditure for a governmental purpose, are allocated to transferred proceeds of another issue, or cease to be allocated to that issue at retirement of the issue or under the universal cap of paragraph (b)(2) of this section. Amounts cease to be allocated to an issue as replacement proceeds only when those amounts are allocated to an expenditure for a governmental purpose, are no longer used in a manner that causes those amounts to be replacement proceeds of that issue, or cease to be allocated to that issue because of the retirement of the issue or the application of the universal cap under paragraph (b)(2) of this section. Amounts that cease to be allocated to an issue as gross proceeds are eligible for allocation to another issue. Under §1.148–10(a), however, the rules in this paragraph (b)(1) do not apply in certain cases involving abusive arbitrage devices.

(2) *Universal cap on value of nonpurpose investments allocated to an issue*—(i) *Application.* The rules in this paragraph (b)(2) provide an overall limitation on the amount of gross proceeds allocable to an issue. Although the universal cap generally may be applied at any time in the manner described in this paragraph (b)(2), it need not be applied on any otherwise required date of application if its application on that date would not result in a reduction or reallocation of gross proceeds of an issue. For this purpose, if an issuer reasonably expects as of the issue date that the universal cap will not reduce the amount of gross proceeds allocable to the issue during the term of the issue, the universal cap need not be applied on any date on which an issue actually has all of the following characteristics—

(A) No replacement proceeds are allocable to the issue, other than replacement proceeds in a bona fide debt service fund or a reasonably required reserve or replacement fund;

(B) The net sale proceeds of the issue—

(*1*) Qualified for one of the temporary periods available for capital projects, restricted working capital expenditures, or pooled financings under §1.148–2 (e)(2), (e)(3), or (e)(4), and those net sales proceeds were in fact allocated to expenditures prior to the expiration of the longest applicable temporary period; or

(*2*) were deposited in a refunding escrow and expended as originally expected;

(C) The issue does not refund a prior issue that, on any transfer date, has unspent proceeds allocable to it;

(D) None of the bonds are retired prior to the date on which those bonds are treated as retired in computing the yield on the issue; and

(E) No proceeds of the issue are invested in qualified student loans or qualified mortgage loans.

(ii) *General rule.* Except as otherwise provided below, amounts that would otherwise be gross proceeds allocable to an issue are allocated (and remain allocated) to the issue only to the extent that the value of the nonpurpose investments allocable to those gross proceeds does not exceed the value of all outstanding bonds of the issue. For this purpose, gross proceeds allocable to cash, tax-exempt bonds that would be nonpurpose investments (absent section 148(b)(3)(A)), qualified student loans, and qualified mortgage loans are treated as nonpurpose investments. The values of bonds and investments are determined under §1.148–4(e) and §1.148–5(d), respectively. The value of all outstanding bonds of the issue is referred to as the *universal cap*. Thus, for example, the universal cap for an issue of plain par bonds is equal to the outstanding stated principal amount of those bonds plus accrued interest.

(iii) *Determination and application of the universal cap*. Except as otherwise provided, beginning with the first bond year that commences after the second anniversary of the issue date, the amount of the universal cap and the value of the nonpurpose investments must be determined as of the first day of each bond year. For refunding and refunded issues, the cap and values must be determined as of each date that, but for this paragraph (b)(2), proceeds of the refunded issue would become transferred proceeds of the refunding issue, and need not otherwise be determined in the bond year in which that date occurs. All values are determined as of the close of business on each determination date, after giving effect to all payments on bonds and payments for and receipts on investments on that date.

(iv) *General ordering rule for allocations of amounts in excess of the universal cap*—(A) *In general*. If the value of all nonpurpose investments allocated to the gross proceeds of an issue exceeds the universal cap for that issue on a date as of which the cap is determined under paragraph (b)(2)(iii) of this section, nonpurpose investments allocable to gross proceeds necessary to eliminate that excess cease to be allocated to the issue, in the following order of priority—

(*1*) First, nonpurpose investments allocable to replacement proceeds;

(*2*) Second, nonpurpose investments allocable to transferred proceeds; and

(*3*) Third, nonpurpose investments allocable to sale proceeds and investment proceeds.

(B) *Re-allocation of certain amounts*. Except as provided in §1.148–9(b)(3), amounts that cease to be allocated to an issue as a result of the application of the universal cap may only be allocated to another issue as replacement proceeds.

(C) *Allocations of portions of investments*. Portions of investments to which this paragraph (b)(2)(iv) applies are allocated under either the ratable method or the representative method in the same manner as allocations of portions of investments to transferred proceeds under §1.148–9(c).

(v) *Nonpurpose investments in a bona fide debt service fund not counted*. For purposes of this paragraph (b)(2), nonpurpose investments allocated to gross proceeds in a bona fide debt service fund for an issue are not taken into account in determining the value of the nonpurpose investments, and those nonpurpose investments remain allocated to the issue.

(c) *Fair market value limit on allocations to nonpurpose investments*. Upon a purchase or sale of a nonpurpose investment, gross proceeds of an issue are not allocated to a payment for that nonpurpose investment in an amount greater than, or to a receipt from that nonpurpose investment in an amount less than, the fair market value of the nonpurpose investment as of the purchase or sale date. For purposes of this paragraph (c) only, the fair market value of a nonpurpose investment is adjusted to take into account qualified administrative costs allocable to the investment.

(d) *Allocation of gross proceeds to expenditures*—(1) *Expenditures in general*—(i) *General rule*. Reasonable accounting methods for allocating funds from different sources to expenditures for the same governmental purpose include any of the following methods if consistently applied: a specific tracing method; a gross proceeds spent first method; a first-in, first-out method; or a ratable allocation method.

(ii) *General limitation*. An allocation of gross proceeds of an issue to an expenditure must involve a current outlay of cash for a governmental purpose of the issue. A *current outlay of cash* means an outlay reasonably expected to occur not later than 5 banking days after the date as of which the allocation of gross proceeds to the expenditure is made.

(iii) *Timing.* An issuer must account for the allocation of proceeds to expenditures not later than 18 months after the later of the date the expenditure is paid or the date the project, if any, that is financed by the issue is placed in service. This allocation must be made in any event by the date 60 days after the fifth anniversary of the issue date or the date 60 days after the retirement of the issue, if earlier. This paragraph (d)(1)(iii) applies to bonds issued on or after May 16, 1997.

(2) *Treatment of gross proceeds invested in purpose investments*—(i) *In general.* Gross proceeds of an issue invested in a purpose investment are allocated to an expenditure on the date on which the conduit borrower under the purpose investment allocates the gross proceeds to an expenditure in accordance with this paragraph (d).

(ii) *Exception for qualified mortgage loans and qualified student loans.* If gross proceeds of an issue are allocated to a purpose investment that is a qualified mortgage loan or a qualified student loan, those gross proceeds are allocated to an expenditure for the governmental purpose of the issue on the date on which the issuer allocates gross proceeds to that purpose investment.

(iii) *Continuing allocation of gross proceeds to purpose investments.* Regardless of whether gross proceeds of a conduit financing issue invested in a purpose investment have been allocated to an expenditure under paragraph (d)(2) (i) or (ii) of this section, with respect to the actual issuer those gross proceeds continue to be allocated to the purpose investment until the sale, discharge, or other disposition of the purpose investment.

(3) *Expenditures for working capital purposes*—(i) *In general.* Except as otherwise provided in this paragraph (d)(3) or paragraph (d)(4) of this section, proceeds of an issue may only be allocated to working capital expenditures as of any date to the extent that those working capital expenditures exceed available amounts (as defined in paragraph (d)(3)(iii) of this section) as of that date (*i.e.*, a ''proceeds-spent-last'' method). For this purpose, proceeds include replacement proceeds described in § 1.148–1(c)(4).

(ii) *Exceptions*—(A) *General de minimis exception.* Paragraph (d)(3)(i) of this section does not apply to expenditures to pay—

(*1*) Any issuance costs of the issue or any qualified administrative costs within the meaning of §§ 1.148–5(e)(2) (i) or (ii), or § 1.148–5(e)(3)(ii)(A);

(*2*) Fees for qualified guarantees of the issue or payments for a qualified hedge for the issue;

(*3*) Interest on the issue for a period commencing on the issue date and ending on the date that is the later of three years from the issue date or one year after the date on which the project is placed in service;

(*4*) Amounts paid to the United States under §§ 1.148–3, 1.148–5(c), or 1.148–7 for the issue;

(*5*) Costs, other than those described in paragraphs (d)(3)(ii)(A) (*1*) through (*4*) of this section, that do not exceed 5 percent of the sale proceeds of an issue and that are directly related to capital expenditures financed by the issue (e.g., initial operating expenses for a new capital project);

(*6*) Principal or interest on an issue paid from unexpected excess sale or investment proceeds; and

(*7*) Principal or interest on an issue paid from investment earnings on a reserve or replacement fund that are deposited in a bona fide debt service fund.

(B) *Exception for extraordinary items.* Paragraph (d)(3)(i) of this section does not apply to expenditures for extraordinary, nonrecurring items that are not customarily payable from current revenues, such as casualty losses or extraordinary legal judgments in amounts in excess of reasonable insurance coverage. If, however, an issuer or a related party maintains a reserve for such items (e.g., a self-insurance fund) or has set aside other available amounts for such expenses, gross proceeds within that reserve must be allocated to expenditures only after all other available amounts in that reserve are expended.

(C) *Exception for payment of principal and interest on prior issues.* Paragraph (d)(3)(i) of this section does not apply to expenditures for payment of principal, interest, or redemption prices on a prior issue and, for a crossover refunding issue, interest on that issue.

(D) *No exceptions if replacement proceeds created.* The exceptions provided in this paragraph (d)(3)(ii) do not apply if the allocation merely substitutes gross proceeds for other amounts that would have been used to make those expenditures in a manner that gives rise to replacement proceeds. For example, if a purported reimbursement allocation of proceeds of a reimbursement bond does not result in an expenditure under § 1.150–2, those proceeds may not be allocated to pay interest on an issue that, absent this allocation, would have been paid from the issuer's current revenues.

(iii) *Definition of available amount*—(A) *In general.* For purposes of this paragraph (d)(3), *available amount* means any amount that is available to an issuer for working capital expenditure purposes of the type financed by an issue. Except as otherwise provided, *available amount* excludes proceeds of the issue but includes cash, investments, and other amounts held in accounts or otherwise by the issuer or a related party if those amounts may be used by the issuer for working capital expenditures of the type being financed by an issue without legislative or judicial action and without a legislative, judicial, or contractual requirement that those amounts be reimbursed.

(B) *Reasonable working capital reserve treated as unavailable.* A reasonable working capital reserve is treated as unavailable. Any working capital reserve is reasonable if it does not exceed 5 percent of the actual working capital expenditures of the issuer in the fiscal year before the year in which the determination of available amounts is made. For this purpose only, in determining the working capital expenditures of an issuer for a prior fiscal year, any expenditures (whether capital or working capital expenditures) that are paid out of current revenues may be treated as working capital expenditures.

(C) *Qualified endowment funds treated as unavailable.* For a 501(c)(3) organization, a qualified endowment fund is treated as unavailable. A fund is a qualified endowment fund if—

(*1*) The fund is derived from gifts or bequests, or the income thereon, that were neither made nor reasonably expected to be used to pay working capital expenditures;

(*2*) Pursuant to reasonable, established practices of the organization, the governing body of the 501(c)(3) organization designates and consistently operates the fund as a permanent endowment fund or quasi-endowment fund restricted as to use; and

(*3*) There is an independent verification that the fund is reasonably necessary as part of the organization's permanent capital.

(D) *Application to statutory safe harbor for tax and revenue anticipation bonds.* For purposes of section 148(f)(4)(B)(iii)(II), *available amount* has the same meaning as in paragraph (d)(3)(iii) of this section, except that the otherwise-permitted reasonable working capital reserve is treated as part of the available amount.

(4) *Expenditures for grants*—(i) *In general.* Gross proceeds of an issue that are used to make a grant are allocated to an expenditure on the date on which the grant is made.

(ii) *Characterization of repayments of grants.* If any amount of a grant financed by gross proceeds of an issue is repaid to the grantor, the repaid amount is treated as unspent proceeds of the issue as of the repayment date unless expended within 60 days of repayment.

(iii) *Definition of grant. Grant* means a transfer for a governmental purpose of money or property to a transferee that is not a related party to or an agent of the transferor. The transfer must not impose any obligation or condition to directly or indirectly repay any amount to the transferor. Obligations or conditions intended solely to assure expenditure of the transferred moneys in accordance with the governmental purpose of the transfer do not prevent a transfer from being a grant.

(5) *Expenditures for reimbursement purposes.* In allocating gross proceeds of

issues of reimbursement bonds (as defined in §1.150–2)) to certain expenditures, §1.150–2 applies. In allocating gross proceeds to an expenditure to reimburse a previously paid working capital expenditure, paragraph (d)(3) of this section applies. Thus, if the expenditure is described in paragraph (d)(3)(ii) of this section or there are no available amounts on the date a working capital expenditure is made and there are no other available amounts on the date of the reimbursement of that expenditure, gross proceeds are allocated to the working capital expenditure as of the date of the reimbursement.

(6) *Expenditures of certain commingled investment proceeds of governmental issues.* This paragraph (d)(6) applies to any issue of governmental bonds, any issue of private activity bonds issued to finance a facility that is required by section 142 to be owned by a governmental unit, and any portion of an issue that is not treated as consisting of private activity bonds under section 141(b)(9). Investment proceeds of the issue (other than investment proceeds held in a refunding escrow) are treated as allocated to expenditures for a governmental purpose when the amounts are deposited in a commingled fund with substantial tax or other revenues from governmental operations of the issuer and the amounts are reasonably expected to be spent for governmental purposes within 6 months from the date of the commingling. In establishing these reasonable expectations, an issuer may use any reasonable accounting assumption and is not bound by the *proceeds-spent-last* assumption generally required for working capital expenditures under paragraph (d)(3) of this section.

(7) *Payments to related parties.* Any payment of gross proceeds of the issue to a related party of the payor is not an expenditure of those gross proceeds.

(e) *Special rules for commingled funds*—(1) *In general.* An accounting method for gross proceeds of an issue in a commingled fund, other than a bona fide debt service fund, is reasonable only if it satisfies the requirements of paragraphs (e)(2) through (6) of this section in addition to the other requirements of this section.

(2) *Investments held by a commingled fund*—(i) *Required ratable allocations.* Not less frequently than as of the close of each fiscal period, all payments and receipts (including deemed payments and receipts) on investments held by a commingled fund must be allocated (but not necessarily distributed) among the different investors in the fund. This allocation must be based on a consistently applied, reasonable ratable allocation method.

(ii) *Safe harbors for ratable allocation methods.* Reasonable ratable allocation methods include, without limitation, methods that allocate these items in proportion to either—

(A) The average daily balances of the amounts in the commingled fund from different investors during a fiscal period (as described in paragraph (e)(4) of this section); or

(B) The average of the beginning and ending balances of the amounts in the commingled fund from different investors for a fiscal period that does not exceed one month.

(iii) *Definition of investor.* For purposes of this paragraph (e), the term *investor* means each different source of funds invested in a commingled fund. For example, if a city invests gross proceeds of an issue and tax revenues in a commingled fund, it is treated as two different investors.

(3) *Certain expenditures involving a commingled fund.* If a ratable allocation method is used under paragraph (d) of this section to allocate expenditures from the commingled fund, the same ratable allocation method must be used to allocate payments and receipts on investments in the commingled fund under paragraph (e)(2) of this section.

(4) *Fiscal periods.* The fiscal year of a commingled fund is the calendar year unless the fund adopts another fiscal year. A commingled fund may use any consistent fiscal period that does not exceed three months (e.g., a daily, weekly, monthly, or quarterly fiscal period).

(5) *Unrealized gains and losses on investments of a commingled fund*—(i) *Mark-to-market requirement for internal commingled funds with longer-term investment portfolios.* Except as otherwise provided in this paragraph (e), in the case of a commingled fund in which the

issuer and any related party own more than 25 percent of the beneficial interests in the fund (an *internal commingled fund*), the fund must treat all its investments as if sold at fair market value either on the last day of the fiscal year or the last day of each fiscal period. The net gains or losses from these deemed sales of investments must be allocated to all investors of the commingled fund during the period since the last allocation.

(ii) *Exception for internal commingled funds with shorter-term investment portfolios.* If the remaining weighted average maturity of all investments held by a commingled fund during a particular fiscal year does not exceed 18 months, and the investments held by the commingled fund during that fiscal year consist exclusively of obligations, the mark-to-market requirement of paragraph (e)(5)(i) of this section does not apply.

(iii) *Exception for commingled reserve funds and sinking funds.* The mark-to-market requirement of paragraph (e)(5)(i) of this section does not apply to a commingled fund that operates exclusively as a reserve fund, sinking fund, or replacement fund for two or more issues of the same issuer.

(6) *Allocations of commingled funds serving as common reserve funds or sinking funds*—(i) *Permitted ratable allocation methods.* If a commingled fund serves as a common reserve fund, replacement fund, or sinking fund for two or more issues (a *commingled reserve*), after making reasonable adjustments to account for proceeds allocated under paragraph (b)(1) or (b)(2) of this section, investments held by that commingled fund must be allocated ratably among the issues served by the commingled fund in accordance with one of the following methods—

(A) The relative values of the bonds of those issues under §1.148–4(e);

(B) The relative amounts of the remaining maximum annual debt service requirements on the outstanding principal amounts of those issues; or

(C) The relative original stated principal amounts of the outstanding issues.

(ii) *Frequency of allocations.* An issuer must make any allocations required by this paragraph (e)(6) as of a date at least every 3 years and as of each date that an issue first becomes secured by the commingled reserve. If relative original principal amounts are used to allocate, allocations must also be made on the retirement of any issue secured by the commingled reserve.

[T.D. 8476, 58 FR 33532, June 18, 1993; 58 FR 44452, Aug. 23, 1993, as amended by T.D. 8538, 59 FR 24045, May 10, 1994; T.D. 8712, 62 FR 2304, Jan. 16, 1997; T.D. 8718, 62 FR 25512, May 9, 1997]

§ 1.148–7 Spending exceptions to the rebate requirement.

(a) *Scope of section*—(1) *In general.* This section provides guidance on the spending exceptions to the arbitrage rebate requirement of section 148(f)(2). These exceptions are the 6-month exception in section 148(f)(4)(B) (the *6-month exception*), the 18-month exception under paragraph (d) of this section (the *18-month exception*), and the 2-year construction exception under section 148(f)(4)(C) (the *2-year exception*) (collectively, the *spending exceptions*).

(2) *Relationship of spending exceptions.* Each of the spending exceptions is an independent exception to arbitrage rebate. For example, a construction issue may qualify for the 6-month exception or the 18-month exception even though the issuer makes one or more elections under the 2-year exception with respect to the issue.

(3) *Spending exceptions not mandatory.* Use of the spending exceptions is not mandatory. An issuer may apply the arbitrage rebate requirement to an issue that otherwise satisfies a spending exception. If an issuer elects to pay penalty in lieu of rebate under the 2-year exception, however, the issuer must apply those penalty provisions.

(b) *Rules applicable for all spending exceptions.* The provisions of this paragraph (b) apply for purposes of applying each of the spending exceptions.

(1) *Special transferred proceeds rules*—(i) *Application to prior issues.* For purposes of applying the spending exceptions to a prior issue only, proceeds of the prior issue that become transferred proceeds of the refunding issue continue to be treated as unspent proceeds of the prior issue. If the prior issue satisfies one of the spending exceptions, the proceeds of the prior issue that are

excepted from rebate under that spending exception are not subject to rebate either as proceeds of the prior issue or as transferred proceeds of the refunding issue.

(ii) *Application to refunding issues*—(A) *In general.* The only spending exception applicable to refunding issues is the 6-month exception. For purposes of applying the 6-month exception to a refunding issue only, proceeds of the prior issue that become transferred proceeds of the refunding issue generally are not treated as proceeds of the refunding issue and need not be spent for the refunding issue to satisfy that spending exception. Even if the refunding issue qualifies for that spending exception, those transferred proceeds are subject to rebate as proceeds of the refunding issue unless an exception to rebate applied to those proceeds as proceeds of the prior issue.

(B) *Exception.* For purposes of applying the 6-month exception to refunding issues, those transferred proceeds of the refunding issue excluded from the gross proceeds of the prior issue under the special definition of gross proceeds in paragraph (c)(3) of this section, and those that transferred from a prior taxable issue, are generally treated as gross proceeds of the refunding issue. Thus, for the refunding issue to qualify for the 6-month exception, those proceeds must be spent within 6 months of the issue date of the refunding issue, unless those amounts continue to be used in a manner that does not cause those amounts to be gross proceeds under paragraph (c)(3) of this section.

(2) *Application of multipurpose issue rules.* Except as otherwise provided, if any portion of an issue is treated as a separate issue allocable to refunding purposes under §1.148–9(h) (relating to multipurpose issues), for purposes of this section, that portion is treated as a separate issue.

(3) *Expenditures for governmental purposes of the issue.* For purposes of this section, expenditures for the governmental purpose of an issue include payments for interest, but not principal, on the issue, and for principal or interest on another issue of obligations. The preceding sentence does not apply for purposes of the 18-month and 2-year exceptions if those payments cause the issue to be a refunding issue.

(4) *De minimis rule.* Any failure to satisfy the final spending requirement of the 18-month exception or the 2-year exception is disregarded if the issuer exercises due diligence to complete the project financed and the amount of the failure does not exceed the lesser of 3 percent of the issue price of the issue or $250,000.

(5) *Special definition of reasonably required reserve or replacement fund.* For purposes of this section only, a reasonably required reserve or replacement fund also includes any fund to the extent described in §1.148–5(c)(3)(i)(E) or (G).

(6) *Pooled financing issue*—(i) *In general.* Except as otherwise provided in this paragraph (b)(6), the spending exceptions apply to a pooled financing issue as a whole, rather than to each loan separately.

(ii) *Election to apply spending exceptions separately to each loan*—(A) *In general.* At the election (made on or before the issue date) of the issuer of a pooled financing issue, the spending exceptions are applied separately to each conduit loan, and the applicable spending requirements for a loan begin on the earlier of the date the loan is made, or the first day following the 1-year period beginning on the issue date of the pooled financing issue. If this election is made, the rebate requirement applies to, and none of the spending exceptions are available for, gross proceeds of the pooled financing bonds before the date on which the spending requirements for those proceeds begin.

(B) *Application of spending exceptions.* If the issuer makes the election under this paragraph (b)(6)(ii), the rebate requirement is satisfied for proceeds used to finance a particular conduit loan to the extent that the loan satisfies a spending exception or the small issuer exception under §1.148–8, regardless of whether any other conduit loans allocable to the issue satisfy such an exception. A pooled financing issue is an issue of arbitrage bonds, however, unless the entire issue satisfies the requirements of section 148. An issuer may pay rebate for some conduit loans and 1½ percent penalty for other conduit loans from the same pooled financing issue. The 1½ percent penalty is computed separately for each conduit loan.

(C) *Elections under 2-year exception.* If the issuer makes the election under this paragraph (b)(6)(ii), the issuer may make all elections under the 2-year exception separately for each loan. Elections regarding a loan that otherwise must be made by the issuer on or before the issue date instead may be made on or before the date the loan is made (but not later than 1 year after the issue date).

(D) *Example.* The operation of this paragraph (b)(6) is illustrated by the following example:

Example. Pooled financing issue. On January 1, 1994, Authority *J* issues bonds. As of the issue date, *J* reasonably expects to use the proceeds of the issue to make loans to City *K*, County *L*, and City *M*. *J* does not reasonably expect to use more than 75 percent of the available construction proceeds of the issue for construction expenditures. On or before the issue date, *J* elects to apply the spending exceptions separately for each loan, with spending requirements beginning on the earlier of the date the loan is made or the first day following the 1-year period beginning on the issue date. On February 1, 1994, *J* loans a portion of the proceeds to *K*, and *K* reasonably expects that 45 percent of those amounts will be used for construction expenditures. On the date this loan is made, *J* elects under paragraph (j) of this section to treat 60 percent of the amount loaned to *K* as a separate construction issue, and also elects the 1½ percent penalty under paragraph (k) of this section for the separate construction issue. On March 1, 1994, *J* loans a portion of the proceeds to *L*, and *L* reasonably expects that more than 75 percent of those amounts will be used for construction expenditures. On March 1, 1995, *J* loans the remainder of the proceeds to *M*, and none of those amounts will be used for construction expenditures. *J* must satisfy the rebate requirement for all gross proceeds before those amounts are loaned. For the loan to *K*, the spending periods begin on February 1, 1994, and the 1½ percent penalty must be paid for any failure to meet a spending requirement for the portion of the loan to *K* that is treated as a separate construction issue. Rebate must be paid on the remaining portion of the loan to *K*, unless that portion qualifies for the 6-month exception. For the loan to *L*, the spending periods begin on March 1, 1994, and the rebate requirement must be satisfied unless the 6-month, 18-month, or the 2-year exception is satisfied with respect to those amounts. For the loan to *M*, the spending periods begin on January 2, 1995, and the rebate requirement must be satisfied for those amounts unless the 6-month or 18-month exception is satisfied.

(c) *6-month exception*—(1)*General rule.* An issue is treated as meeting the rebate requirement if—

(i) The gross proceeds (as modified by paragraph (c)(3) of this section) of the issue are allocated to expenditures for the governmental purposes of the issue within the 6-month period beginning on the issue date (the *6-month spending period*); and

(ii) The rebate requirement is met for amounts not required to be spent within the 6-month spending period (excluding earnings on a bona fide debt service fund).

(2) *Additional period for certain bonds.* The 6-month spending period is extended for an additional 6 months in certain circumstances specified under section 148(f)(4)(B)(ii).

(3) *Amounts not included in gross proceeds.* For purposes of paragraph (c)(1)(i) of this section only, gross proceeds has the meaning used in §1.148–1, except it does not include amounts—

(i) In a bona fide debt service fund;

(ii) In a reasonably required reserve or replacement fund (see §1.148–7(b)(5));

(iii) That, as of the issue date, are not reasonably expected to be gross proceeds but that become gross proceeds after the end of the 6-month spending period;

(iv) Representing sale or investment proceeds derived from payments under any purpose investment of the issue; and

(v) Representing repayments of grants (as defined in §1.148–6(d)(4)) financed by the issue.

(4) *Series of refundings.* If a principal purpose of a series of refunding issues is to exploit the difference between taxable and tax-exempt interest rates by investing proceeds during the temporary periods provided in §1.148–9(d), the 6-month spending period for all issues in the series begins on the issue date of the first issue in the series.

(d) *18-month exception*—(1) *General rule.* An issue is treated as meeting the rebate requirement if all of the following requirements are satisfied—

(i) *18-month expenditure schedule met.* The gross proceeds (as defined in paragraph (d)(3) of this section) are allocated to expenditures for a governmental purpose of the issue in accordance with the following schedule (the *18-month expenditure schedule*) measured from the issue date—

(A) At least 15 percent within 6 months (the *first spending period*);

(B) At least 60 percent within 12 months (the *second spending period*); and

(C) 100 percent within 18 months (the *third spending period*).

(ii) *Rebate requirement met for amounts not required to be spent.* The rebate requirement is met for all amounts not required to be spent in accordance with the 18-month expenditure schedule (other than earnings on a bona fide debt service fund).

(iii) *Issue qualifies for initial temporary period.* All of the gross proceeds (as defined in paragraph (d)(3)(i) of this section) of the issue qualify for the initial temporary period under §1.148–2(e)(2).

(2) *Extension for reasonable retainage.* An issue does not fail to satisfy the spending requirement for the third spending period as a result of a reasonable retainage if the reasonable retainage is allocated to expenditures within 30 months of the issue date. Reasonable retainage has the meaning under paragraph (h) of this section, as modified to refer to net sale proceeds on the date 18 months after the issue date.

(3) *Gross proceeds*—(i) *Definition of gross proceeds.* For purposes of paragraph (d)(1) of this section only, *gross proceeds* means gross proceeds as defined in paragraph (c)(3) of this section, as modified to refer to ''18 months'' in paragraph (c)(3)(iii) of this section in lieu of ''6 months.''

(ii) *Estimated earnings.* For purposes of determining compliance with the first two spending periods under paragraph (d)(1)(i) of this section, the amount of investment proceeds included in gross proceeds of the issue is determined based on the issuer's reasonable expectations on the issue date.

(4) *Application to multipurpose issues.* This paragraph (d) does not apply to an issue any portion of which is treated as meeting the rebate requirement under paragraph (e) of this section (relating to the 2-year exception).

(e) *2-year exception*—(1) *General rule.* A construction issue is treated as meeting the rebate requirement for available construction proceeds if those proceeds are allocated to expenditures for governmental purposes of the issue in accordance with the following schedule (the *2-year expenditure schedule*), measured from the issue date—

(i) At least 10 percent within 6 months (the *first spending period*);

(ii) At least 45 percent within 1 year (the *second spending period*);

(iii) At least 75 percent within 18 months (the *third spending period*); and

(iv) 100 percent within 2 years (the *fourth spending period*).

(2) *Extension for reasonable retainage.* An issue does not fail to satisfy the spending requirement for the fourth spending period as a result of unspent amounts for reasonable retainage (as defined in paragraph (h) of this section) if those amounts are allocated to expenditures within 3 years of the issue date.

(3) *Definitions.* For purposes of the 2-year exception, the following definitions apply:

(i) *Real property* means land and improvements to land, such as buildings or other inherently permanent structures, including interests in real property. For example, real property includes wiring in a building, plumbing systems, central heating or air-conditioning systems, pipes or ducts, elevators, escalators installed in a building, paved parking areas, roads, wharves and docks, bridges, and sewage lines.

(ii) *Tangible personal property* means any tangible property other than real property, including interests in tangible personal property. For example, tangible personal property includes machinery that is not a structural component of a building, subway cars, fire trucks, automobiles, office equipment, testing equipment, and furnishings.

(iii) *Substantially completed.* Construction may be treated as substantially completed when the issuer abandons construction or when at least 90 percent of the total costs of the construction reasonably expected, as of that date, to be financed with the available construction proceeds have been allocated to expenditures.

(f) *Construction issue*—(1) *Definition. Construction issue* means any issue that is not a refunding issue if—

(i) The issuer reasonably expects, as of the issue date, that at least 75 percent of the available construction proceeds of the issue will be allocated to construction expenditures (as defined in paragraph (g) of this section) for property owned by a governmental unit or a 501(c)(3) organization; and

(ii) Any private activity bonds that are part of the issue are qualified 501(c)(3) bonds or private activity bonds issued to finance property to be owned by a governmental unit or a 501(c)(3) organization.

(2) *Use of actual facts.* For the provisions of paragraphs (e) through (m) of this section that apply based on the issuer's reasonable expectations, an issuer may elect on or before the issue date to apply all of those provisions based on actual facts, except that this election does not apply for purposes of determining whether an issue is a construction issue under paragraph (f)(1) of this section if the 1½ percent penalty election is made under paragraph (k) of this section.

(3) *Ownership requirement*—(i) *In general.* A governmental unit or 501(c)(3) organization is treated as the owner of property if it would be treated as the owner for Federal income tax purposes. For obligations issued on behalf of a State or local governmental unit, the entity that actually issues the bonds is treated as a governmental unit.

(ii) *Safe harbor for leases and management contracts.* Property leased by a governmental unit or a 501(c)(3) organization is treated as owned by the governmental unit or 501(c)(3) organization if the lessee complies with the requirements of section 142(b)(1)(B). For a bond described in section 142(a)(6), the requirements of section 142(b)(1)(B) apply as modified by section 146(h)(2).

(g) *Construction expenditures*—(1) *Definition.* Except as otherwise provided, *construction expenditures* means capital expenditures (as defined in §1.150–1) that are allocable to the cost of real property or constructed personal property (as defined in paragraph (g)(3) of this section). Except as provided in paragraph (g)(2) of this section, construction expenditures do not include expenditures for acquisitions of interests in land or other existing real property.

(2) *Certain acquisitions under turnkey contracts treated as construction expenditures.* Expenditures are not for the acquisition of an interest in existing real property other than land if the contract between the seller and the issuer requires the seller to build or install the property (e.g., a *turnkey contract*), but only to the extent that the property has not been built or installed at the time the parties enter into the contract.

(3) *Constructed personal property. Constructed personal property* means tangible personal property (or, if acquired pursuant to a single acquisition contract, properties) or specially developed computer software if—

(i) A substantial portion of the property or properties is completed more than 6 months after the earlier of the date construction or rehabilitation commenced and the date the issuer entered into an acquisition contract;

(ii) Based on the reasonable expectations of the issuer, if any, or representations of the person constructing the property, with the exercise of due diligence, completion of construction or rehabilitation (and delivery to the issuer) could not have occurred within that 6-month period; and

(iii) If the issuer itself builds or rehabilitates the property, not more than 75 percent of the capitalizable cost is attributable to property acquired by the issuer (e.g., components, raw materials, and other supplies).

(4) *Specially developed computer software. Specially developed computer software* means any programs or routines used to cause a computer to perform a desired task or set of tasks, and the documentation required to describe and maintain those programs, provided that the software is specially developed and is functionally related and subordinate to real property or other constructed personal property.

(5) *Examples.* The operation of this paragraph (g) is illustrated by the following examples:

Example 1. Purchase of construction materials. City A issues bonds to finance a new office building. *A* uses proceeds of the bonds to purchase materials to be used in constructing the building, such as bricks, pipes, wires, lighting, carpeting, heating equipment, and similar materials. Expenditures by *A* for the construction materials are construction expenditures because those expenditures will be capitalizable to the cost of the building upon completion, even though they are not initially capitalizable to the cost of existing real property. This result would be the same if *A* hires a third-party to perform the construction, unless the office building is partially constructed at the time that *A* contracts to purchase the building.

Example 2. Turnkey contract. City *B* issues bonds to finance a new office building. *B* enters into a turnkey contract with developer *D* under which *D* agrees to provide *B* with a completed building on a specified completion date on land currently owned by *D*. Under the agreement, *D* holds title to the land and building and assumes any risk of loss until the completion date, at which time title to the land and the building will be transferred to *B*. No construction has been performed by the date that *B* and *D* enter into the agreement. All payments by *B* to *D* for construction of the building are construction expenditures because all the payments are properly capitalized to the cost of the building, but payments by *B* to *D* allocable to the acquisition of the land are not construction expenditures.

Example 3. Right-of-way. P, a public agency, issues bonds to finance the acquisition of a right-of-way and the construction of sewage lines through numerous parcels of land. The right-of-way is acquired primarily through *P*' s exercise of its powers of eminent domain. As of the issue date, *P* reasonably expects that it will take approximately 2 years to acquire the entire right-of-way because of the time normally required for condemnation proceedings. No expenditures for the acquisition of the right-of-way are construction expenditures because they are costs incurred to acquire an interest in existing real property.

Example 4. Subway cars. City *C* issues bonds to finance new subway cars. *C* reasonably expects that it will take more than 6 months for the subway cars to be constructed to *C*'s specifications. The subway cars are constructed personal property. Alternatively, if the builder of the subway cars informs *C* that it will only take 3 months to build the subway cars to *C*'s specifications, no payments for the subway cars are construction expenditures.

Example 5. Fractional interest in property. U, a public agency, issues bonds to finance an undivided fractional interest in a newly constructed power-generating facility. *U* contributes its ratable share of the cost of building the new facility to the project manager for the facility. *U*'s contributions are construction expenditures in the same proportion that the total expenditures for the facility qualify as construction expenditures.

Example 6. Park land. City *D* issues bonds to finance the purchase of unimproved land and the cost of subsequent improvements to the land, such as grading and landscaping, necessary to transform it into a park. The costs of the improvements are properly capitalizable to the cost of the land, and therefore, are construction expenditures, but expenditures for the acquisition of the land are not.

(h) *Reasonable retainage definition. Reasonable retainage* means an amount, not to exceed 5 percent of available construction proceeds as of the end of the fourth spending period, that is retained for reasonable business purposes relating to the property financed with the proceeds of the issue. For example, a reasonable retainage may include a retention to ensure or promote compliance with a construction contract in circumstances in which the retained amount is not yet payable, or in which the issuer reasonably determines that a dispute exists regarding completion or payment.

(i) *Available construction proceeds*—(1) *Definition in general. Available construction proceeds* has the meaning used in section 148(f)(4)(C)(vi). For purposes of this definition, earnings include earnings on any tax-exempt bond. Pre-issuance accrued interest and earnings thereon may be disregarded. Amounts that are not gross proceeds as a result of the application of the universal cap under §1.148–6(b)(2) are not available construction proceeds.

(2) *Earnings on a reasonably required reserve or replacement fund.* Earnings on any reasonably required reserve or replacement fund are available construction proceeds only to the extent that those earnings accrue before the earlier of the date construction is substantially completed or the date that is 2 years after the issue date. An issuer may elect on or before the issue date to exclude from available construction proceeds the earnings on such a fund. If the election is made, the rebate requirement applies to the excluded amounts from the issue date.

(3) *Reasonable expectations test for future earnings.* For purposes of determining compliance with the spending requirements as of the end of each of the first three spending periods, available construction proceeds include the amount of future earnings that the issuer reasonably expected as of the issue date.

(4) *Issuance costs.* Available construction proceeds do not include gross proceeds used to pay issuance costs financed by an issue, but do include earnings on such proceeds. Thus, an expenditure of gross proceeds of an issue for issuance costs does not count toward meeting the spending requirements. The expenditure of earnings on gross proceeds used to pay issuance costs does count toward meeting those requirements. If the spending requirements are met and the proceeds used to pay issuance costs are expended by the end of the fourth spending period, those proceeds and the earnings thereon are treated as having satisfied the rebate requirement.

(5) *One and one-half percent penalty in lieu of arbitrage rebate.* For purposes of the spending requirements of paragraph (e) of this section, available construction proceeds as of the end of any spending period are reduced by the amount of penalty in lieu of arbitrage rebate (under paragraph (k) of this section) that the issuer has paid from available construction proceeds before the last day of the spending period.

(6) *Payments on purpose investments and repayments of grants.* Available construction proceeds do not include—

(i) Sale or investment proceeds derived from payments under any purpose investment of the issue; or

(ii) Repayments of grants (as defined in §1.148–6(d)(4)) financed by the issue.

(7) *Examples.* The operation of this paragraph (i) is illustrated by the following examples:

Example 1. Treatment of investment earnings. City *F* issues bonds having an issue price of $10,000,000. *F* deposits all of the proceeds of the issue into a construction fund to be used for expenditures other than costs of issuance. *F* estimates on the issue date that, based on reasonably expected expenditures and rates of investment, earnings on the construction fund will be $800,000. As of the issue date and the end of each of the first three spending periods, the amount of available construction proceeds is $10,800,000. To qualify as a construction issue, *F* must reasonably expect on the issue date that at least $8,100,000 (75 percent of $10,800,000) will be used for construction expenditures. In order to meet the 10 percent spending requirement at the end of the first spending period, *F* must spend at least $1,080,000. As of the end of the fourth spending period, *F* has received $1,100,000 in earnings. In order to meet the spending requirement at the end of the fourth spending period, however, *F* must spend all of the $11,100,000 of actual available construction proceeds (except for reasonable retainage not exceeding $555,000).

Example 2. Treatment of investment earnings without a reserve fund. City *G* issues bonds having an issue price of $11,200,000. *G* does not elect to exclude earnings on the reserve fund from available construction proceeds. *G* uses $200,000 of proceeds to pay issuance costs and deposits $1,000,000 of proceeds into a reasonably required reserve fund. *G* deposits the remaining $10,000,000 of proceeds into a construction fund to be used for construction expenditures. On the issue date, *G* reasonably expects that, based on the reasonably expected date of substantial completion and rates of investment, total earnings on the construction fund will be $800,000, and total earnings on the reserve fund to the date of substantial completion will be $150,000. *G* reasonably expects that substantial completion will occur during the fourth spending period. As of the issue date, the amount of available construction proceeds is $10,950,000 ($10,000,000 originally deposited into the construction fund plus $800,000 expected earnings on the construction fund and $150,000 expected earnings on the reserve fund). To qualify as a construction issue, *G* must reasonably expect on the issue date that at least $8,212,500 will be used for construction expenditures.

Example 3. Election to exclude earnings on a reserve fund. The facts are the same as *Example 2,* except that *G* elects on the issue date to exclude earnings on the reserve fund from available construction proceeds. The amount of available construction proceeds as of the issue date is $10,800,000.

(j) *Election to treat portion of issue used for construction as separate issue*—(1) *In general.* For purposes of paragraph (e) of this section, if any proceeds of an issue are to be used for construction expenditures, the issuer may elect on or before the issue date to treat the portion of the issue that is not a refunding issue as two, and only two, separate issues, if—

(i) One of the separate issues is a construction issue as defined in paragraph (f) of this section;

(ii) The issuer reasonably expects, as of the issue date, that this construction issue will finance all of the construction expenditures to be financed by the issue; and

(iii) The issuer makes an election to apportion the issue under this paragraph (j)(1) in which it identifies the amount of the issue price of the issue allocable to the construction issue.

(2) *Example*. The operation of this paragraph (j) is illustrated by the following example.

Example. City *D* issues bonds having an issue price of $19,000,000. On the issue date, *D* reasonably expects to use $10,800,000 of bond proceeds (including investment earnings) for construction expenditures for the project being financed. *D* deposits $10,000,000 in a construction fund to be used for construction expenditures and $9,000,000 in an acquisition fund to be used for acquisition of equipment not qualifying as construction expenditures. *D* estimates on the issue date, based on reasonably expected expenditures and rates of investment, that total earnings on the construction fund will be $800,000 and total earnings on the acquisition fund will be $200,000. Because the total construction expenditures to be financed by the issue are expected to be $10,800,000, the maximum available construction proceeds for a construction issue is $14,400,000 ($10,800,000 divided by 0.75). To determine the maximum amount of the issue price allocable to a construction issue, the estimated investment earnings allocable to the construction issue are subtracted. The entire $800,000 of earnings on the construction fund are allocable to the construction issue. Only a portion of the $200,000 of earnings on the acquisition fund, however, are allocable to the construction issue. The total amount of the available construction proceeds that is expected to be used for acquisition is $3,600,000 ($14,400,000 − $10,800,000). The portion of earnings on the acquisition fund that is allocable to the construction issue is $78,261 ($200,000×$3,600,000/$9,200,000). Accordingly, *D* may elect on or before the issue date to treat up to $13,521,739 of the issue price as a construction issue ($14,400,000 − $800,000 − $78,261). *D*'s election must specify the amount of the issue price treated as a construction issue. The balance of the issue price is treated as a separate nonconstruction issue that is subject to the rebate requirement unless it meets another exception to arbitrage rebate. Because the financing of a construction issue is a separate governmental purpose under §1.148–9(h), the election causes the issue to be a multipurpose issue under that section.

(k) *One and one-half percent penalty in lieu of arbitrage rebate*—(1) *In general*. Under section 148(f)(4)(C)(vii), an issuer of a construction issue may elect on or before the issue date to pay a penalty (the *1½ percent penalty*) to the United States in lieu of the obligation to pay the rebate amount on available construction proceeds upon failure to satisfy the spending requirements of paragraph (e) of this section. The 1½ percent penalty is calculated separately for each spending period, including each semiannual period after the end of the fourth spending period, and is equal to 1.5 percent times the underexpended proceeds as of the end of the spending period. For each spending period, underexpended proceeds equal the amount of available construction proceeds required to be spent by the end of the spending period, less the amount actually allocated to expenditures for the governmental purposes of the issue by that date. The 1½ percent penalty must be paid to the United States no later than 90 days after the end of the spending period to which it relates. The 1½ percent penalty continues to apply at the end of each spending period and each semiannual period thereafter until the earliest of the following—

(i) The termination of the penalty under paragraph (l) of this section;

(ii) The expenditure of all of the available construction proceeds; or

(iii) The last stated final maturity date of bonds that are part of the issue and any bonds that refund those bonds.

(2) *Application to reasonable retainage*. If an issue meets the exception for reasonable retainage except that all retainage is not spent within 3 years of the issue date, the issuer must pay the 1½ percent penalty to the United States for any reasonable retainage that was not so spent as of the close of the 3-year period and each later spending period.

(3) *Coordination with rebate requirement*. The rebate requirement is treated as met with respect to available construction proceeds for a period if the 1½ percent penalty is paid in accordance with this section.

(l) *Termination of 1½ percent penalty*—(1)*Termination after initial temporary period*. The issuer may terminate the 1½ percent penalty after the initial temporary period (a *section 148(f)(4)(C)(viii) penalty termination*) if—

(i) Not later than 90 days after the earlier of the end of the initial temporary period or the date construction is substantially completed, the issuer elects to terminate the 1½ percent penalty; provided that solely for this purpose, the initial temporary period may be extended by the issuer to a date ending 5 years after the issue date;

(ii) Within 90 days after the end of the initial temporary period, the issuer pays a penalty equal to 3 percent of the unexpended available construction proceeds determined as of the end of the initial temporary period, multiplied by the number of years (including fractions of years computed to 2 decimal places) in the initial temporary period;

(iii) For the period beginning as of the close of the initial temporary period, the unexpended available construction proceeds are not invested in higher yielding investments; and

(iv) On the earliest date on which the bonds may be called or otherwise redeemed, with or without a call premium, the unexpended available construction proceeds as of that date (not including any amount earned after the date on which notice of the redemption was required to be given) must be used to redeem the bonds. Amounts used to pay any call premium are treated as used to redeem bonds. This redemption requirement may be met by purchases of bonds by the issuer on the open market at prices not exceeding fair market value. A portion of the annual principal payment due on serial bonds of a construction issue may be paid from the unexpended amount, but only in an amount no greater than the amount that bears the same ratio to the annual principal due that the total unexpended amount bears to the issue price of the construction issue.

(2) *Termination before end of initial temporary period.* If the construction to be financed by the construction issue is substantially completed before the end of the initial temporary period, the issuer may elect to terminate the 1½ percent penalty before the end of the initial temporary period (a *section 148(f)(4)(C)(ix) penalty termination*) if—

(i) Before the close of the initial temporary period and not later than 90 days after the date the construction is substantially completed, the issuer elects to terminate the 1½ percent penalty;

(ii) The election identifies the amount of available construction proceeds that will not be spent for the governmental purposes of the issue; and

(iii) The issuer has met all of the conditions for a section 148(f)(4)(C)(viii) penalty termination, applied as if the initial temporary period ended as of the date the required election for a section 148(f)(4)(C)(ix) penalty termination is made. That penalty termination election satisfies the required election for a section 148(f)(4)(C)(viii) termination.

(3) *Application to reasonable retainage.* Solely for purposes of determining whether the conditions for terminating the 1½ percent penalty are met, reasonable retainage may be treated as spent for a governmental purpose of the construction issue. Reasonable retainage that is so treated continues to be subject to the 1½ percent penalty.

(4) *Example.* The operation of this paragraph (l) is illustrated by the following example.

Example. City *I* issues a construction issue having a 20-year maturity and qualifying for a 3-year initial temporary period. The bonds are first subject to optional redemption 10 years after the issue date at a premium of 3 percent. *I* elects, on or before the issue date, to pay the 1½ percent penalty in lieu of arbitrage rebate. At the end of the 3-year temporary period, the project is not substantially completed, and $1,500,000 of available construction proceeds of the issue are unspent. At that time, *I* reasonably expects to need $500,000 to complete the project. *I* may terminate the 1½ percent penalty in lieu of arbitrage rebate with respect to the excess $1,500,000 by electing to terminate within 90 days of the end of the initial temporary period; paying a penalty to the United States of $135,000 (3 percent of $1,500,000 multiplied by 3 years); restricting the yield on the investment of unspent available construction proceeds for 7 years until the first call date, although any portion of these proceeds may still be spent on the project prior to that call date; and using the available construction proceeds that, as of the first call date, have not been allocated to expenditures for the governmental purposes of the issue to redeem bonds on that call date. If *I* fails to make the termination election, *I* is required to pay the 1½ percent penalty on unspent available construction proceeds every 6 months until the latest maturity date of bonds of the issue (or any bonds of another issue that refund such bonds).

(m) *Payment of penalties.* Each penalty payment under this section must be paid in the manner provided in §1.148–3(g). See §1.148–3(h) for rules on failures to pay penalties under this section.

[T.D. 8476, 58 FR 33535, June 18, 1993; 58 FR 44452, Aug. 23, 1993]

§ 1.148–8 Small issuer exception to rebate requirement.

(a) *Scope.* Under section 148(f)(4)(D), bonds issued to finance governmental activities of certain small issuers are treated as meeting the arbitrage rebate requirement of section 148(f)(2) (the ''small issuer exception''). This section provides guidance on the small issuer exception.

(b) *General taxing powers.* The small issuer exception generally applies only to bonds issued by governmental units with general taxing powers. A governmental unit has general taxing powers if it has the power to impose taxes (or to cause another entity to impose taxes) of general applicability which, when collected, may be used for the general purposes of the issuer. The taxing power may be limited to a specific type of tax, provided that the applicability of the tax is not limited to a small number of persons. The governmental unit's exercise of its taxing power may be subject to procedural limitations, such as voter approval requirements, but may not be contingent on approval by another governmental unit. See, also, section 148(f)(4)(D)(iv).

(c) *Size limitation*—(1) *In general.* An issue (other than a refunding issue) qualifies for the small issuer exception only if the issuer reasonably expects, as of the issue date, that the aggregate face amount of all tax-exempt bonds (other than private activity bonds) issued by it during that calendar year will not exceed $5,000,000; or the aggregate face amount of all tax-exempt bonds of the issuer (other than private activity bonds) actually issued during that calendar year does not exceed $5,000,000. For this purpose, if an issue has more than a de minimis amount of original issue discount or premium, *aggregate face amount* means the aggregate issue price of that issue (determined without regard to pre-issuance accrued interest).

(2) *Aggregation rules.* The following aggregation rules apply for purposes of applying the $5,000,000 size limitation under paragraph (c)(1) of this section.

(i) *On-behalf-of issuers.* An issuer and all entities (other than political subdivisions) that issue bonds on behalf of that issuer are treated as one issuer.

(ii) *Subordinate entities*—(A) *In general.* Except as otherwise provided in paragraph (d) of this section and section 148(f)(4)(D)(iv), all bonds issued by a subordinate entity are also treated as issued by each entity to which it is subordinate. An issuer is subordinate to another governmental entity if it is directly or indirectly controlled by the other entity within the meaning of §1.150–1(e).

(B) *Exception for allocations of size limitation.* If an entity properly makes an allocation of a portion of its $5,000,000 size limitation to a subordinate entity (including an on behalf of issuer) under section 148(f)(4)(D)(iv), the portion of bonds issued by the subordinate entity under the allocation is treated as issued only by the allocating entity and not by any other entity to which the issuing entity is subordinate. These allocations are irrevocable and must bear a reasonable relationship to the benefits received by the allocating unit from issues issued by the subordinate entity. The benefits to be considered include the manner in which—

(*1*) Proceeds are to be distributed;

(*2*) The debt service is to be paid;

(*3*) The facility financed is to be owned;

(*4*) The use or output of the facility is to be shared; and

(*5*) Costs of operation and maintenance are to be shared.

(iii) *Avoidance of size limitation.* An entity formed or availed of to avoid the purposes of the $5,000,000 size limitation and all entities that would benefit from the avoidance are treated as one issuer. Situations in which an entity is formed or availed of to avoid the purposes of the $5,000,000 size limitation include those in which the issuer—

(A) Issues bonds which, but for the $5,000,000 size limitation, would have been issued by another entity; and

(B) Does not receive a substantial benefit from the project financed by the bonds.

(3) *Certain refunding bonds not taken into account.* In applying the $5,000,000 size limitation, there is not taken into account the portion of an issue that is a current refunding issue to the extent that the stated principal amount of the refunding bond does not exceed the portion of the outstanding stated principal amount of the refunded bond paid with proceeds of the refunding bond. For this purpose, *principal amount* means, in reference to a plain par bond, its stated principal amount plus accrued unpaid interest, and in reference to any other bond, its present value.

(d) *Pooled financings*—(1) *Treatment of pool issuer.* To the extent that an issuer of a pooled financing is not an ultimate borrower in the financing and the conduit borrowers are governmental units with general taxing powers and not subordinate to the issuer, the pooled financing is not counted towards the $5,000,000 size limitation of the issuer for purposes of applying the small issuer exception to its other issues. The issuer of the pooled financing issue is, however, subject to the rebate requirement for any unloaned gross proceeds.

(2) *Treatment of conduit borrowers.* A loan to a conduit borrower in a pooled financing qualifies for the small issuer exception, regardless of the size of either the pooled financing or of any loan to other conduit borrowers, only if—

(i) The bonds of the pooled financing are not private activity bonds;

(ii) None of the loans to conduit borrowers are private activity bonds; and

(iii) The loan to the conduit borrower meets all the requirements of the small issuer exception.

(e) *Refunding issues*—(1) *In general.* Sections 148(f)(4)(D) (v) and (vi) provide restrictions on application of the small issuer exception to refunding issues.

(2) *Multipurpose issues.* The multipurpose issue allocation rules of §1.148–9(h) apply for purposes of determining whether refunding bonds meet the requirements of section 148(f)(4)(D)(v).

[T.D. 8476, 58 FR 33540, June 18, 1993]

§ 1.148–9 Arbitrage rules for refunding issues.

(a) *Scope of application.* This section contains special arbitrage rules for refunding issues. These rules apply for all purposes of section 148 and govern allocations of proceeds, bonds, and investments to determine transferred proceeds, temporary periods, reasonably required reserve or replacement funds, minor portions, and separate issue treatment of certain multipurpose issues.

(b) *Transferred proceeds allocation rule*—(1) *In general.* When proceeds of the refunding issue discharge any of the outstanding principal amount of the prior issue, proceeds of the prior issue become transferred proceeds of the refunding issue and cease to be proceeds of the prior issue. The amount of proceeds of the prior issue that becomes transferred proceeds of the refunding issue is an amount equal to the proceeds of the prior issue on the date of that discharge multiplied by a fraction—

(i) The numerator of which is the principal amount of the prior issue discharged with proceeds of the refunding issue on the date of that discharge; and

(ii) The denominator of which is the total outstanding principal amount of the prior issue on the date immediately before the date of that discharge.

(2) *Special definition of principal amount.* For purposes of this section, *principal amount* means, in reference to a plain par bond, its stated principal amount, and in reference to any other bond, its present value.

(3) *Relation of transferred proceeds rule to universal cap rule*—(i) *In general.* Paragraphs (b)(1) and (c) of this section apply to allocate transferred proceeds and corresponding investments to a refunding issue on any date required by those paragraphs before the application of the universal cap rule of §1.148–6(b)(2) to reallocate any of those amounts. To the extent nonpurpose investments allocable to proceeds of a refunding issue exceed the universal cap for the issue on the date that amounts

become transferred proceeds of the refunding issue, those transferred proceeds and corresponding investments are reallocated back to the issue from which they transferred on that same date to the extent of the unused universal cap on that prior issue.

(ii) *Example.* The following example illustrates the application of this paragraph of (b)(3):

Example. On January 1, 1995, $100,000 of nonpurpose investments allocable to proceeds of issue *A* become transferred proceeds of issue *B* under § 1.148–9, but the unused portion of issue *B'* s universal cap is $75,000 as of that date. On January 1, 1995, issue *A* has unused universal cap in excess of $25,000. Thus, $25,000 of nonpurpose investments representing the transferred proceeds are immediately reallocated back to issue *A* on January 1, 1995, and are proceeds of issue *A*. On the next transfer date under § 1.148–9, the $25,000 receives no priority in determining transferred proceeds as of that date but is treated the same as all other proceeds of issue *A* subject to transfer.

(4) *Limitation on multi-generational transfers.* This paragraph (b)(4) contains limitations on the manner in which proceeds of a first generation issue that is refunded by a refunding issue (a *second generation issue*) become transferred proceeds of a refunding issue (a *third generation issue*) that refunds the second generation issue. Proceeds of the first generation issue that become transferred proceeds of the third generation issue are treated as having a yield equal to the yield on the refunding escrow allocated to the second generation issue (*i.e.*, as determined under § 1.148–5(b)(2)(iv)). The determination of the transferred proceeds of the third generation issue does not affect compliance with the requirements of section 148, including the determination of the amount of arbitrage rebate with respect to or the yield on the refunding escrow, of the second generation issue.

(c) *Special allocation rules for refunding issues*—(1) *Allocations of investments*—(i) *In general.* Except as otherwise provided in this paragraph (c), investments purchased with sale proceeds or investment proceeds of a refunding issue must be allocated to those proceeds, and investments not purchased with those proceeds may not be allocated to those proceeds (*i.e.*, a *specific tracing method*).

(ii) *Allocations to transferred proceeds.* When proceeds of a prior issue become transferred proceeds of a refunding issue, investments (and the related payments and receipts) of proceeds of the prior issue that are held in a refunding escrow for another issue are allocated to the transferred proceeds under the ratable allocation method described in paragraph (c)(1)(iii) of this section. Investments of proceeds of the prior issue that are not held in a refunding escrow for another issue are allocated to the transferred proceeds by application of the allocation methods described in paragraph (c)(1) (iii) or (iv) of this section, consistently applied to all investments on a transfer date.

(iii) *Ratable allocation method.* Under the ratable allocation method, a ratable portion of each nonpurpose and purpose investment of proceeds of the prior issue is allocated to transferred proceeds of the refunding issue.

(iv) *Representative allocation method*—(A) *In general.* Under the representative allocation method, representative portions of the portfolio of nonpurpose investments and the portfolio of purpose investments of proceeds of the prior issue are allocated to transferred proceeds of the refunding issue. Unlike the ratable allocation method, this representative allocation method permits an allocation of particular whole investments. Whether a portion is representative is based on all the facts and circumstances, including, without limitation, whether the current yields, maturities, and current unrealized gains or losses on the particular allocated investments are reasonably comparable to those of the unallocated investments in the aggregate. In addition, if a portion of nonpurpose investments is otherwise representative, it is within the issuer's discretion to allocate the portion from whichever source of funds it deems appropriate, such as a reserve fund or a construction fund for a prior issue.

(B) *Mark-to-market safe harbor for representative allocation method.* In addition to other representative allocations, a specific allocation of a particular nonpurpose investment to transferred proceeds (e.g., of lower yielding investments) is treated as satisfying the representative allocation method if that investment is valued at fair market value on the transfer date in determining the payments and receipts on that date, but only if the portion of the nonpurpose investments that transfers is based on the relative fair market value of all nonpurpose investments.

(2) *Allocations of mixed escrows to expenditures for principal, interest, and redemption prices on a prior issue*—(i) *In general.* Except for amounts required or permitted to be accounted for under paragraph (c)(2)(ii) of this section, proceeds of a refunding issue and other amounts that are not proceeds of a refunding issue that are deposited in a refunding escrow (a *mixed escrow*) must be accounted for under this paragraph (c)(2)(i). Those proceeds and other amounts must be allocated to expenditures for principal, interest, or stated redemption prices on the prior issue so that the expenditures of those proceeds do not occur faster than ratably with expenditures of the other amounts in the mixed escrow. During the period that the prior issue has unspent proceeds, however, these allocations must be ratable (with reasonable adjustments for rounding) both between sources for expenditures (*i.e.*, proceeds and other amounts) and between uses (*i.e.*, principal, interest, and stated redemption prices on the prior issue).

(ii) *Exceptions*—(A) *Mandatory allocation of certain non-proceeds to earliest expenditures.* If amounts other than proceeds of the refunding issue are deposited in a mixed escrow, but before the issue date of the refunding issue those amounts had been held in a bona fide debt service fund or a fund to carry out the governmental purpose of the prior issue (e.g., a construction fund), those amounts must be allocated to the earliest maturing investments in the mixed escrow.

(B) *Permissive allocation of non-proceeds to earliest expenditures.* Excluding amounts covered by paragraph (c)(2)(ii)(A) of this section and subject to any required earlier expenditure of those amounts, any amounts in a mixed escrow that are not proceeds of a refunding issue may be allocated to the earliest maturing investments in the mixed escrow, provided that those investments mature and the proceeds thereof are expended before the date of any expenditure from the mixed escrow to pay any principal of the prior issue.

(d) *Temporary periods in refundings*—(1) *In general.* Proceeds of a refunding issue may be invested in higher yielding investments under section 148(c) only during the temporary periods described in paragraph (d)(2) of this section.

(2) *Types of temporary periods in refundings.* The available temporary periods for proceeds of a refunding issue are as follows:

(i) *General temporary period for refunding issues.* Except as otherwise provided in this paragraph (d)(2), the temporary period for proceeds (other than transferred proceeds) of a refunding issue is the period ending 30 days after the issue date of the refunding issue.

(ii) *Temporary periods for current refunding issues*—(A) *In general.* Except as otherwise provided in paragraph (d)(2)(ii)(B) of this section, the temporary period for proceeds (other than transferred proceeds) of a current refunding issue is 90 days.

(B) *Temporary period for short-term current refunding issues.* The temporary period for proceeds (other than transferred proceeds) of a current refunding issue that has an original term to maturity of 270 days or less may not exceed 30 days. The aggregate temporary periods for proceeds (other than transferred proceeds) of all current refunding issues described in the preceding sentence that are part of the same series of refundings is 90 days. An issue is part of a series of refundings if it finances or refinances the same expenditures for a particular governmental purpose as another issue.

(iii) *Temporary periods for transferred proceeds*—(A) *In general.* Except as otherwise provided in paragraph (d)(2)(iii)(B) of this section, each available temporary period for transferred proceeds of a refunding issue begins on the date those amounts become transferred proceeds of the refunding issue and ends on the date that, without regard to the discharge of the prior issue, the available temporary period for those proceeds would have ended had those proceeds remained proceeds of the prior issue.

(B) *Termination of initial temporary period for prior issue in an advance refunding.* The initial temporary period under §1.148–2(e) (2) and (3) for the proceeds of a prior issue that is refunded by an advance refunding issue (including transferred proceeds) terminates on the issue date of the advance refunding issue.

(iv) *Certain short-term gross proceeds.* Except for proceeds of a refunding issue held in a refunding escrow, proceeds otherwise reasonably expected to be used to pay principal or interest on the prior issue, replacement proceeds not held in a bona fide debt service fund, and transferred proceeds, the temporary period for gross proceeds of a refunding issue is the 13-month period beginning on the date of receipt.

(e) *Reasonably required reserve or replacement funds in refundings.* In addition to the requirements of §1.148–2(f), beginning on the issue date of a refunding issue, a reserve or replacement fund for a refunding issue or a prior issue is a reasonably required reserve or replacement fund under section 148(d) that may be invested in higher yielding investments only if the aggregate amount invested in higher yielding investments under this paragraph (e) for both the refunding issue and the prior issue does not exceed the size limitations under §1.148–2 (f)(2) and (f)(3), measured by reference to the refunding issue only (regardless of whether proceeds of the prior issue have become transferred proceeds of the refunding issue).

(f) *Minor portions in refundings.* Beginning on the issue date of the refunding issue, gross proceeds not in excess of a minor portion of the refunding issue qualify for investment in higher yielding investments under section 148(e), and gross proceeds not in excess of a minor portion of the prior issue qualify for investment in higher yielding investments under either section 148(e) or section 149(d)(3)(A)(v), whichever is applicable. *Minor portion* is defined in §1.148–2(g).

(g) *Certain waivers permitted.* On or before the issue date, an issuer may waive the right to invest in higher yielding investments during any temporary period or as part of a reasonably required reserve or replacement fund. At any time, an issuer may waive the right to invest in higher yielding investments as part of a minor portion.

(h) *Multipurpose issue allocations*—(1) *Application of multipurpose issue allocation rules.* The portion of the bonds of a multipurpose issue reasonably allocated to any separate purpose under this paragraph (h) is treated as a separate issue for all purposes of section 148 except the following—

(i) *Arbitrage yield.* Except to the extent that the proceeds of an issue are allocable to two or more conduit loans that are tax-exempt bonds, determining the yield on a multipurpose issue and the yield on investments for purposes of the arbitrage yield restrictions of section 148 and the arbitrage rebate requirement of section 148(f);

(ii) *Rebate amount.* Except as provided in paragraph (h)(1)(i) of this section, determining the rebate amount for a multipurpose issue, including subsidiary matters with respect to that determination, such as the computation date credit under §1.148–3(d)(1), the due date for payments, and the $100,000 bona fide debt service fund exception under section 148(f)(4)(A)(ii);

(iii) *Minor portion.* Determining the *minor portion* of an issue under section 148(e);

(iv) *Reasonably required reserve or replacement fund.* Determining the portion of an issue eligible for investment in higher yielding investments as part of a reasonably required reserve or replacement fund under section 148(d); and

(v) *Effective date.* Applying the provisions of §1.148–11(b) (relating to elective retroactive application of §§1.148–1 through 1.148–10 to certain issues).

(2) *Rules on allocations of multipurpose issues*—(i) *In general.* This paragraph (h) applies to allocations of multipurpose issues, including allocations involving the refunding purposes of the issue. Except as otherwise provided in this paragraph (h), proceeds, investments, and bonds of a multipurpose issue may be allocated among the various separate purposes of the issue using any reasonable, consistently applied allocation method. An allocation is not reasonable if it achieves more favorable results under section 148 or 149(d) than could be achieved with actual separate

issues. An allocation under this paragraph (h) may be made at any time, but once made may not be changed.

(ii) *Allocations involving certain common costs*. A ratable allocation of common costs (as described in paragraph (h)(3)(ii) of this section) among the separate purposes of the multipurpose issue is generally reasonable. If another allocation method more accurately reflects the extent to which any separate purpose of a multipurpose issue enjoys the economic benefit or bears the economic burden of certain common costs, that allocation method may be used.

(3) *Separate purposes of a multipurpose issue*—(i) *In general*. Separate purposes of a multipurpose issue include refunding a separate prior issue, financing a separate purpose investment, financing a construction issue (as defined in §1.148–7(f)), and any clearly discrete governmental purpose reasonably expected to be financed by that issue. In general, all integrated or functionally related capital projects that qualify for the same initial temporary period under §1.148–2(e)(2) are treated as having a single governmental purpose. The separate purposes of a refunding issue include the separate purposes of the prior issue, if any. Separate purposes may be treated as a single purpose if the proceeds used to finance those purposes are eligible for the same initial temporary period under section 148(c). For example, the use of proceeds of a multipurpose issue to finance separate qualified mortgage loans may be treated as a single purpose.

(ii) *Financing common costs*. Common costs of a multipurpose issue are not separate purposes. Common costs include issuance costs, accrued interest, capitalized interest on the issue, a reserve or replacement fund, qualified guarantee fees, and similar costs properly allocable to the separate purposes of the issue.

(iii) *Example*. The following example illustrates the application of this paragraph (h)(3).

Example. On January 1, 1994, Housing Authority of State *A* issues a $10 million issue (the *1994 issue*) at an interest rate of 10 percent to finance qualified mortgage loans for owner-occupied residences under section 143. During 1994, *A* originates $5 million in qualified mortgage loans at an interest rate of 10 percent. In 1995, the market interest rates for housing loans falls to 8 percent and *A* is unable to originate further loans from the 1994 issue. On January 1, 1996, *A* issues a $5 million issue (the *1996 issue*) at an interest rate of 8 percent to refund partially the 1994 issue. Under paragraph (h) of this section, *A* treats the portion of the 1994 issue used to originate $5 million in loans as a separate issue comprised of that group of purpose investments. *A* allocates those purpose investments representing those loans to that separate unrefunded portion of the issue. In addition, *A* treats the unoriginated portion of the 1994 issue as a separate issue and allocates the nonpurpose investments representing the unoriginated proceeds of the 1994 issue to the refunded portion of the issue. Thus, when proceeds of the 1996 issue are used to pay principal on the refunded portion of the 1994 issue that is treated as a separate issue under paragraph (h) of this section, only the portion of the 1994 issue representing unoriginated loan funds invested in nonpurpose investments transfer to become transferred proceeds of the 1996 issue.

(4) *Allocations of bonds of a multipurpose issue*—(i) *Reasonable allocation of bonds to portions of issue*. After reasonable adjustment of the issue price of a multipurpose issue to account for common costs, the portion of the bonds of a multipurpose issue allocated to a separate purpose must have an issue price that bears the same ratio to the aggregate issue price of the multipurpose issue as the portion of the sale proceeds of the multipurpose issue used for that separate purpose bears to the aggregate sale proceeds of the multipurpose issue. For a refunding issue used to refund two or more prior issues, the portion of the sales proceeds allocated to the refunding of a separate prior issue is based on the present value of the refunded debt service on that prior issue, using the yield on investments in the refunding escrow allocable to the entire refunding issue as the discount rate.

(ii) *Safe harbor for pro rata allocation method for bonds*. The use of the relative amount of sales proceeds used for each separate purpose to ratably allocate each bond or a ratable number of substantially identical whole bonds is a reasonable method for allocating bonds of a multipurpose issue.

(iii) *Safe harbor for allocations of bonds used to finance separate purpose investments*. An allocation of a portion of the bonds of a multipurpose issue to a particular purpose investment is generally reasonable if that purpose investment has principal and interest payments that reasonably coincide in time and amount to principal and interest payments on the bonds allocated to that purpose investment.

(iv) *Rounding of bond allocations to next whole bond denomination permitted.* An allocation that rounds each resulting fractional bond up or down to the next integral multiple of a permitted denomination of bonds of that issue not in excess of $100,000 does not prevent the allocation from satisfying this paragraph (h)(4).

(v) *Restrictions on allocations of bonds to refunding purposes.* For each portion of a multipurpose issue that is used to refund a separate prior issue, a method of allocating bonds of that issue is reasonable under this paragraph (h) only if, in addition to the requirements of paragraphs (h)(1) and (h)(2) of this section, the portion of the bonds allocated to the refunding of that prior issue—

(A) Results from a pro rata allocation under paragraph (h)(4)(ii) of this section;

(B) Reflects aggregate principal and interest payable in each bond year that is less than, equal to, or proportionate to, the aggregate principal and interest payable on the prior issue in each bond year;

(C) Results from an allocation of all the bonds of the entire multipurpose issue in proportion to the remaining weighted average economic life of the capital projects financed or refinanced by the issue, determined in the same manner as under section 147(b); or

(D) Results from another reasonable allocation method, but only to the extent that the application of the allocation methods provided in this paragraph (h)(4)(v) is not permitted under state law restrictions applicable to the bonds, reasonable terms of bonds issued before, or subject to a master indenture that became effective prior to, July 1, 1993, or other similar restrictions or circumstances. This paragraph (h)(4)(v)(D) shall be strictly construed and is available only if it does not result in a greater burden on the market for tax-exempt bonds than would occur using one of the other allocation methods provided in this paragraph (h)(4)(v). (See also §1.148–11(c)(2).)

(vi) *Exception for refundings of interim notes.* Paragraph (h)(4)(v) of this section need not be applied to refunding bonds issued to provide permanent financing for one or more projects if the prior issue had a term of less than 3 years and was sold in anticipation of permanent financing, but only if the aggregate term of all prior issues sold in anticipation of permanent financing was less than 3 years.

(5) *Limitation on multi-generation allocations.* This paragraph (h) does not apply to allocations of a multipurpose refunded issue unless that refunded issue is refunded directly by an issue to which this paragraph (h) applies. For example, if a 1994 issue refunds a 1984 multipurpose issue, which in turn refunded a 1980 multipurpose issue, this paragraph (h) applies to allocations of the 1984 issue for purposes of allocating the refunding purposes of the 1994 issue, but does not permit allocations of the 1980 issue.

(i) *Operating rules for separation of prior issue into refunded and unrefunded portions*—(1) *In general.* For purposes of paragraph (h)(3)(i) of this section, the separate purposes of a prior issue include the refunded and unrefunded portions of the prior issue. Thus, the refunded and unrefunded portions are treated as separate issues under paragraph (h)(1) of this section. Those separate issues must satisfy the requirements of paragraphs (h) and (i) of this section. The refunded portion of the bonds of a prior issue is based on a fraction the numerator of which is the principal amount of the prior issue to be paid with proceeds of the refunding issue and the denominator of which is the outstanding principal amount of the bonds of the prior issue, each determined as of the issue date of the refunding issue. (See also paragraph (b)(2) of this section.)

(2) *Allocations of proceeds and investments in a partial refunding.* As of the issue date of a partial refunding issue under this paragraph (i), unspent proceeds of the prior issue are allocated ratably between the refunded and unrefunded portions of the prior issue and the investments allocable to those unspent proceeds are allocated in the

manner required for the allocation of investments to transferred proceeds under paragraph (c)(1)(ii) of this section.

(3) *References to prior issue.* If the refunded and unrefunded portions of a prior issue are treated as separate issues under this paragraph (i), then, except to the extent that the context clearly requires otherwise (e.g., references to the aggregate prior issue in the mixed escrow rule in paragraph (c)(2) of this section), all references in this section to a prior issue refer only to the refunded portion of that prior issue.

[T.D. 8476, 58 FR 33541, June 18, 1993; 58 FR 44453, Aug. 23, 1993, as amended by T.D. 8538, 59 FR 24045, May 10, 1994; T.D. 8718, 62 FR 25512, May 9, 1997]

§ 1.148–10 Anti-abuse rules and authority of Commissioner.

(a) *Abusive arbitrage device*—(1) *In general.* Bonds of an issue are arbitrage bonds under section 148 if an abusive arbitrage device under paragraph (a)(2) of this section is used in connection with the issue. This paragraph (a) is to be applied and interpreted broadly to carry out the purposes of section 148, as further described in § 1.148–0. Except as otherwise provided in paragraph (c) of this section, any action that is expressly permitted by section 148 or §§ 1.148–1 through 1.148–11 is not an abusive arbitrage device (e.g., investment in higher yielding investments during a permitted temporary period under section 148(c)).

(2) *Abusive arbitrage device defined.* Any action is an abusive arbitrage device if the action has the effect of—

(i) Enabling the issuer to exploit the difference between tax-exempt and taxable interest rates to obtain a material financial advantage; and

(ii) Overburdening the tax-exempt bond market.

(3) *Exploitation of tax-exempt interest rates.* An action may exploit tax-exempt interest rates under paragraph (a)(2) of this section as a result of an investment of any portion of the gross proceeds of an issue over any period of time, notwithstanding that, in the aggregate, the gross proceeds of the issue are not invested in higher yielding investments over the term of the issue.

(4) *Overburdening the tax-exempt market.* An action overburdens the tax-exempt bond market under paragraph (a)(2)(ii) of this section if it results in issuing more bonds, issuing bonds earlier, or allowing bonds to remain outstanding longer than is otherwise reasonably necessary to accomplish the governmental purposes of the bonds, based on all the facts and circumstances. Whether an action is reasonably necessary to accomplish the governmental purposes of the bonds depends on whether the primary purpose of the transaction is a bona fide governmental purpose (e.g., an issue of refunding bonds to achieve a debt service restructuring that would be issued independent of any arbitrage benefit). An important factor bearing on this determination is whether the action would reasonably be taken to accomplish the governmental purpose of the issue if the interest on the issue were not excludable from gross income under section 103(a) (assuming that the hypothetical taxable interest rate would be the same as the actual tax-exempt interest rate). Factors evidencing an overissuance include the issuance of an issue the proceeds of which are reasonably expected to exceed by more than a minor portion the amount necessary to accomplish the governmental purposes of the issue, or an issue the proceeds of which are, in fact, substantially in excess of the amount of sale proceeds allocated to expenditures for the governmental purposes of the issue. One factor evidencing an early issuance is the issuance of bonds that do not qualify for a temporary period under § 1.148–2(e)(2), (e)(3), or (e)(4). One factor evidencing that bonds may remain outstanding longer than necessary is a term that exceeds the safe harbors against the creation of replacement proceeds under § 1.148–1(c)(4)(i)(B). These factors may be outweighed by other factors, however, such as bona fide cost underruns or long-term financial distress.

(b) *Consequences of overburdening the tax-exempt bond market*—(1) *In general.* An issue that overburdens the tax-exempt bond market (within the meaning of paragraph (a)(4) of this section) is subject to the following special limitations—

(i) *Special yield restriction.* Investments are subject to the definition of *materially higher* yield under §1.148–2(d) that is equal to one-thousandth of 1 percent. In addition, each investment is treated as a separate class of investments under §1.148–5(b)(2)(ii), the yield on which may not be blended with that of other investments.

(ii) *Certain regulatory provisions inapplicable.* The provisions of §1.148–5(c) (relating to yield reduction payments) and §1.148–5(e) (2) and (3) (relating to recovery of qualified administrative costs) do not apply.

(iii) *Restrictive expenditure rule.* Proceeds are not allocated to expenditures unless the proceeds-spent-last rule under §1.148–6(d)(3)(i) is satisfied, applied by treating those proceeds as proceeds to be used for restricted working capital expenditures. For this purpose, available amount includes a reasonable working capital reserve as defined in §1.148–6(d)(3)(iii)(B).

(2) *Application.* The provisions of this paragraph (b) only apply to the portion of an issue that, as a result of actions taken (or actions not taken) after the issue date, overburdens the market for tax-exempt bonds, except that for an issue that is reasonably expected as of the issue date to overburden the market, those provisions apply to all of the gross proceeds of the issue.

(c) *Anti-abuse rules on excess gross proceeds of advance refunding issues*—(1) *In general.* Except as otherwise provided in this paragraph (c), an abusive arbitrage device is used and bonds of an advance refunding issue are arbitrage bonds if the issue has excess gross proceeds.

(2) *Definition of excess gross proceeds.* Excess gross proceeds means all gross proceeds of an advance refunding issue that exceed an amount equal to 1 percent of sale proceeds of the issue, other than gross proceeds allocable to—

(i) Payment of principal, interest, or call premium on the prior issue;

(ii) Payment of pre-issuance accrued interest on the refunding issue, and interest on the refunding issue that accrues for a period up to the completion date of any capital project for which the prior issue was issued, plus one year;

(iii) A reasonably required reserve or replacement fund for the refunding issue or investment proceeds of such a fund;

(iv) Payment of costs of issuance of the refunding issue;

(v) Payment of administrative costs allocable to repaying the prior issue, carrying and repaying the refunding issue, or investments of the refunding issue;

(vi) Transferred proceeds that will be used or maintained for the governmental purpose of the prior issue;

(vii) Interest on purpose investments;

(viii) Replacement proceeds in a sinking fund for the refunding issue;

(ix) Qualified guarantee fees for the refunding issue or the prior issue; and

(x) Fees for a qualified hedge for the refunding issue.

(3) *Special treatment of transferred proceeds.* For purposes of this paragraph (c), all unspent proceeds of the prior issue as of the issue date of the refunding issue are treated as transferred proceeds of the advance refunding issue.

(4) *Special rule for crossover refundings.* An advance refunding issue is not an issue of arbitrage bonds under this paragraph (c) if all excess gross proceeds of the refunding issue are used to pay interest that accrues on the refunding issue before the prior issue is discharged, and no gross proceeds of any refunding issue are used to pay interest on the prior issue or to replace funds used directly or indirectly to pay such interest (other than transferred proceeds used to pay interest on the prior issue that accrues for a period up to the completion date of the project for which the prior issue was issued, plus one year, or proceeds used to pay principal that is attributable to accrued original issue discount).

(5) *Special rule for gross refundings.* This paragraph (c)(5) applies if an advance refunding issue (the *series B issue*) is used together with one or more other advance refunding issues (the *series A issues*) in a gross refunding of a prior issue, but only if the use of a gross refunding method is required under bond documents that were effective prior to November 6, 1992. These advance refunding issues are not arbitrage bonds under this paragraph (c) if—

(i) All excess gross proceeds of the series B issue and each series A issue are investment proceeds used to pay principal and interest on the series B issue;

(ii) At least 99 percent of all principal and interest on the series B issue is paid with proceeds of the series B and series A issues or with the earnings on other amounts in the refunding escrow for the prior issue;

(iii) The series B issue is discharged not later than the prior issue; and

(iv) As of any date, the amount of gross proceeds of the series B issue allocated to expenditures does not exceed the aggregate amount of expenditures before that date for principal and interest on the series B issue, and administrative costs of carrying and repaying the series B issue, or of investments of the series B issue.

(d) *Examples.* The provisions of this section are illustrated by the following examples:

Example 1. Mortgage sale. In 1982, City issued its revenue issue (the *1982 issue*) and lent the proceeds to Developer to finance a low-income housing project under former section 103(b)(4)(A) of the 1954 Code. In 1994, Developer encounters financial difficulties and negotiates with City to refund the 1982 issue. City issues $10 million in principal amount of its 8 percent bonds (the *1994 issue*). City lends the proceeds of the 1994 issue to Developer. To evidence Developer's obligation to repay that loan, Developer, as obligor, issues a note to City (the *City note*). Bank agrees to provide Developer with a direct-pay letter of credit pursuant to which Bank will make all payments to the trustee for the 1994 issue necessary to meet Developer's obligations under the City note. Developer pays Bank a fee for the issuance of the letter of credit and issues a note to Bank (the *Bank note*). The Bank note is secured by a mortgage on the housing project and is guaranteed by FHA. The Bank note and the 1994 issue have different prepayment terms. The City does not reasonably expect to treat prepayments of the Bank note as gross proceeds of the 1994 issue. At the same time or pursuant to a series of related transactions, Bank sells the Bank note to Investor for $9.5 million. Bank invests these monies together with its other funds. In substance, the transaction is a loan by City to Bank, under which Bank enters into a series of transactions that, in effect, result in Bank retaining $9.5 million in amounts treated as proceeds of the 1994 issue. Those amounts are invested in materially higher yielding investments that provide funds sufficient to equal or exceed the Bank's liability under the letter of credit. Alternatively, the letter of credit is investment property in a sinking fund for the 1994 issue provided by Developer, a substantial beneficiary of the financing. Because, in substance, Developer acquires the $10 million principal amount letter of credit for a fair market value purchase price of $9.5 million, the letter of credit is a materially higher yielding investment. Neither result would change if Developer's obligation under the Bank note is contingent on Bank performing its obligation under the letter of credit. Each characterization causes the bonds to be arbitrage bonds.

Example 2. Bonds outstanding longer than necessary for yield-blending device. (i) *Longer bond maturity to create sinking fund.* In 1994, Authority issues an advance refunding issue (the *refunding issue*) to refund a 1982 prior issue (the *prior issue*). Under current market conditions, Authority will have to invest the refunding escrow at a yield significantly below the yield on the refunding issue. Authority issues its refunding issue with a longer weighted average maturity than otherwise necessary primarily for the purpose of creating a sinking fund for the refunding issue that will be invested in a guaranteed investment contract. The weighted average maturity of the refunding issue is less than 120 percent of the remaining average economic life of the facilities financed with the proceeds of the prior issue. The guaranteed investment contract has a yield that is higher than the yield on the refunding issue. The yield on the refunding escrow blended with the yield on the guaranteed investment contract does not exceed the yield on the issue. The refunding issue uses an abusive arbitrage device and the bonds of the issue are arbitrage bonds under section 148(a).

(ii) *Refunding of noncallable bonds.* The facts are the same as in paragraph (i) of this *Example 2* except that instead of structuring the refunding issue to enable it to take advantage of sinking fund investments, Authority will also refund other long-term, non-callable bonds in the same refunding issue. There are no savings attributable to the refunding of the non-callable bonds (e.g., a *low-to-high* refunding). The Authority invests the portion of the proceeds of the refunding issue allocable to the refunding of the non-callable bonds in the refunding escrow at a yield that is higher than the yield on the refunding issue, based on the relatively long escrow period for this portion of the refunding. The Authority invests the other portion of the proceeds of the refunding issue in the refunding escrow at a yield lower than the yield on the refunding issue. The blended yield on all the investments in the refunding escrow for the prior issues does not exceed the yield on the refunding issue. The portion of the refunding issue used to refund the noncallable bonds, however, was not otherwise necessary and was issued primarily to exploit the difference between taxable and tax-exempt rates for that long portion of the refunding escrow to minimize the effect of lower yielding investments in the other portion of the escrow. The refunding issue uses an abusive arbitrage device and the bonds of the issue are arbitrage bonds.

(iii) *Governmental purpose.* In paragraphs (i) and (ii) of this *Example 2,* the existence of a governmental purpose for the described financing structures would not change the conclusions unless Authority clearly established that the primary purpose for the use of the particular structure was a bona fide governmental purpose. The fact that each financing structure had the effect of eliminating significant amounts of negative arbitrage is strong evidence of a primary purpose that is not a bona fide governmental purpose. Moreover, in paragraph (i) of this *Example 2,* the structure of the refunding issue coupled with the acquisition of the guaranteed investment contract to lock in the investment yield associated with the structure is strong evidence of a primary purpose that is not a bona fide governmental purpose.

Example 3. Window refunding. (i) Authority issues its 1994 refunding issue to refund a portion of the principal and interest on its outstanding 1985 issue. The 1994 refunding issue is structured using zero-coupon bonds that pay no interest or principal for the 5-year period following the issue date. The proceeds of the 1994 refunding issue are deposited in a refunding escrow to be used to pay only the interest requirements of the refunded portion of the 1985 issue. Authority enters into a guaranteed investment contract with a financial institution, *G,* under which *G* agrees to provide a guaranteed yield on revenues invested by Authority during the 5-year period following the issue date. The guaranteed investment contract has a yield that is no higher than the yield on the refunding issue. The revenues to be invested under this guaranteed investment contract consist of the amounts that Authority otherwise would have used to pay principal and interest on the 1994 refunding issue. The guaranteed investment contract is structured to generate receipts at times and in amounts sufficient to pay the principal and redemption requirements of the refunded portion of the 1985 issue. A principal purpose of these transactions is to avoid transferred proceeds. Authority will continue to invest the unspent proceeds of the 1985 issue that are on deposit in a refunding escrow for its 1982 issue at a yield equal to the yield on the 1985 issue and will not otherwise treat those unspent proceeds as transferred proceeds of the 1994 refunding issue. The 1994 refunding issue is an issue of arbitrage bonds since those bonds involve a transaction or series of transactions that overburdens the market by leaving bonds outstanding longer than is necessary to obtain a material financial advantage based on arbitrage. Specifically, Authority has structured the 1994 refunding issue to make available for the refunding of the 1985 issue replacement proceeds rather than proceeds so that the unspent proceeds of the 1985 issue will not become transferred proceeds of the 1994 refunding issue.

(ii) The result would be the same in each of the following circumstances:

(A) The facts are the same as in paragraph (i) of this *Example 3* except that Authority does not enter into the guaranteed investment contract but instead, as of the issue date of the 1994 refunding issue, reasonably expects that the released revenues will be available for investment until used to pay principal and interest on the 1985 issue.

(B) The facts are the same as in paragraph (i) of this *Example 3* except that there are no unspent proceeds of the 1985 issue and Authority invests the released revenues at a yield materially higher than the yield on the 1994 issue.

(C) The facts are the same as in paragraph (i) of this *Example 3* except that Authority uses the proceeds of the 1994 issue for capital projects instead of to refund a portion of the 1985 issue.

Example 4. Sale of conduit loan. On January 1, 1994, Authority issues a conduit financing issue (the *1994 conduit financing issue*) and uses the proceeds to purchase from City, an unrelated party, a tax-exempt bond of City (the *City note*). The proceeds of the 1994 conduit financing issue are to be used to advance refund a prior conduit financing issue that was issued in 1988 and used to make a loan to City. The 1994 conduit financing issue and the City note each have a yield of 8 percent on January 1, 1994. On June 30, 1996, interest rates have decreased and Authority sells the City note to D, a person unrelated to either City or Authority. Based on the sale price of the City note and treating June 30, 1996 as the issue date of the City note, the City note has a 6 percent yield. Authority deposits the proceeds of the sale of the City note into an escrow to redeem the bonds of the 1994 conduit financing issue on January 1, 2001. The escrow is invested in nonpurpose investments having a yield of 8 percent. For purposes of section 149(d), City and Authority are related parties and, therefore, the issue date of the City note is treated as being June 30, 1996. Thus, the City note is an advance refunding of Authority's 1994 conduit financing issue. Interest on the City note is not exempt from Federal income tax from the date it is sold to D under section 149(d), because, by investing the escrow investments at a yield of 8 percent instead of a yield not materially higher than 6 percent, the sale of the City note employs a device to obtain a material financial advantage, based on arbitrage, apart from the savings attributable to lower interest rates. In addition, the City note is not a tax-exempt bond because the note is the second advance refunding of the original bond under section 149(d)(3). The City note also employs an abusive arbitrage device and is an arbitrage bond under section 148.

Example 5. Re-refunding. (i) On January 1, 1984, City issues a tax-exempt issue (the *1984 issue*) to finance the cost of constructing a prison. The 1984 issue has a 7 percent yield and a 30-year maturity. The 1984 issue is callable at any time on or after January 1, 1994. On January 1, 1990, City issues a refunding issue (the *1990 issue*) to advance refund the 1984 issue. The 1990 issue has an 8 percent yield and a 30-year maturity. The 1990 issue is callable at any time on or after January 1, 2000. The proceeds of the 1990 issue are invested at an 8 percent yield in a refunding escrow for the 1984 issue (the *original 1984 escrow*) in a manner sufficient to pay debt service on the 1984 issue until maturity (*i.e.*, an escrow to maturity). On January 1, 1994, City issues a refunding issue (the *1994 issue*). The 1994 issue has a 6 percent yield and a 30-year maturity. City does not invest the proceeds of the 1994 issue in a refunding escrow for the 1990 issue in a manner sufficient to pay a portion of the debt service until, and redeem a portion of that issue on, January 1, 2000. Instead, City invests those proceeds at a 6 percent yield in a new refunding escrow for a portion of the 1984 issue (the *new 1984 escrow*) in a manner sufficient to pay debt service on a portion of the 1984 issue until maturity. City also liquidates the investments allocable to the proceeds of the 1990 issue held in the original 1984 escrow and reinvests those proceeds in an escrow to pay a portion of the debt service on the 1990 issue itself until, and redeem a portion of that issue on, January 1, 2000 (the *1990 escrow*). The 1994 bonds are arbitrage bonds and employ an abusive device under section 149(d)(4). Although, in form, the proceeds of the 1994 issue are used to pay principal on the 1984 issue, this accounting for the use of the proceeds of the 1994 issue is an unreasonable, inconsistent accounting method under §1.148–6(a). Moreover, since the proceeds of the 1990 issue were set aside in an escrow to be used to retire the 1984 issue, the use of proceeds of the 1994 issue for that same purpose involves a replacement of funds invested in higher yielding investments under section 148(a)(2). Thus, using a reasonable, consistent accounting method and giving effect to the substance of the transaction, the proceeds of the 1994 issue are treated as used to refund the 1990 issue and are allocable to the 1990 escrow. The proceeds of the 1990 issue are treated as used to refund the 1984 issue and are allocable to the investments in the new 1984 escrow. The proceeds of the 1990 issue allocable to the nonpurpose investments in the new 1984 escrow become transferred proceeds of the 1994 issue as principal is paid on the 1990 issue from amounts on deposit in the 1990 escrow. As a result, the yield on nonpurpose investments allocable to the 1994 issue is materially higher than the yield on the 1994 issue, causing the bonds of the 1994 issue to be arbitrage bonds. In addition, the transaction employs a device under section 149(d)(4) to obtain a material financial advantage based on arbitrage, other than savings attributable to lower interest rates.

(ii) The following changes in the facts do not affect the conclusion that the 1994 issue consists of arbitrage bonds—

(1) The 1990 issue is a taxable issue;

(2) The original 1984 escrow is used to pay the 1994 issue (rather than the 1990 issue); or

(3) The 1994 issue is used to retire the 1984 issue within 90 days of January 1, 1994.

(e) *Authority of the Commissioner to clearly reflect the economic substance of a transaction.* If an issuer enters into a transaction for a principal purpose of obtaining a material financial advantage based on the difference between tax-exempt and taxable interest rates in a manner that is inconsistent with the purposes of section 148, the Commissioner may exercise the Commissioner's discretion to depart from the rules of §1.148–1 through §1.148–11 as necessary to clearly reflect the economic substance of the transaction. For this purpose, the Commissioner may recompute yield on an issue or on investments, reallocate payments and receipts on investments, recompute the rebate amount on an issue, treat a hedge as either a qualified hedge or not a qualified hedge, or otherwise adjust any item whatsoever bearing upon the investments and expenditures of gross proceeds of an issue. For example, if the amount paid for a hedge is specifically based on the amount of arbitrage earned or expected to be earned on the hedged bonds, a principal purpose of entering into the contract is to obtain a material financial advantage based on the difference between tax-exempt and taxable interest rates in a manner that is inconsistent with the purposes of section 148.

(f) *Authority of the Commissioner to require an earlier date for payment of rebate.* If the Commissioner determines that an issue is likely to fail to meet the requirements of §1.148–3 and that a failure to serve a notice of demand for payment on the issuer will jeopardize the assessment or collection of tax on interest paid or to be paid on the issue, the date that the Commissioner serves notice on the issuer is treated as a required computation date for payment of rebate for that issue.

(g) *Authority of the Commissioner to waive regulatory limitations.* Notwithstanding any specific provision in §§1.148–1 through 1.148–11, the Commissioner may prescribe extensions of temporary periods, larger reasonably required reserve or replacement funds, or consequences of failures or remedial action under section 148 in lieu of or in addition to other consequences of those failures, or take other action, if the Commissioner finds that good faith or other similar circumstances so warrant, consistent with the purposes of section 148.

[T.D. 8476, 58 FR 33544, June 18, 1993; 58 FR 44453, Aug. 23, 1993, as amended by T.D. 8538, 59 FR 24046, May 10, 1994; T.D. 8476, 59 FR 24351, May 11, 1994; T.D. 8718, 62 FR 25512, May 9, 1997]

§ 1.148–11 Effective dates.

(a) *In general.* Except as otherwise provided in this section, §§1.148–1 through 1.148–11 apply to bonds sold on or after July 8, 1997.

(b) *Elective retroactive application in whole*—(1) *In general.* Except as otherwise provided in this section, and subject to the applicable effective dates for the corresponding statutory provisions, an issuer may apply the provisions of §§1.148–1 through 1.148–11 in whole, but not in part, to any issue that is outstanding on July 8, 1997, and is subject to section 148(f) or to sections 103(c)(6) or 103A(i) of the Internal Revenue Code of 1954, in lieu of otherwise applicable regulations under those sections.

(2) *No elective retroactive application for 18-month spending exception.* The provisions of §1.148–7(d) (relating to the 18-month spending exception) may not be applied to any issue issued on or before June 30, 1993.

(3) *No elective retroactive application for hedges of fixed rate issues.* The provisions of §1.148–4(h)(2)(i)(B) (relating to hedges of fixed rate issues) may not be applied to any bond sold on or before July 8, 1997.

(4) *No elective retroactive application for safe harbor for establishing fair market value for guaranteed investment contracts and investments purchased for a yield restricted defeasance escrow.* The provisions of §§1.148–5(d)(6)(iii) (relating to the safe harbor for establishing fair market value of guaranteed investment contracts and yield restricted defeasance escrow investments) and 1.148–5(e)(2)(iv) (relating to a special rule for yield restricted defeasance escrow investments) may not be applied to any bond sold before December 30, 1998.

(c) *Elective retroactive application of certain provisions and special rules*—(1) *Retroactive application of overpayment recovery provisions.* An issuer may apply the provisions of §1.148–3(i) to any issue that is subject to section 148(f) or to sections 103(c)(6) or 103A(i) of the Internal Revenue Code of 1954.

(2) *Certain allocations of multipurpose issues.* An allocation of bonds to a refunding purpose under §1.148–9(h) may be adjusted as necessary to reflect allocations made between May 18, 1992, and August 15, 1993, if the allocations satisfied the corresponding prior provision of §1.148–11(j)(4) under applicable prior regulations.

(3) *Special limitation.* The provisions of §1.148–9 apply to issues issued before August 15, 1993, only if the issuer in good faith estimates the present value savings, if any, associated with the effect of the application of that section on refunding escrows, using any reasonable accounting method, and applies those savings, if any, to redeem outstanding tax-exempt bonds of the applicable issue at the earliest possible date on which those bonds may be redeemed or otherwise retired. These savings are not reduced to take into account any administrative costs associated with applying these provisions retroactively.

(d) *Transition rule excepting certain state guarantee funds from the definition of replacement proceeds*—(1) *Certain perpetual trust funds.* A guarantee by a fund created and controlled by a State and established pursuant to its constitution does not cause the amounts in the fund to be pledged funds treated as replacement proceeds if—

(i) Substantially all of the corpus of the fund consists of nonfinancial assets, revenues derived from these assets, gifts, and bequests;

(ii) The corpus of the guarantee fund may be invaded only to support specifically designated essential governmental functions (*designated functions*) carried on by political subdivisions with general taxing powers;

(iii) Substantially all of the available income of the fund is required to be applied annually to support designated functions;

(iv) The issue guaranteed consists of general obligations that are not private activity bonds substantially all of the proceeds of which are to be used for designated functions;

(v) The fund satisfied each of the requirements of paragraphs (d)(1)(i) through (d)(1)(iii) of this section on August 16, 1986; and

(vi) The guarantee is not attributable to a deposit to the fund made after May 14, 1989, unless—

(A) The deposit is attributable to the sale or other disposition of fund assets; or

(B) Prior to the deposit, the outstanding amount of the bonds guaranteed by the fund did not exceed 250 percent of the lower of the cost or fair market value of the fund.

(2) *Permanent University Fund.* Replacement proceeds do not include amounts allocable to investments of the fund described in section 648 of Public Law 98–369.

(e) *Transition rule regarding special allowance payments.* Section 1.148–5(b)(5) applies to any bond issued after January 5, 1990, except a bond issued exclusively to refund a bond issued before January 6, 1990, if the amount of the refunding bond does not exceed 101 percent of the amount of the refunded bond, and the maturity date of the refunding bond is not later than the date that is 17 years after the date on which the refunded bond was issued (or, in the case of a series of refundings, the date on which the original bond was issued), but only if §1.148–2(d)(2)(iv) is applied by substituting *1 and one-half percentage points* for *2 percentage points*.

(f) *Transition rule regarding applicability of yield reduction rule.* Section 1.148–5(c) applies to nonpurpose investments allocable to replacement proceeds of an issue that are held in a reserve or replacement fund to the extent that—

(1) Amounts must be paid into the fund under a constitutional provision, statute, or ordinance adopted before May 3, 1978;

(2) Under that provision, amounts paid into the fund (and investment earnings thereon) can be used only to pay debt service on the issues; and

(3) The size of the payments made into the fund is independent of the size of the outstanding issues or the debt service thereon.

(g) *Provisions applicable to certain bonds sold before effective date.* Except for bonds to which paragraph (b)(1) of this section applies—

(1) Section 1.148–11A provides rules applicable to bonds sold after June 6, 1994, and before July 8, 1997; and

(2) Sections 1.148–1 through 1.148–11 as in effect on July 1, 1993 (see 26 CFR part 1 as revised April 1, 1994), and §1.148–11A(i) (relating to elective retroactive application of certain provisions) provide rules applicable to certain issues issued before June 7, 1994.

(h) *Safe harbor for establishing fair market value for guaranteed investment contracts and investments purchased for a yield restricted defeasance escrow.* The provisions of §1.148–5(d)(6)(iii) are applicable to bonds sold on or after March 1, 1999. Issuers may apply these provisions to bonds sold on or after December 30, 1998, and before March 1, 1999.

(i) *Special rule for certain broker's commissions and similar fees.* Section 1.148–5(e)(2)(iii) applies to bonds sold on or after February 9, 2004. In the case of bonds sold before February 9, 2004, that are subject to §1.148–5 (pre-effective date bonds), issuers may apply §1.148–5(e)(2)(iii), in whole but not in part, with respect to transactions entered into on or after December 11, 2003. If an issuer applies §1.148–5(e)(2)(iii) to pre-effective date bonds, the per-issue safe harbor in §1.148–5(e)(2)(iii)(B)(*1*)(*ii*) is applied by taking into account all brokers' commissions or similar fees with respect to guaranteed investment contracts and investments for yield restricted defeasance escrows that the issuer treats as qualified administrative costs for the issue, including all such commissions or fees paid before February 9, 2004. For purposes of §§1.148–5(e)(2)(iii)(B)(*3*) and 1.148–

5(e)(2)(iii)(B)(*6*) (relating to cost-of-living adjustments), transactions entered into before 2003 are treated as entered into in 2003.

(j) *Certain prepayments.* Section 1.148–1(e)(1) and (2) apply to bonds sold on or after October 3, 2003. Issuers may apply §1.148–1(e)(1) and (2), in whole but not in part, to bonds sold before October 3, 2003, that are subject to §1.148–1.

[T.D. 8476, 58 FR 33547, June 18, 1993; 58 FR 44453, Aug. 23, 1993, as amended by T.D. 8538, 59 FR 24046, May 10, 1994; T.D. 8718, 62 FR 25512, May 9, 1997; T.D. 8476, 64 FR 37037, July 9, 1999; T.D. 9085, 68 FR 45777, Aug. 4, 2003; T.D. 9097, 68 FR 69023, Dec. 11, 2003]

§ 1.149(b)–1 Federally guaranteed bonds.

(a) *General rule.* Under section 149(b) and this section, nothing in section 103(a) or in any other provision of law shall be construed to provide an exemption from Federal income tax for interest on any bond issued as part of an issue that is federally guaranteed.

(b) *Exceptions.* Pursuant to section 149(b)(3)(B), section 149(b)(1) and paragraph (a) of this section do not apply to—

(1) Investments in obligations issued pursuant to §21B(d)(3) of the Federal Home Loan Bank Act, as amended by §511 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, or any successor provision; or

(2) Any investments that are held in a refunding escrow (as defined in §1.148–1).

(c) *Effective date.* This section applies to investments made after June 30, 1993.

[T.D. 8476, 58 FR 33548, June 18, 1993]

§ 1.149(d)–1 Limitations on advance refundings.

(a) *General rule.* Under section 149(d) and this section, nothing in section 103(a) or in any other provision of law shall be construed to provide an exemption from Federal income tax for interest on any bond issued as part of an issue described in paragraphs (2), (3), or (4) of section 149(d).

(b) *Advance refunding issues that employ abusive devices*—(1) *In general.* An advance refunding issue employs an abusive device and is described in section 149(d)(4) if the issue violates any of the anti-abuse rules under §1.148–10.

(2) *Failure to pay required rebate.* An advance refunding issue is described in section 149(d)(4) if the issue fails to meet the requirements of §1.148–3. This paragraph (b)(2) applies to any advance refunding issue issued after August 31, 1986.

(3) *Mixed escrows invested in tax-exempt bonds.* An advance refunding issue is described in section 149(d)(4) if—

(i) Any of the proceeds of the issue are invested in a refunding escrow in which a portion of the proceeds are invested in tax-exempt bonds and a portion of the proceeds are invested in nonpurpose investments;

(ii) The yield on the tax-exempt bonds in the refunding escrow exceeds the yield on the issue;

(iii) The yield on all the investments (including investment property and tax-exempt bonds) in the refunding escrow exceeds the yield on the issue; and

(iv) The weighted average maturity of the tax-exempt bonds in the refunding escrow is more than 25 percent greater or less than the weighted average maturity of the nonpurpose investments in the refunding escrow, and the weighted average maturity of nonpurpose investments in the refunding escrow is greater than 60 days.

(4) *Tax-exempt conduit loans.* For purposes of applying section 149(d) to a conduit financing issue that finances any conduit loan that is a tax-exempt bond, the actual issuer of a conduit financing issue and the conduit borrower of that conduit financing issue are treated as related parties. Thus, the issue date of the conduit loan does not occur prior to the date on which the actual issuer of the conduit financing issue sells, exchanges, or otherwise disposes of that conduit loan, and the use of the proceeds of the disposition to pay debt service on the conduit financing issue causes the conduit loan to be a refunding issue. See §1.148–10(d), *Example 4.*

(c) *Unrefunded debt service remains eligible for future advance refunding.* For purposes of section 149(d)(3)(A)(i), any principal or interest on a prior issue that has not been paid or provided for by any advance refunding issue is treated as not having been advance refunded.

(d) *Application of arbitrage regulations*—(1) *Application of multipurpose issue rules*. For purposes of sections 149(d)(2) and (3)(A)(i), (ii), and (iii), the provisions of the multipurpose issue rule in §1.148–9(h) apply, except that the limitation in §1.148–9(h)(5) is disregarded.

(2) *General mixed escrow rules*. For purposes of section 149(d), the provisions of §1.148–9(c) (relating to mixed escrows) apply, except that those provisions do not apply for purposes of section 149(d)(2) and (d)(3)(A) (i) and (ii) to amounts that were not gross proceeds of the prior issue before the issue date of the refunding issue.

(3) *Temporary periods and minor portions*. Section 1.148–9(d) and (f) contains rules applicable to temporary periods and minor portions for advance refunding issues.

(4) *Definitions*. Section 1.148–1 applies for purposes of section 149(d).

(e) *Taxable refundings*—(1) *In general*. Except as provided in paragraph (e)(2) of this section, for purposes of section 149(d)(3)(A)(i), an advance refunding issue the interest on which is not excludable from gross income under section 103(a) (*i.e.*, a taxable advance refunding issue) is not taken into account. In addition, for this purpose, an advance refunding of a taxable issue is not taken into account unless the taxable issue is a conduit loan of a tax-exempt conduit financing issue.

(2) *Use to avoid section 149(d)(3)(A)(i)*. A taxable issue is taken into account under section 149(d)(3)(A)(i) if it is issued to avoid the limitations of that section. For example, in the case of a refunding of a tax-exempt issue with a taxable advance refunding issue that is, in turn, currently refunded with a tax-exempt issue, the taxable advance refunding issue is taken into account under section 149(d)(3)(A)(i) if the two tax-exempt issues are outstanding concurrently for more than 90 days.

(f) *Redemption at first call date*—(1) *General rule*. Under sections 149(d)(3)(A)(ii) and (iii) (the *first call requirement*), bonds refunded by an advance refunding must be redeemed on their first call date if the savings test under section 149(d)(3)(B)(i) (the *savings test*) is satisfied. The savings test is satisfied if the issuer may realize present value debt service savings (determined without regard to administrative expenses) in connection with the issue of which the refunding bond is a part.

(2) *First call date*. *First call date* means the earliest date on which a bond may be redeemed (or, if issued before 1986, on the earliest date on which that bond may be redeemed at a redemption price not in excess of 103 percent of par). If, however, the savings test is not met with respect to the date described in the preceding sentence (*i.e.*, there are no present value savings if the refunded bonds are retired on that date), the first call date is the first date thereafter on which the bonds can be redeemed and on which the savings test is met.

(3) *Application of savings test to multipurpose issues*. Except as otherwise provided in this paragraph (f)(3), the multipurpose issue rules in §1.148–9(h) apply for purposes of the savings test. If any separate issue in a multipurpose issue increases the aggregate present value debt service savings on the entire multipurpose issue or reduces the present value debt service losses on that entire multipurpose issue, that separate issue satisfies the savings test.

(g) *Limitation on advance refundings of private activity bonds*. Under section 149(d)(2) and this section, interest on a bond is not excluded from gross income if any portion of the issue of which the bond is a part is issued to advance refund a private activity bond (other than a qualified 501(c)(3) bond). For this purpose, the term private activity bond—

(1) Includes a qualified bond described in section 141(e) (other than a qualified 501(c)(3) bond), regardless of whether the refunding issue consists of private activity bonds under §1.141–13; and

(2) Does not include a taxable bond.

(h) *Effective dates*—(1) *In general*. Except as provided in this paragraph (h), this section applies to bonds issued after June 30, 1993, to which §§1.148–1 through 1.148–11 apply, including conduit loans that are treated as issued after June 30, 1993, under paragraph (b)(4) of this section. In addition, this section applies to any issue to which the election described in §1.148–11(b)(1) is made.

(2) *Special effective date for paragraph (b)(3).* Paragraph (b)(3) of this section applies to any advance refunding issue issued after May 28, 1991.

(3) *Special effective date for paragraph (f)(3).* Paragraph (f)(3) of this section applies to bonds sold on or after July 8, 1997 and to any issue to which the election described in §1.148–11(b)(1) is made. See §1.148–11A(i) for rules relating to certain bonds sold before July 8, 1997.

(4) *Special effective date for paragraph (g).* See §1.141–15 for the applicability date of paragraph (g) of this section.

[T.D. 8476, 58 FR 33548, June 18, 1993; 58 FR 44453, Aug. 23, 1993, as amended by T.D. 8538, 59 FR 24046, May 10, 1994; T.D. 8718, 62 FR 25513, May 9, 1997; T.D. 9234, 70 FR 75035, Dec. 19, 2005]

§ 1.149(e)–1 Information reporting requirements for tax-exempt bonds.

(a) *General rule.* Interest on a bond is included in gross income unless certain information with respect to the issue of which the bond is a part is reported to the Internal Revenue Service in accordance with the requirements of this section. This section applies to any bond if the issue of which the bond is a part is issued after December 31, 1986 (including any bond issued to refund a bond issued on or before December 31, 1986).

(b) *Requirements for private activity bonds*—(1) *In general.* If the issue of which the bond is a part is an issue of private activity bonds, the issuer must comply with the following requirements—

(i) Not later than the 15th day of the second calendar month after the close of the calendar quarter in which the issue is issued, the issuer must file with the Internal Revenue Service a completed information reporting form prescribed for this purpose;

(ii) If any bond that is part of the issue is taken into account under section 146 (relating to volume cap on private activity bonds), the state certification requirement of paragraph (b)(2) of this section must be satisfied; and

(iii) If any bond that is part of the issue is a qualified mortgage bond or qualified veterans' mortgage bond (within the meaning of section 143 (a) or (b) or section 103A(c) (1) or (3) as in effect on the day before enactment of the Tax Reform Act of 1986), the issuer must submit the annual report containing information on the borrowers of the original proceeds of the issue as required under §1.103A–2 (k)(2)(ii) and (k)(3) through (k)(6).

(2) *State certification with respect to volume cap*—(i) *In general.* If an issue is subject to the volume cap under section 146, a state official designated by state law (if there is no such official, then the governor or the governor's delegate) must certify that the issue meets the requirements of section 146, and a copy of this certification must be attached to the information reporting form filed with respect to the issue. In the case of any constitutional home rule city (as defined in section 146(d)(3)(C)), the preceding sentence is applied by substituting ''city'' for ''state'' and ''chief executive officer'' for ''governor.''

(ii) *Certification.* The certifying official need not perform an independent investigation in order to certify that the issue meets the requirements of section 146. For example, if the certifying official receives an affidavit that was executed by an officer of the issuer who is responsible for issuing the bonds and that sets forth, in brief and summary terms, the facts necessary to determine that the issue meets the requirements of section 146 and if the certifying official has compared the information in that affidavit to other readily available information with respect to that issuer (e.g., previous affidavits and certifications for other private activity bonds issued by that issuer), the certifying official may rely on the affidavit.

(c) *Requirements for governmental bonds*—(1) *Issue price of $100,000 or more.* If the issue of which the bond is a part has an issue price of $100,000 or more and is not an issue of private activity bonds, then, not later than the 15th day of the second calendar month after the close of the calendar quarter in which the issue is issued, the issuer must file with the Internal Revenue Service a completed information reporting form prescribed for this purpose.

(2) *Issue price of less than $100,000*—(i) *In general.* If the issue of which the bond is a part has an issue price of less than $100,000 and is not an issue of private activity bonds, the issuer must file with the Internal Revenue Service one of the following information reporting forms within the prescribed period—

(A) *Separate return.* Not later than the 15th day of the second calendar month after the close of the calendar quarter in which the issue is issued, a completed information reporting form prescribed for this purpose with respect to that issue; or

(B) *Consolidated return.* Not later than February 15 of the calendar year following the calendar year in which the issue is issued, a completed information form prescribed for this purpose with respect to all issues to which this paragraph (c)(2) applies that were issued by the issuer during the calendar year and for which information was not reported on a separate information return pursuant to paragraph (c)(2)(i)(A) of this section.

(ii) *Bond issues issued before January 1, 1992.* Paragraph (c)(2)(i)(A) of this section does not apply if the issue of which the bond is a part is issued before January 1, 1992.

(iii) *Extended filing date for first and second calendar quarters of 1992.* If the issue of which the bond is a part is issued during the first or second calendar quarter of 1992, the prescribed period for filing an information reporting form with respect to that issue pursuant to paragraph (c)(2)(i)(A) of this section is extended until November 16, 1992.

(d) *Filing of forms and special rules*—(1) *Completed form.* For purposes of this section—

(i) *Good faith effort.* An information reporting form is treated as completed if the issuer (or a person acting on behalf of the issuer) has made a good faith effort to complete the form (taking into account the instructions to the form).

(ii) *Information.* In general, information reporting forms filed pursuant to this section must be completed on the basis of available information and reasonable expectations as of the date the issue is issued. Forms that are filed on a consolidated basis pursuant to paragraph (c)(2)(i)(B) of this section, however, may be completed on the basis of information readily available to the issuer at the close of the calendar year to which the form relates, supplemented by estimates made in good faith.

(iii) *Certain information not required.* An issuer need not report to the Internal Revenue Service any information specified in the first sentence of section 149(e)(2) that is not required to be reported to the Internal Revenue Service pursuant to the information reporting forms prescribed under that section and the instructions to those forms.

(2) *Manner of filing*—(i) *Place for filing.* The information reporting form must be filed with the Internal Revenue Service at the address specified on the form or in the instructions to the form.

(ii) *Extension of time.* The Commissioner may grant an extension of time to file any form or attachment required under this section if the Commissioner determines that the failure to file in a timely manner was not due to willful neglect. The Commissioner may make this determination with respect to an issue or to a class of issues.

(e) *Definitions.* For purposes of this section only—(1) *Private activity bond.* The term ''private activity bond'' has the meaning given that term in section 141(a) of the Internal Revenue Code, except that the term does not include any bond described in section 1312(c) of the Tax Reform Act of 1986 to which section 1312 or 1313 of the Tax Reform Act of 1986 applies.

(2) *Issue*—(i) *In general.* Except as otherwise provided in this paragraph (e)(2), bonds are treated as part of the same issue only if the bonds are issued—

(A) By the same issuer;

(B) On the same date; and

(C) Pursuant to a single transaction or to a series of related transactions.

(ii) *Draw-down loans, commercial paper, etc.* (A) Bonds issued during the same calendar year may be treated as part of the same tissue if the bonds are issued—

(*1*) Pursuant to a loan agreement under which amounts are to be advanced periodically (''draw-down loan''); or

(*2*) With a term not exceeding 270 days.

(B) In addition, the bonds must be equally and ratably secured under a single indenture or loan agreement and issued pursuant to a common financing arrangement (e.g., pursuant to the same official statement that is periodically updated to reflect changing factual circumstances). In the case of bonds issued pursuant to a draw-down loan that meets the requirements of the preceding sentence, bonds issued during different calendar years may be treated as part of the same issue if all the amounts to be advanced pursuant to the draw-down loan are reasonably expected to be advanced within three years of the date of issue of the first bond.

(iii) *Leases and installment sales.* Bonds other than private activity bonds may be treated as part of the same issue if—

(A) The bonds are issued pursuant to a single agreement that is in the form of a lease or installment sales agreement; and

(B) All of the property covered by that agreement is reasonably expected to be delivered within three years of the date of issue of the first bond.

(iv) *Qualified 501(c)(3) bonds.* If an issuer elects under section 141(b)(9) to treat a portion of an issue as a qualified 501(c)(3) bond, that portion is treated as a separate issue.

(3) *Date of issue*—(i) *Bond.* The date of issue of a bond is determined under §1.150–1.

(ii) *Issue.* The date of issue of an issue of bonds is the date of issue of the first bond that is part of the issue. See paragraphs (e)(2) (ii) and (iii) of this section for rules relating to draw-down loans, commercial paper, etc., and leases and installment sales.

(iii) *Bonds to which prior law applied.* Notwithstanding the provisions of this paragraph (e)(3), an issue for which an information report was required to be filed under section 103(l) or section 103A(j)(3) is treated as issued prior to January 1, 1987.

(4) *Issue price.* The term ''issue price'' has the same meaning given the term under §1.148–1(b).

[T.D. 8425, 57 FR 36002, Aug. 12, 1992, as amended at 59 FR 24351, May 11, 1994]

§ 1.149(g)–1 Hedge bonds.

(a) *Certain definitions.* Except as otherwise provided, the definitions set forth in §1.148–1 apply for purposes of section 149(g) and this section. In addition, the following terms have the following meanings:

Reasonable expectations means reasonable expectations (as defined in §1.148–1), as modified to take into account the provisions of section 149(f)(2)(B).

Spendable proceeds means net sale proceeds (as defined in §1.148–1).

(b) *Applicability of arbitrage allocation and accounting rules.* Section 1.148–6 applies for purposes of section 149(g), except that an expenditure that results in the creation of replacement proceeds (other than amounts in a bona fide debt service fund or a reasonably required reserve or replacement fund) is not an expenditure for purposes of section 149(g).

(c) *Refundings*—(1) *Investment in tax-exempt bonds.* A bond issued to refund a bond that is a tax-exempt bond by virtue of the rule in section 149(g)(3)(B) is not a tax-exempt bond unless the gross proceeds of that refunding bond (other than proceeds in a refunding escrow for the refunded bond) satisfy the requirements of section 149(g)(3)(B).

(2) *Anti-abuse rule.* A refunding bond is treated as a hedge bond unless there is a significant governmental purpose for the issuance of that bond (e.g., an advance refunding bond issued to realize debt service savings or to relieve the issuer of significantly burdensome document provisions, but not to otherwise hedge against future increases in interest rates).

(d) *Effective date.* This section applies to bonds issued after June 30, 1993 to which §§1.148–1 through 1.148–11 apply. In addition, this section applies to any issue to which the election described in §1.148–11(b)(1) is made.

[T.D. 8476, 58 FR 33549, June 18, 1993]

§ 1.150–1 Definitions.

(a) *Scope and effective date*—(1) *In general.* Except as otherwise provided, the definitions in this section apply for all purposes of sections 103 and 141 through 150.

(2) *Effective date*—(i) *In general*. Except as otherwise provided in this paragraph (a)(2), this section applies to issues issued after June 30, 1993 to which §§1.148–1 through 1.148–11 apply. In addition, this section (other than paragraph (c)(3) of this section) applies to any issue to which the election described in §1.148–11(b)(1) is made.

(ii) *Special effective date for paragraphs (c)(1), (c)(4)(iii), and (c)(6)*. Paragraphs (c)(1), (c)(4)(iii), and (c)(6) of this section apply to bonds sold on or after July 8, 1997 and to any issue to which the election described in §1.148–11(b)(1) is made. See §1.148–11A(i) for rules relating to certain bonds sold before July 8, 1997.

(3) *Exceptions to general effective date*. See §1.141–15 for the applicability date of the definition of bond documents contained in paragraph (b) of this section and the effective date of paragraph (c)(3)(ii) of this section.

(4) [Reserved] For further guidance, see §1.150–1T(a)(4).

(b) *Certain general definitions*. The following definitions apply:

Bond means any obligation of a State or political subdivision thereof under section 103(c)(1).

Bond documents means the bond indenture or resolution, transcript of proceedings, and any related documents.

Capital expenditure means any cost of a type that is properly chargeable to capital account (or would be so chargeable with a proper election or with the application of the definition of placed in service under §1.150–2(c)) under general Federal income tax principles. For example, costs incurred to acquire, construct, or improve land, buildings, and equipment generally are capital expenditures. Whether an expenditure is a capital expenditure is determined at the time the expenditure is paid with respect to the property. Future changes in law do not affect whether an expenditure is a capital expenditure.

Conduit borrower means the obligor on a purpose investment (as defined in §1.148–1). For example, if an issuer invests proceeds in a purpose investment in the form of a loan, lease, installment sale obligation, or similar obligation to another entity and the obligor uses the proceeds to carry out the governmental purpose of the issue, the obligor is a conduit borrower.

Conduit financing issue means an issue the proceeds of which are used or are reasonably expected to be used to finance at least one purpose investment representing at least one conduit loan to one conduit borrower.

Conduit loan means a purpose investment (as defined in §1.148–1).

Governmental bond means any bond of an issue of tax-exempt bonds in which none of the bonds are private activity bonds.

Issuance costs [Reserved] For further guidance, see §1.150–1T(b), *Issuance costs*.

Issue date means, in reference to an issue, the first date on which the issuer receives the purchase price in exchange for delivery of the evidence of indebtedness representing any bond included in the issue. Issue date means, in reference to a bond, the date on which the issuer receives the purchase price in exchange for that bond. In no event is the issue date earlier than the first day on which interest begins to accrue on the bond or bonds for Federal income tax purposes.

Obligation means any valid evidence of indebtedness under general Federal income tax principles.

Pooled financing issue means an issue the proceeds of which are to be used to finance purpose investments representing conduit loans to two or more conduit borrowers, unless those conduit loans are to be used to finance a single capital project.

Private activity bond means a private activity bond (as defined in section 141).

Qualified mortgage loan means a mortgage loan with respect to an owner-occupied residence acquired with the proceeds of an obligation described in section 143(a)(1) or 143(b) (or applicable prior law).

Qualified student loan means a student loan acquired with the proceeds of an obligation described in section 144(b)(1).

Related party means, in reference to a governmental unit or a 501(c)(3) organization, any member of the same controlled group, and, in reference to any person that is not a governmental unit or 501(c)(3) organization, a related person (as defined in section 144(a)(3)).

Taxable bond means any obligation the interest on which is not excludable from gross income under section 103.

Tax-exempt bond means any bond the interest on which is excludable from gross income under section 103(a). For purposes of section 148, tax-exempt bond includes:

(1) An interest in a regulated investment company to the extent that at least 95 percent of the income to the holder of the interest is interest that is excludable from gross income under section 103; and

(2) A certificate of indebtedness issued by the United States Treasury pursuant to the Demand Deposit State and Local Government Series program described in 31 CFR part 344.

Working capital expenditure means any cost that is not a capital expenditure. Generally, current operating expenses are working capital expenditures.

(c) *Definition of issue*—(1) *In general*. Except as otherwise provided in this paragraph (c), the term *issue* means two or more bonds that meet all of the following requirements:

(i) *Sold at substantially the same time*. The bonds are sold at substantially the same time. Bonds are treated as sold at substantially the same time if they are sold less than 15 days apart.

(ii) *Sold pursuant to the same plan of financing*. The bonds are sold pursuant to the same plan of financing. Factors material to the plan of financing include the purposes for the bonds and the structure of the financing. For example, generally—

(A) Bonds to finance a single facility or related facilities are part of the same plan of financing;

(B) Short-term bonds to finance working capital expenditures and long-term bonds to finance capital projects are not part of the same plan of financing; and

(C) Certificates of participation in a lease and general obligation bonds secured by tax revenues are not part of the same plan of financing.

(iii) *Payable from same source of funds*. The bonds are reasonably expected to be paid from substantially the same source of funds, determined without regard to guarantees from parties unrelated to the obligor.

(2) *Exception for taxable bonds*. Taxable bonds and tax-exempt bonds are not part of the same issue under this paragraph (c). The issuance of tax-exempt bonds in a transaction (or series of related transactions) that includes taxable bonds, however, may constitute an abusive arbitrage device under §1.148–10(a) or a device to avoid other limitations in sections 103 and 141 through 150 (for example, structures involving *windows* or unreasonable allocations of bonds).

(3) *Exception for certain bonds financing separate purposes*—(i) *In general*. Bonds may be treated as part of separate issues if the requirements of this paragraph (c)(3) are satisfied. Each of these separate issues must finance a separate purpose (e.g., refunding a separate prior issue, financing a separate purpose investment, financing integrated or functionally related capital projects, and financing any clearly discrete governmental purpose). Each of these separate issues independently must be a tax-exempt bond (e.g., a governmental bond or a qualified mortgage bond). The aggregate proceeds, investments, and bonds in such a transaction must be allocated between each of the separate issues using a reasonable, consistently applied allocation method. If any separate issue consists of refunding bonds, the allocation rules in §1.148–9(h) must be satisfied. An allocation is not reasonable if it achieves more favorable results under sections 103 and 141 to 150 than could be achieved with actual separate issues. All allocations under this paragraph (c)(3) must be made in writing on or before the issue date.

(ii) *Exceptions*. This paragraph (c)(3) does not apply for purposes of sections 141, 144(a), 148, 149(d) and 149(g).

(4) *Special rules for certain financings*—(i) *Draw-down loans*. Bonds issued pursuant to a draw-down loan are treated as part of a single issue. The issue date of that issue is the first date on which the aggregate draws under the loan exceed the lesser of $50,000 or 5 percent of the issue price.

(ii) *Commercial paper*—(A) *In general*. Short-term bonds having a maturity of 270 days or less (*commercial paper*) issued pursuant to the same commercial paper program may be treated as part of a single issue, the issue date of which is the first date the aggregate amount of commercial paper issued under the program exceeds the lesser of $50,000 or 5 percent of the aggregate issue price of the commercial paper in the program. A commercial paper program is a program to issue commercial paper to finance or refinance the same governmental purpose pursuant to a single master legal document. Commercial paper is not part of the same commercial paper program unless issued during an 18-month period, beginning on the deemed issue date. In addition, commercial paper issued after the end of this 18-month period may be treated as part of the program to the extent issued to refund commercial paper that is part of the program, but only to the extent that—

(*1*) There is no increase in the principal amount outstanding; and

(*2*) The program does not have a term in excess of—

(*i*) 30 years; or

(*ii*) The period reasonably necessary for the governmental purposes of the program.

(B) *Safe harbor*. The requirement of paragraph (c)(4)(ii)(A)(*2*) of this section is treated as satisfied if the weighted average maturity of the issue does not exceed 120 percent of the weighted average expected economic life of the property financed by the issue.

(iii) *Certain general obligation bonds*. Except as otherwise provided in paragraph (c)(2) of this section, bonds that are secured by a pledge of the issuer's full faith and credit (or a substantially similar pledge) and sold and issued on the same dates pursuant to a single offering document may be treated as part of the same issue if the issuer so elects on or before the issue date.

(5) *Anti-abuse rule*. In order to prevent the avoidance of sections 103 and 141 through 150 and the general purposes thereof, the Commissioner may treat bonds as part of the same issue or as part of separate issues to clearly reflect the economic substance of a transaction.

(6) *Sale date*. The sale date of a bond is the first day on which there is a binding contract in writing for the sale or exchange of the bond.

(d) *Definition of refunding issue and related definitions*—(1) *General definition of refunding issue*. *Refunding issue* means an issue of obligations the proceeds of which are used to pay principal, interest, or redemption price on another issue (a *prior issue*, as more particularly defined in paragraph (d)(5) of this section), including the issuance costs, accrued interest, capitalized interest on the refunding issue, a reserve or replacement fund, or similar costs, if any, properly allocable to that refunding issue.

(2) *Exceptions and special rules*. For purposes of paragraph (d)(1) of this section, the following exceptions and special rules apply—

(i) *Payment of certain interest*. An issue is not a refunding issue if the only principal and interest that is paid with proceeds of the issue (determined without regard to the multipurpose issue rules of §1.148–9(h)) is interest on another issue that—

(A) Accrues on the other issue during a one-year period including the issue date of the issue that finances the interest;

(B) Is a capital expenditure; or

(C) Is a working capital expenditure to which the de minimis rule of §1.148–6(d)(3)(ii)(A) applies.

(ii) *Certain issues with different obligors*—(A) *In general*. An issue is not a refunding issue to the extent that the obligor (as defined in paragraph (d)(2)(ii)(B) of this section) of one issue is neither the obligor of the other issue nor a related party with respect to the obligor of the other issue.

(B) *Definition of obligor*. The *obligor* of an issue means the actual issuer of the issue, except that the obligor of the portion of an issue properly allocable to an investment in a purpose investment means the conduit borrower under that purpose investment. The obligor of an issue used to finance qualified mortgage loans, qualified student loans, or similar program investments (as defined in §1.148–1) does not include the ultimate recipient of the loan (e.g., the homeowner, the student).

(iii) *Certain special rules for purpose investments.* For purposes of this paragraph (d), the following special rules apply:

(A) *Refunding of a conduit financing issue by a conduit loan refunding issue.* Except as provided in paragraph (d)(2)(iii)(B) of this section, the use of the proceeds of an issue that is used to refund an obligation that is a purpose investment (a *conduit refunding issue*) by the actual issuer of the conduit financing issue determines whether the conduit refunding issue is a refunding of the conduit financing issue (in addition to a refunding of the obligation that is the purpose investment).

(B) *Recycling of certain payments under purpose investments.* A conduit refunding issue is not a refunding of a conduit financing issue to the extent that the actual issuer of the conduit financing issue reasonably expects as of the date of receipt of the proceeds of the conduit refunding issue to use those amounts within 6 months (or, if greater, during the applicable temporary period for those amounts under section 148(c) or under applicable prior law) to acquire a new purpose investment. Any new purpose investment is treated as made from the proceeds of the conduit financing issue.

(C) *Application to tax-exempt loans.* For purposes of this paragraph (d), obligations that would be purpose investments (absent section 148(b)(3)(A)) are treated as purpose investments.

(iv) *Substance of transaction controls.* In the absence of other applicable controlling rules under this paragraph (d), the determination of whether an issue is a refunding issue is based on the substance of the transaction in light of all the facts and circumstances.

(v) *Certain integrated transactions in connection with asset acquisition not treated as refunding issues.* If, within six months before or after a person assumes (including taking subject to) obligations of an unrelated party in connection with an asset acquisition (other than a transaction to which section 381(a) applies if the person assuming the obligation is the acquiring corporation within the meaning of section 381(a)), the assumed issue is refinanced, the refinancing issue is not treated as a refunding issue.

(3) *Current refunding issue. Current refunding issue* means:

(i) Except as provided in paragraph (d)(3)(ii) of this section, a refunding issue that is issued not more than 90 days before the last expenditure of any proceeds of the refunding issue for the payment of principal or interest on the prior issue; and

(ii) In the case of a refunding issue issued before 1986—

(A) A refunding issue that is issued not more than 180 days before the last expenditure of any proceeds of the refunding issue for the payment of principal or interest on the prior issue; or

(B) A refunding issue if the prior issue had a term of less than 3 years and was sold in anticipation of permanent financing, but only if the aggregate term of all prior issues sold in anticipation of permanent financing was less than 3 years.

(4) *Advance refunding issue. Advance refunding issue* means a refunding issue that is not a current refunding issue.

(5) *Prior issue. Prior issue* means an issue of obligations all or a portion of the principal, interest, or call premium on which is paid or provided for with proceeds of a refunding issue. A prior issue may be issued before, at the same time as, or after a refunding issue. If the refunded and unrefunded portions of a prior issue are treated as separate issues under §1.148–9(i), for the purposes for which that section applies, except to the extent that the context clearly requires otherwise, references to a prior issue refer only to the refunded portion of that prior issue.

(e) *Controlled group* means a group of entities controlled directly or indirectly by the same entity or group of entities within the meaning of this paragraph (e).

(1) *Direct control.* The determination of direct control is made on the basis of all the relevant facts and circumstances. One entity or group of entities (the *controlling entity*) generally controls another entity or group of entities (the *controlled entity*) for purposes of this paragraph if the controlling entity possesses either of the following rights or powers and the rights or powers are discretionary and non-ministerial—

(i) The right or power both to approve and to remove without cause a controlling portion of the governing body of the controlled entity; or

(ii) The right or power to require the use of funds or assets of the controlled entity for any purpose of the controlling entity.

(2) *Indirect control.* If a controlling entity controls a controlled entity under the test in paragraph (e)(1) of this section, then the controlling entity also controls all entities controlled, directly or indirectly, by the controlled entity or entities.

(3) *Exception for general purpose governmental entities.* An entity is not a controlled entity under this paragraph (e) if the entity possesses substantial taxing, eminent domain, and police powers. For example, a city possessing substantial amounts of each of these sovereign powers is not a controlled entity of the state.

[T.D. 8476, 58 FR 33549, June 18, 1993; 58 FR 44453, Aug. 23, 1993, as amended by T.D. 8538, 59 FR 24046, May 10, 1994; T.D. 8712, 62 FR 2304, Jan. 16, 1997; T.D. 8718, 62 FR 25513, May 9, 1997; T.D. 9234, 70 FR 75036, Dec. 19, 2005; T.D. 9533, 76 FR 39280, July 6, 2011]

§ 1.150–1T Definitions (temporary).

(a) through (a)(3) [Reserved] For further guidance, see § 1.150–1(a) through (a)(3).

(4) *Additional exception to the general applicability date.* Section 1.150–1T(b), *Issuance costs*, applies on and after July 6, 2011.

(5) *Expiration date.* The applicability of § 1.150–1T(b), *Issuance costs*, expires on or before July 1, 2014.

(b) *Bond* through the definition of *Governmental bond* [Reserved] For further guidance, see § 1.150–1(b) *Bond* through the definition of *Governmental bond*.

Issuance costs means costs to the extent incurred in connection with, and allocable to, the issuance of an issue within the meaning of section 147(g). For example, issuance costs include the following costs but only to the extent incurred in connection with, and allocable to, the borrowing: Underwriters' spread; counsel fees; financial advisory fees; fees paid to an organization to evaluate the credit quality of an issue; trustee fees; paying agent fees; bond registrar, certification, and authentication fees; accounting fees; printing costs for bonds and offering documents; public approval process costs; engineering and feasibility study costs; guarantee fees, other than for qualified guarantees (as defined in § 1.148–4(f)); and similar costs.

(c) *Issue date* through paragraph (e) [Reserved] For further guidance, see § 1.150–1(b) *Issue date* through paragraph (e).

[T.D. 9533, 76 FR 39280, July 6, 2011]

§ 1.150–2 Proceeds of bonds used for reimbursement.

(a) *Table of contents.* This table of contents contains a listing of the headings contained in § 1.150–2.

(b) *Scope.* This section applies to reimbursement bonds (as defined in paragraph (c) of this section) for all purposes of sections 103 and 141 to 150.

(c) *Definitions.* The following definitions apply:

Issuer means—

(1) For any private activity bond (excluding a qualified 501(c)(3) bond, qualified student loan bond, qualified mortgage bond, or qualified veterans' mortgage bond), the entity that actually issues the reimbursement bond; and

(2) For any bond not described in paragraph (1) of this definition, either the entity that actually issues the reimbursement bond or, to the extent that the reimbursement bond proceeds are to be loaned to a conduit borrower, that conduit borrower.

Official intent means an issuer's declaration of intent to reimburse an original expenditure with proceeds of an obligation.

Original expenditure means an expenditure for a governmental purpose that is originally paid from a source other than a reimbursement bond.

Placed in service means, with respect to a facility, the date on which, based on all the facts and circumstances—

(1) The facility has reached a degree of completion which would permit its operation at substantially its design level; and

(2) The facility is, in fact, in operation at such level.

Reimbursement allocation means an allocation in writing that evidences an issuer's use of proceeds of a reimbursement bond to reimburse an original expenditure. An allocation made within 30 days after the issue date of a reimbursement bond may be treated as made on the issue date.

Reimbursement bond means the portion of an issue allocated to reimburse an original expenditure that was paid before the issue date.

(d) *General operating rules for reimbursement expenditures.* Except as otherwise provided, a reimbursement allocation is treated as an expenditure of proceeds of a reimbursement bond for the governmental purpose of the original expenditure on the date of the reimbursement allocation only if:

(1) *Official intent.* Not later than 60 days after payment of the original expenditure, the issuer adopts an official intent for the original expenditure that satisfies paragraph (e) of this section.

(2) *Reimbursement period*—(i) *In general.* The reimbursement allocation is made not later than 18 months after the later of—

(A) The date the original expenditure is paid; or

(B) The date the project is placed in service or abandoned, but in no event more than 3 years after the original expenditure is paid.

(ii) *Special rule for small issuers.* In applying paragraph (d)(2)(i) of this section to an issue that satisfies section 148(f)(4)(D)(i) (I) through (IV), the "18 month" limitation is changed to "3 years" and the "3-year" maximum reimbursement period is disregarded.

(iii) *Special rule for long-term construction projects.* In applying paragraph (d)(2)(i) to a construction project for which both the issuer and a licensed architect or engineer certify that at least 5 years is necessary to complete construction of the project, the maximum reimbursement period is changed from "3 years" to "5 years."

(3) *Nature of expenditure.* The original expenditure is a capital expenditure, a cost of issuance for a bond, an expenditure described in §1.148–6(d)(3)(ii)(B) (relating to certain extraordinary working capital items), a grant (as defined in §1.148–6(d)(4)), a qualified student loan, a qualified mortgage loan, or a qualified veterans' mortgage loan.

(e) *Official intent rules.* An official intent satisfies this paragraph (e) if:

(1) *Form of official intent.* The official intent is made in any reasonable form, including issuer resolution, action by an appropriate representative of the issuer (e.g., a person authorized or designated to declare official intent on behalf of the issuer), or specific legislative authorization for the issuance of obligations for a particular project.

(2) *Project description in official intent*—(i) *In general.* The official intent generally describes the project for which the original expenditure is paid and states the maximum principal amount of obligations expected to be issued for the project. A project includes any property, project, or program (e.g., *highway capital improvement program, hospital equipment acquisition*, or *school building renovation*).

(ii) *Fund accounting.* A project description is sufficient if it identifies, by name and functional purpose, the fund or account from which the original expenditure is paid (e.g., *parks and recreation fund—recreational facility capital improvement program*).

(iii) *Reasonable deviations in project description.* Deviations between a project described in an official intent and the actual project financed with reimbursement bonds do not invalidate the official intent to the extent that the actual project is reasonably related in function to the described project. For example, *hospital equipment* is a reasonable deviation from *hospital building improvements*. In contrast, a *city office building rehabilitation* is not a reasonable deviation from *highway improvements*.

(3) *Reasonableness of official intent*. On the date of the declaration, the issuer must have a reasonable expectation (as defined in §1.148–1(b)) that it will reimburse the original expenditure with proceeds of an obligation. Official intents declared as a matter of course or in amounts substantially in excess of the amounts expected to be necessary for the project (e.g., *blanket declarations*) are not reasonable. Similarly, a pattern of failure to reimburse actual original expenditures covered by official intents (other than in extraordinary circumstances) is evidence of unreasonableness. An official intent declared pursuant to a specific legislative authorization is rebuttably presumed to satisfy this paragraph (e)(3).

(f) *Exceptions to general operating rules*—(1) *De minimis exception*. Paragraphs (d)(1) and (d)(2) of this section do not apply to costs of issuance of any bond or to an amount not in excess of the lesser of $100,000 or 5 percent of the proceeds of the issue.

(2) *Preliminary expenditures exception*. Paragraphs (d)(1) and (d)(2) of this section do not apply to any preliminary expenditures, up to an amount not in excess of 20 percent of the aggregate issue price of the issue or issues that finance or are reasonably expected by the issuer to finance the project for which the preliminary expenditures were incurred. Preliminary expenditures include architectural, engineering, surveying, soil testing, reimbursement bond issuance, and similar costs that are incurred prior to commencement of acquisition, construction, or rehabilitation of a project, other than land acquisition, site preparation, and similar costs incident to commencement of construction.

(g) *Special rules on refundings*—(1) *In general—once financed, not reimbursed*. Except as provided in paragraph (g)(2) of this section, paragraph (d) of this section does not apply to an allocation to pay principal or interest on an obligation or to reimburse an original expenditure paid by another obligation. Instead, such an allocation is analyzed under rules on refunding issues. See §1.148–9.

(2) *Certain proceeds of prior issue used for reimbursement treated as unspent*. In the case of a refunding issue (or series of refunding issues), proceeds of a prior issue purportedly used to reimburse original expenditures are treated as unspent proceeds of the prior issue unless the purported reimbursement was a valid expenditure under applicable law on reimbursement expenditures on the issue date of the prior issue.

(h) *Anti-abuse rules*—(1) *General rule*. A reimbursement allocation is not an expenditure of proceeds of an issue under this section if the allocation employs an abusive arbitrage device under §1.148–10 to avoid the arbitrage restrictions or to avoid the restrictions under sections 142 through 147.

(2) *One-year step transaction rule*—(i) *Creation of replacement proceeds*. A purported reimbursement allocation is invalid and thus is not an expenditure of proceeds of an issue if, within 1 year after the allocation, funds corresponding to the proceeds of a reimbursement bond for which a reimbursement allocation was made are used in a manner that results in the creation of replacement proceeds (as defined in §1.148–1) of that issue or another issue. The preceding sentence does not apply to amounts deposited in a bona fide debt service fund (as defined in §1.148–1).

(ii) *Example*. The provisions of paragraph (h)(2)(i) of this section are illustrated by the following example.

Example. On January 1, 1994, County *A* issues an issue of 7 percent tax-exempt bonds (the *1994 issue*) and makes a purported reimbursement allocation to reimburse an original expenditure for specified capital improvements. *A* immediately deposits funds corresponding to the proceeds subject to the reimbursement allocation in an escrow fund to provide for payment of principal and interest on its outstanding 1991 issue of 9 percent tax-exempt bonds (the *prior issue*). The use of amounts corresponding to the proceeds of the reimbursement bonds to create a sinking fund for another issue within 1 year after the purported reimbursement allocation invalidates the reimbursement allocation. The proceeds retain their character as unspent proceeds of the 7 percent issue upon deposit in the escrow fund. Accordingly, the proceeds are subject to the 7 percent yield restriction of the 1994 issue instead of the 9 percent yield restriction of the prior issue.

(i) *Authority of the Commissioner to prescribe rules.* The Commissioner may by revenue ruling or revenue procedure (see §601.601(d)(2)(ii)(*b*) of this chapter) prescribe rules for the expenditure of proceeds of reimbursement bonds in circumstances that do not otherwise satisfy this section.

(j) *Effective date*—(1) *In general.* The provisions of this section apply to all allocations of proceeds of reimbursement bonds issued after June 30, 1993.

(2) *Transitional rules*—(i) *Official intent.* An official intent is treated as satisfying the official intent requirement of paragraph (d)(1) of this section if it—

(A) Satisfied the applicable provisions of §1.103–8(a)(5) as in effect prior to July 1, 1993, (as contained in 26 CFR part 1 revised as of April 1, 1993) and was made prior to that date, or

(B) Satisfied the applicable provisions of §1.103–18 as in effect between January 27, 1992, and June 30, 1993, (as contained in 26 CFR part 1 revised as of April 1, 1993) and was made during that period.

(ii) *Certain expenditures of private activity bonds.* For any expenditure that was originally paid prior to August 15, 1993, and that would have qualified for expenditure by reimbursement from the proceeds of a private activity bond under T.D. 7199, section 1.103–8(a)(5), 1972–2 C.B. 45 (see §601.601(d)(2)(ii)(*b*)) of this chapter, the requirements of that section may be applied in lieu of this section.

[T.D. 8476, 58 FR 33551, June 18, 1993; 58 FR 44453, Aug. 23, 1993]

§ 1.150–4 Change in use of facilities financed with tax-exempt private activity bonds.

(a) *Scope.* This section applies for purposes of the rules for change of use of facilities financed with private activity bonds under sections 150(b)(3) (relating to qualified 501(c)(3) bonds), 150(b)(4) (relating to certain exempt facility bonds and small issue bonds), 150(b)(5) (relating to facilities required to be owned by governmental units or 501(c)(3) organizations), and 150(c).

(b) *Effect of remedial actions*—(1) *In general.* Except as provided in this section, the change of use provisions of sections 150(b) (3) through (5), and 150(c) apply even if the issuer takes a remedial action described in §§1.142–2, 1.144–2, or 1.145–2.

(2) *Exceptions*—(i) *Redemption.* If nonqualified bonds are redeemed within 90 days of a deliberate action under §1.145–2(a) or within 90 days of the date on which a failure to properly use proceeds occurs under §1.142–2 or §1.144–2, sections 150(b) (3) through (5) do not apply during the period between that date and the date on which the nonqualified bonds are redeemed.

(ii) *Alternative qualifying use of facility.* If a bond-financed facility is used for an alternative qualifying use under §§1.145–2 and 1.141–12(f), sections 150(b) (3) and (5) do not apply because of the alternative use.

(iii) *Alternative use of disposition proceeds.* If disposition proceeds are used for a qualifying purpose under §§1.145–2 and 1.141–12(e), 1.142–2(c)(4), or 1.144–2, sections 150(b) (3) through (5) do not apply because of the deliberate action that gave rise to the disposition proceeds after the date on which all of the disposition proceeds have been expended on the qualifying purpose. If all of the disposition proceeds are so expended within 90 days of the date of the deliberate action, however, sections 150(b) (3) through (5) do not apply because of the deliberate action.

(c) *Allocation rules*—(1) *In general.* If a change in use of a portion of the property financed with an issue of qualified private activity bonds causes section 150 (b)(3), (b)(4), or (b)(5) to apply to an issue, the bonds of the issue allocable to that portion under section 150(c)(3) are the same as the nonqualified bonds determined for purposes of §§1.142–1, 1.144–1, and 1.145–1, except that bonds allocable to all common areas are also allocated to that portion.

(2) *Special rule when remedial action is taken.* If an issuer takes a remedial action with respect to an issue of private activity bonds under §§1.142–2, 1.144–2, or 1.145–2, the bonds of the issue allocable to a portion of property are the

same as the nonqualified bonds determined for purposes of those sections.

(d) *Effective dates.* For effective dates of this section, see § 1.141–16.

[T.D. 8712, 62 FR 2304, Jan. 16, 1997]

§ 1.150–5 Filing notices and elections.

(a) *In general.* Notices and elections under the following sections must be filed with the Internal Revenue Service, 1111 Constitution Avenue, NW, Attention: T:GE:TEB:O, Washington, DC 20224 or such other place designated by publication of a notice in the Internal Revenue Bulletin—

(1) Section 1.141–12(d)(3);

(2) Section 1.142(f)(4)-1; and

(3) Section 1.142–2(c)(2).

(b) *Effective dates.* This section applies to notices and elections filed on or after January 19, 2001.

[T.D. 8941, 66 FR 4671, Jan. 18, 2001]

Regulations Applicable to Certain Bonds Sold Prior to July 8, 1997

Editorial Note: IRS redesignated the following sections to appear below the undesignated center heading "Regulations Applicable to Certain Bonds Sold Prior to July 8, 1997" and preceding the undesignated center heading "Deductions for Personal Exemptions." See 62 FR 25507 and 25513, May 9, 1997 for the specific sections involved in the redesignation.

§ 1.148–1A Definitions and elections.

(a) [Reserved]. For guidance see § 1.148–1.

(b) *Certain definitions.*

Investment-type property. See § 1.148–1(b). Investment-type property also includes a contract that would be a hedge (within the meaning of § 1.148–4(h)) except that it contains a significant investment element.

(c) through (c)(4)(i) [Reserved]. For guidance see § 1.148–1.

(c)(4)(ii) *Bonds financing a working capital reserve*—(A) *In general.* Except as otherwise provided in § 1.148–1(c)(4)(ii)(B), replacement proceeds arise to the extent a working capital reserve is, directly or indirectly, financed with the proceeds of the issue (regardless of the expenditure of proceeds of the issue). Thus, for example, if an issuer that does not maintain a working capital reserve borrows to fund such a reserve, the issuer will have replacement proceeds. To determine the amount of a working capital reserve maintained, an issuer may use the average amount maintained as a working capital reserve during annual periods of at least one year, the last of which ends within a year before the issue date. For example, the amount of a working capital reserve may be computed using the average of the beginning or ending monthly balances of the amount maintained as a reserve (net of unexpended gross proceeds) during the one year period preceding the issue date.

[T.D. 8538, 59 FR 24041, May 10, 1994. Redesignated by T.D. 8718, 62 FR 25507, May 9, 1997]

§ 1.148–2A General arbitrage yield restriction rules.

(a) through (b)(2)(i) [Reserved]. For guidance see § 1.148–2.

(b)(2)(ii) *Exceptions to certification requirement.* An issuer is not required to make a certification for an issue under § 1.148–2(b)(2)(i) if—

(A) The issuer reasonably expects as of the issue date that there will be no unspent gross proceeds after the issue date, other than gross proceeds in a bona fide debt service fund (e.g., *equipment lease* financings in which the issuer purchases equipment in exchange for an installment payment note); or

(B) The issue price of the issue does not exceed $1,000,000.

[T.D. 8538, 59 FR 24042, May 10, 1994. Redesignated by T.D. 8718, 62 FR 25507, May 9, 1997]

§ 1.148–3A General arbitrage rebate rules.

(a) through (h)(2) [Reserved]. For guidance see § 1.148–3.

(h)(3) *Waivers of the penalty.* For purposes of § 1.148–3(h)(3), willful neglect does not include a failure that is attributable solely to the permissible retroactive selection of a short first bond year if the rebate amount that the issuer failed to pay is paid within 60 days of the selection of that bond year.

[T.D. 8538, 59 FR 24042, May 10, 1994. Redesignated by T.D. 8718, 62 FR 25507, May 9, 1997]

§ 1.148–4A Yield on an issue of bonds.

(a) through (b)(4) [Reserved]. For guidance see § 1.148–4.

(b)(5) *Special aggregation rule treating certain bonds as a single fixed yield bond.* Two variable yield bonds of an issue are treated in the aggregate as a single fixed yield bond if—

(i) Aggregate treatment would result in the single bond being a fixed yield bond; and

(ii) The terms of the bonds do not contain any features that could distort the aggregate fixed yield from what the yield would be if a single fixed yield bond were issued. For example, if an issue contains a bond bearing interest at a floating rate and a related bond bearing interest at a rate equal to a fixed rate minus that floating rate, those two bonds are treated as a single fixed yield bond only if neither bond may be redeemed unless the other bond is also redeemed at the same time.

(c) through (f) [Reserved]. For guidance see § 1.148–4.

(g) *Yield on certain mortgage revenue and student loan bonds.* For purposes of section 148 and § 1.148–4, section 143(g)(2)(C)(ii) applies to the computation of yield on an issue of qualified mortgage bonds or qualified veterans' mortgage bonds. For purposes of applying sections 148 and 143(g) to a variable yield issue of qualified mortgage bonds, qualified veterans' mortgage bonds, or qualified student loan bonds, the yield on that issue is computed over the term of the issue, and § 1.148–4(d) does not apply to the issue. As of any date before the final maturity date, the yield over the term of the issue is based on the actual amounts paid or received to that date and the amounts that are reasonably expected (as of that date) to be paid or received over the remaining term of the issue.

(h) *Qualified hedging transactions*—(1) *In general.* Payments made or received by an issuer under a qualified hedge (as defined in § 1.148–4(h)(2)) relating to bonds of an issue are taken into account (as provided in paragraph (h)(3) of this section) to determine the yield on the issue. Except as provided in paragraphs (h)(4) and (h)(5)(ii)(C) of this section, the bonds to which a qualified hedge relates are treated as variable yield bonds. These hedging rules apply solely for purposes of sections 143(g), 148, and 149(d).

(2) (i) through (vi) [Reserved]. For guidance see § 1.148–4(h)(2).

(2)(vii) *Timing and duration.* For a contract to be a qualified hedge under § 1.148–4(h)(2), payments must not begin to accrue under the contract on a date earlier than the issue date of the hedged bonds and must not accrue longer than the hedged interest payments on the hedged bonds.

(viii) [Reserved]. For guidance see § 1.148–4(h).

(ix) *Identification.* For a contract to be a qualified hedge under § 1.148–4(h)(2), the contract must be identified by the actual issuer on its books and records maintained for the hedged bonds not later than three days after the date on which the parties enter into the contract. The identification must specify the hedge provider, the terms of the contract, and the hedged bonds. The identification must contain sufficient detail to establish that the requirements of § 1.148–4(h)(2), and if applicable, paragraph (h)(4) of this section are satisfied. The existence of the hedge must be noted on all forms filed with the Internal Revenue Service for the issue on or after the date on which the hedge is entered into.

(3) *Accounting for qualified hedges*—(i) *In general.* Except as otherwise provided in paragraph (h)(4) of this section, payments made or received by the issuer under a qualified hedge are treated as payments made or received, as appropriate, on the hedged bonds that are taken into account in determining the yield on those bonds. These payments are reasonably allocated to the hedged bonds in the period to which the payments relate, as determined under paragraph (h)(3)(iii) of this section. Payments made or received by the issuer include payments deemed made or received when a contract is terminated or deemed terminated under this paragraph (h)(3). Payments reasonably allocable to the reduction of risk of interest rate changes and to the hedge provider's overhead under this paragraph (h) are included as payments made or received under a qualified hedge.

(ii) *Exclusions from hedge.* Payments for services or other items under the contract that are not expressly treated as payments under the qualified hedge under paragraph (h)(3)(i) of this section are not payments with respect to a qualified hedge.

(iii) *Timing and allocation of payments.* The period to which a payment made by the issuer relates is determined under general Federal income tax principles, including, without limitation, § 1.446–3, and adjusted as necessary to reflect the end of a computation period and the start of a new computation period. Except as provided in paragraphs (h)(3)(iv) and (h)(5)(ii) of this section, a payment received by the issuer is taken into account in the period that the interest payment that the payment hedges is required to be made.

(iv) *Termination payments*—(A) *Termination defined.* A termination of a qualified hedge includes any sale or other disposition of the hedge by the issuer, or the acquisition by the issuer of an offsetting hedge. A deemed termination occurs when the hedged bonds are redeemed and when a hedge ceases to be a qualified hedge of the hedged bonds. In the case of an assignment by a hedge provider of its remaining rights and obligations on the hedge to a third party or a modification of the hedging contract, the assignment or modification is treated as a termination with respect to the issuer only if it results in a deemed exchange of the hedge and a realization event under section 1001.

(B) *General rule.* A payment made or received by an issuer to terminate a qualified hedge, including loss or gain realized or deemed realized, is treated as a payment made or received on the hedged bonds, as appropriate. The payment is reasonably allocated to the remaining periods originally covered by the terminated hedge in a manner that reflects the economic substance of the hedge.

(C) *Special rule for terminations when bonds are redeemed.* Except as otherwise provided in this paragraph (h)(3)(iv)(C) and in paragraph (h)(3)(iv)(D) of this section, when a qualified hedge is deemed terminated because the hedged bonds are redeemed, the fair market value of the contract on the redemption date is treated as a termination payment made or received on that date. When hedged bonds are redeemed, any payment received by the issuer on termination of a hedge, including a termination payment or a deemed termination payment, reduces, but not below zero, the interest payments made by the issuer on the hedged bonds in the computation period ending on the termination date. The remainder of the payment, if any, is reasonably allocated over the bond years in the immediately preceding computation period or periods to the extent necessary to eliminate the excess.

(D) *Special rules for refundings.* To the extent that the hedged bonds are redeemed using the proceeds of a refunding issue, the termination payment is accounted for under paragraph (h)(3)(iv)(B) of this section by treating it as a payment on the refunding issue, rather than the hedged bonds. In addition, to the extent that the refunding issue, rather than the hedged bonds, has been redeemed, paragraph (h)(3)(iv)(C) of this section applies to the termination payment by treating it as a payment on the redeemed refunding issue.

(E) *Safe harbor for certain non-level payments.* A non-level payment to terminate a hedge does not result in that hedge failing to satisfy the applicable provisions of paragraph (h)(3)(iv)(B) of this section if the payment is allocated to each bond year for which the hedge would have been in effect in accordance with this paragraph (h)(3)(iv)(E). For a variable yield issue, an equal amount (or for any short bond year, a proportionate amount of the equal amount) must be allocated to each bond year such that the sum of the present values of the annual amounts equals the present value of the non-level payment. Present value is computed as of the day the hedge is terminated, using the yield on the hedged bonds, determined without regard to the non-level payment. The yield used for this purpose is computed for the period beginning on the first date the hedge is in effect and ending on the date the hedge is terminated. On the other hand, for a fixed yield issue, the non-level payment is taken into account as a single payment on the date it is paid.

(4) *Certain variable yield bonds treated as fixed yield bonds*—(i) *In general*. Except as otherwise provided in this paragraph (h)(4), if the issuer of variable yield bonds enters into a qualified hedge, the hedged bonds are treated as fixed yield bonds paying a fixed interest rate if:

(A) *Start date*. The date on which payments begin to accrue on the hedge is not later than 15 days after the issue date of the hedged bonds.

(B) *Maturity*. The term of the hedge is equal to the entire period during which the hedged bonds bear interest at variable interest rates.

(C) *Payments closely correspond*. Payments to be received under the hedge correspond closely in time to the hedged portion of the payments on the hedged bonds. Hedge payments received within 15 days of the related payments on the hedged bonds generally so correspond.

(D) *Aggregate payments fixed*. Taking into account all payments made and received under the hedge and all payments on the hedged bonds (*i.e.*, after netting all payments), the issuer's aggregate payments are fixed and determinable as of a date not later than 15 days after the issue date of the hedged bonds. Payments on bonds are treated as fixed for purposes of this paragraph (h)(4)(i)(D) if payments on the bonds are based, in whole or in part, on one interest rate, payments on the hedge are based, in whole or in part, on a second interest rate that is substantially the same as, but not identical to, the first interest rate and payments on the bonds would be fixed if the two rates were identical. Rates are treated as substantially the same if they are reasonably expected to be substantially the same throughout the term of the hedge. For example, an objective 30-day tax-exempt variable rate index or other objective index (e.g., J.J. Kenny Index, PSA Municipal swap index, a percentage of LIBOR) may be substantially the same as an issuer's individual 30-day interest rate.

(ii) *Accounting*. Except as otherwise provided in this paragraph (h)(4)(ii), in determining yield on the hedged bonds, all the issuer's actual interest payments on the hedged bonds and all payments made and received on a hedge described in paragraph (h)(4)(i) of this section are taken into account. If payments on the bonds and payments on the hedge are based, in whole or in part, on variable interest rates that are substantially the same within the meaning of paragraph (h)(4)(i)(D) of this section (but not identical), yield on the issue is determined by treating the variable interest rates as identical. For example, if variable rate bonds bearing interest at a weekly rate equal to the rate necessary to remarket the bonds at par are hedged with an interest rate swap under which the issuer receives payments based on a short-term floating rate index that is substantially the same as, but not identical to, the weekly rate on the bonds, the interest payments on the bonds are treated as equal to the payments received by the issuer under the swap for purposes of computing the yield on the bonds.

(iii) *Effect of termination*—(A) *In general*. Except as otherwise provided in this paragraph (h)(4)(iii) and paragraph (h)(5) of this section, the issue of which the hedged bonds are a part is treated as if it were reissued as of the termination date of the qualified hedge covered by paragraph (h)(4)(i) of this section in determining yield on the hedged bonds for purposes of §1.148–3. The redemption price of the retired issue and the issue price of the new issue equal the aggregate values of all the bonds of the issue on the termination date. In computing the yield on the new issue for this purpose, any termination payment is accounted for under paragraph (h)(3)(iv) of this section, applied by treating the termination payment as made or received on the new issue under this paragraph (h)(4)(iii).

(B) *Effect of early termination*. Except as otherwise provided in this paragraph (h)(4)(iii), the general rules of paragraph (h)(4)(i) of this section do not apply in determining the yield on the hedged bonds for purposes of §1.148–3 if the hedge is terminated or deemed terminated within 5 years after the issue date of the issue of which the hedged bonds are a part. Thus, the hedged bonds are treated as variable yield bonds for purposes of §1.148–3 from the issue date.

(C) *Certain terminations disregarded.* This paragraph (h)(4)(iii) does not apply to a termination if, based on the facts and circumstances (e.g., taking into account both the termination and any qualified hedge that immediately replaces the terminated hedge), there is no change in the yield. In addition, this paragraph (h)(4)(iii) does not apply to a termination caused by the bankruptcy or insolvency of the hedge provider if the Commissioner determines that the termination occurred without any action by the issuer (other than to protect its rights under the hedge).

(5) *Special rules for certain hedges*—(i) *Certain acquisition payments.* A payment to the issuer by the hedge provider (e.g., an up-front payment for an off-market swap) in connection with the acquisition of a hedge that, but for that payment, would be a qualified hedge, does not cause the hedge to fail to be a qualified hedge provided the payment to the issuer and the issuer's payments under the hedge in excess of those that it would make if the hedge bore rates equal to the on-market rates for the hedge are separately identified in a certification of the hedge provider and not taken into account in determining the yield on the issue of which the hedged bonds are a part. The on-market rates are determined as of the date the parties enter into the contract.

(ii) *Anticipatory hedges*—(A) *In general.* A contract does not fail to be a hedge under §1.148–4(h)(2)(i)(A) solely because it is entered into with respect to an anticipated issuance of tax-exempt bonds. The identification required under §1.148–4T(h)(2)(ix) must specify the reasonably expected governmental purpose, principal amount, and issue date of the hedged bonds, and the manner in which interest is reasonably expected to be computed.

(B) *Special rules.* Payments made in connection with the issuance of a bond to terminate or otherwise close (*terminate*) an anticipatory hedge of that bond do not prevent the hedge from satisfying the requirements of §1.148–4(h)(2)(vi) and paragraph (h)(2)(vii) of this section. Amounts received or deemed to be received by the issuer in connection with the issuance of the hedged bonds to terminate an anticipatory hedge are treated as proceeds of the hedged bonds.

(C) *Fixed yield treatment.* A bond that is hedged with an anticipatory hedge is a fixed yield bond if, taking into account payments on the hedge that are made or fixed on or before the issue date of the bond and the payments to be made on the bond, the bond satisfies the definition of fixed yield bond. See also paragraph (h)(4) of this section.

(6) *Authority of the Commissioner*—(i) *In general.* A contract is not a qualified hedge if the Commissioner determines, based on all the facts and circumstances, that treating the contract as a qualified hedge would provide a material potential for arbitrage, or a principal purpose for entering into the contract is that arbitrage potential. For example, a contract that requires a substantial nonperiodic payment may constitute, in whole or part, an embedded loan, investment-type property, or other investment.

(ii) *Other qualified hedges.* The Commissioner, by publication of a revenue ruling or revenue procedure, may specify contracts that do not otherwise meet the requirements of §1.148–4(h)(2) as qualified hedges and contracts that do not otherwise meet the requirements of paragraph (h)(4) of this section as causing the hedged bonds to be treated as fixed yield bonds.

(iii) *Recomputation of yield.* If an issuer enters into a hedge that is not properly identified, fails to properly associate an anticipatory hedge with the hedged bonds, or otherwise fails to meet the requirements of this section, the Commissioner may recompute the yield on the issue taking the hedge into account if the failure to take the hedge into account distorts that yield or otherwise fails to clearly reflect the economic substance of the transaction.

[T.D. 8538, 59 FR 24042, May 10, 1994. Redesignated by T.D. 8718, 62 FR 25507, May 9, 1997]

§ 1.148–5A Yield and valuation of investments.

(a) through (b)(2)(ii) [Reserved]. For guidance see §1.148–5.

(b)(2)(iii) *Permissive application of single investment rules to certain yield restricted investments for all purposes of section 148.* For all purposes of section 148, an issuer may treat all of the yield restricted nonpurpose investments in a refunding escrow and a sinking fund that is reasonably expected as of the issue date to be maintained to reduce the yield on the investments in the refunding escrow as a single investment having a single yield, determined under §1.148(b)(2).

(b) (2)(iv) through (c)(1) [Reserved]. For guidance see §1.148–5.

(c)(2) *Manner of payment*—(i) *In general*. Except as otherwise provided in §1.148–5(c)(2)(ii), an amount is paid under §1.148–5(c) if it is paid to the United States at the same time and in the same manner as rebate amounts are required to be paid or at such other time or in such manner as the Commissioner may prescribe. For example, yield reduction payments must be made on or before the date of required rebate installment payments as described in §1.148–3(f). The date a payment is required to be paid is determined without regard to §1.148–3(h). An amount that is paid untimely is not taken into account under this paragraph (c) unless the Commissioner determines that the failure to pay timely is not due to willful neglect. The provisions of §1.148–3(i) apply to payments made under §1.148–5(c).

(c)(2)(ii) through (c)(3)(i) [Reserved]. For guidance see §1.148–5.

(c)(3)(ii) *Exception to yield reduction payments rule for advance refunding issues*. Section 1.148–5(c)(1) does not apply to investments allocable to gross proceeds of an advance refunding issue, other than—

(A) Transferred proceeds to which §1.148–5(c)(3)(i)(C) applies;

(B) Replacement proceeds to which §1.148–5(c)(3)(i)(F) applies; and

(C) Transferred proceeds to which §1.148–5(c)(3)(i)(E) applies, but only to the extent necessary to satisfy yield restriction under section 148(a) on those proceeds treating all investments allocable to those proceeds as a separate class.

(d)(1) through (d)(3)(i) [Reserved]. For guidance see §1.148–5.

(d)(3)(ii) *Exception to fair market value requirement for transferred proceeds allocations, universal cap allocations, and commingled funds*. Section 1.148–5(d)(3)(i) does not apply if the investment is allocated from one issue to another issue as a result of the transferred proceeds allocation rule under §1.148–9(b) or the universal cap rule under §1.148–6(b)(2), provided that both issues consist exclusively of tax-exempt bonds. In addition, §1.148–5(d)(3)(i) does not apply to investments in a commingled fund (other than a bona fide debt service fund) unless it is an investment being initially deposited in or withdrawn from a commingled fund described in §1.148–6(e)(5)(iii).

(e)(1) through (e)(2)(ii)(A) [Reserved]. For guidance see §1.148–5.

(e)(2)(ii)(B) *External commingled funds*. For any semiannual period, a commingled fund satisfies the 10 percent requirement of §1.148–5(e)(2)(ii)(B) if—

(*1*) Based on average amounts on deposit, this requirement was satisfied for the prior semiannual period; and

(*2*) The fund does not accept deposits that would cause it to fail to meet this requirement.

(iii) *Special rule for guaranteed investment contracts*. For a guaranteed investment contract, a broker's commission or similar fee paid on behalf of either an issuer or the provider is treated as an administrative cost and, except in the case of an issue that satisfies section 148(f)(4)(D)(i), is not a qualified administrative cost to the extent that the present value of the commission, as of the date the contract is allocated to the issue, exceeds the present value of annual payments equal to .05 percent of the weighted average amount reasonably expected to be invested each year of the term of the contract. For this purpose, present value is computed using the taxable discount rate used by the parties to compute the commission or, if not readily ascertainable, a reasonable taxable discount rate.

[T.D. 8538, 59 FR 24045, May 10, 1994. Redesignated by T.D. 8718, 62 FR 25507, May 9, 1997]

§1.148–6A General allocation and accounting rules.

(a) through (d)(3)(iii)(B) [Reserved]. For guidance see §1.148–6.

(d)(3)(iii)(C) *Qualified endowment funds treated as unavailable*. For a 501(c)(3) organization, a qualified endowment fund is treated as unavailable. A fund is a qualified endowment fund if—

(*1*) The fund is derived from gifts or bequests, or the income thereon, that were neither made nor reasonably expected to be used to pay working capital expenditures;

(*2*) Pursuant to reasonable, established practices of the organization, the governing body of the 501(c)(3) organization designates and consistently operates the fund as a permanent endowment fund or quasi-endowment fund restricted as to use; and

(*3*) There is an independent verification (e.g., from an independent certified public accountant) that the fund is reasonably necessary as part of the organization's permanent capital.

[T.D. 8538, 59 FR 24045, May 10, 1994. Redesignated by T.D. 8718, 62 FR 25507, May 9, 1997]

§ 1.148–9A Arbitrage rules for refunding issues.

(a) through (c)(2)(ii)(A) [Reserved]. For guidance see § 1.148–9.

(c)(2)(ii)(B) *Permissive allocation of non-proceeds to earliest expenditures.* Excluding amounts covered by § 1.148–9(c)(2)(ii)(A) and subject to any required earlier expenditure of those amounts, any amounts in a mixed escrow that are not proceeds of a refunding issue may be allocated to the earliest maturing investments in the mixed escrow, provided that those investments mature and the proceeds thereof are expended before the date of any expenditure from the mixed escrow to pay any principal of the prior issue.

(d) through (h)(4)(v) [Reserved]. For guidance see § 1.148–9.

(h)(4)(vi) *Exception for refundings of interim notes.* Section 1.148–9(h)(4)(v) need not be applied to refunding bonds issued to provide permanent financing for one or more projects if the prior issue had a term of less than 3 years and was sold in anticipation of permanent financing, but only if the aggregate term of all prior issues sold in anticipation of permanent financing was less than 3 years.

[T.D. 8538, 59 FR 24045, May 10, 1994. Redesignated by T.D. 8718, 62 FR 25507, May 9, 1997]

§ 1.148–10A Anti-abuse rules and authority of Commissioner.

(a) through (b)(1) [Reserved]. For guidance see § 1.148–10.

(b)(2) *Application.* The provisions of § 1.148–10(b) only apply to the portion of an issue that, as a result of actions taken (or actions not taken) after the issue date, overburdens the market for tax-exempt bonds, except that for an issue that is reasonably expected as of the issue date to overburden the market, those provisions apply to all of the gross proceeds of the issue.

(c) through (c)(2)(viii) [Reserved]. For guidance see § 1.148–10.

(c)(2)(ix) For purposes of § 1.148–10(c)(2), excess gross proceeds do not include gross proceeds allocable to fees for a qualified hedge for the refunding issue.

[T.D. 8538, 59 FR 24046, May 10, 1994. Redesignated by T.D. 8718, 62 FR 25507, May 9, 1997]

§ 1.148–11A Effective dates.

(a) through (c)(3) [Reserved]. For guidance see § 1.148–11.

(c)(4) *Retroactive application of overpayment recovery provisions.* An issuer may apply the provisions of § 1.148–3(i) to any issue that is subject to section 148(f) or to sections 103(c)(6) or 103A(i) of the Internal Revenue Code of 1954.

(d) through (h) [Reserved]. For guidance see § 1.148–11.

(i) *Transition rules for certain amendments*—(1) *In general.* Section 1.103–8(a)(5), §§ 1.148–1, 1.148–2, 1.148–3, 1.148–4, .148–5, 1.148–6, 1.148–7, 1.148–8, 1.148–9, 1.148–10, 1.148–11, 1.149(d)–1, and 1.150–1 as in effect on June 7, 1994 (see 26 CFR part 1 as revised April 1, 1997), and §§ 1.148–1A through 1.148–11A, 1.149(d)–1A, and 1.150–1A apply, in whole, but not in part—

(i) To bonds sold after June 6, 1994, and before July 8, 1997;

(ii) To bonds issued before July 1, 1993, that are outstanding on June 7, 1994, if the first time the issuer applies §§ 1.148–1 through 1.148–11 as in effect on June 7, 1994 (see 26 CFR part 1 as revised April 1, 1997), to the bonds under § 1.148–11 (b) or (c) is after June 6, 1994, and before July 8, 1997;

(iii) At the option of the issuer, to bonds to which §§ 1.148–1 through 1.148–11, as in effect on July 1, 1993 (see 26 CFR part 1 as revised April 1, 1994), apply, if the bonds are outstanding on June 7, 1994, and the issuer applies § 1.103–8(a)(5), §§ 1.148–1, 1.148–2, 1.148–3, 1.148–4, 1.148–5, 1.148–6, 1.148–7, 1.148–8, 1.148–9, 1.148–10, 1.148–11, 1.149(d)–1, and 1.150–1 as in effect on June 7, 1994 (see 26 CFR part 1 as revised April 1, 1997), and §§ 1.148–1A through 1.148–11A, 1.149(d)–1A, and 1.150–1A to the bonds before July 8, 1997.

(2) *Special rule.* For purposes of paragraph (i)(1) of this section, any reference to a particular paragraph of §§ 1.148–1T, 1.148–2T, 1.148–3T, 1.148–4T, 1.148–5T, 1.148–6T, 1.148–9T, 1.148–10T, 1.148–11T, 1.149(d)–1T, or 1.150–1T shall be applied as a reference to the corresponding paragraph of §§ 1.148–1A, 1.148–2A, 1.148–3A, 1.148–4A, 1.148–5A, 1.148–6A, 1.148–9A, 1.148–10A, 1.148–11A, 1.149(d)–1A, or 1.150–1A, respectively.

(3) *Identification of certain hedges.* For any hedge entered into after June 18, 1993, and on or before June 6, 1994, that would be a qualified hedge within the meaning of § 1.148–4(h)(2), as in effect on June 7, 1994 (see 26 CFR part 1 as revised April 1, 1997), except that the hedge does not meet the requirements of § 1.148–4A(h)(2)(ix) because the issuer failed to identify the hedge not later than 3 days after which the issuer and the provider entered into the contract, the requirements of § 1.148–4A(h)(2)(ix) are treated as met if the contract is identified by the actual issuer on its books and records maintained for the hedged bonds not later than July 8, 1997.

[T.D. 8538, 59 FR 24046, May 10, 1994. Redesignated and amended by T.D. 8718, 62 FR 25507, 25513, May 9, 1997]

§ 1.149(d)–1A Limitations on advance refundings.

(a) through (f)(2) [Reserved]. For guidance see § 1.149(d)–1.

(f)(3) *Application of savings test to multipurpose issues.* Except as otherwise provided in this paragraph (f)(3), the multipurpose issue rules in § 1.148–9(h) apply for purposes of the savings test. If any separate issue in a multipurpose issue increases the aggregate present value debt service savings on the entire multipurpose issue or reduces the present value debt service losses on that entire multipurpose issue, that separate issue satisfies the savings test.

[T.D. 8538, 59 FR 24046, May 10, 1994. Redesignated by T.D. 8718, 62 FR 25513, May 9, 1997]

§ 1.150–1A Definitions.

(a) through (b) [Reserved]. For guidance see § 1.150–1.

(c) *Definition of issue*—(1) *In general.* Except as otherwise provided, the provisions of this paragraph (c) apply for all purposes of sections 103 and 141 through 150. Except as otherwise provided in this paragraph (c), two or more bonds are treated as part of the same issue if all of the following factors are present:

(i) *Sold at substantially the same time.* The bonds are sold at substantially the same time. Bonds are treated as sold at substantially the same time if they are sold less than 15 days apart. For this purpose only, a variable yield bond is treated as sold on its issue date.

(ii) *Sold pursuant to the same plan of financing.* The bonds are sold pursuant to the same plan of financing. Factors material to the plan of financing include the purposes for the bonds and the structure of the financing. For example, generally—

(A) Bonds to finance a single facility or related facilities are part of the same plan of financing;

(B) Short-term bonds to finance working capital expenditures and long-term bonds to finance capital projects are not part of the same plan of financing; and

(C) Certificates of participation in a lease and general obligation bonds secured by tax revenues are not part of the same plan of financing.

(iii) *Payable from same source of funds.* The bonds are reasonably expected to be paid from substantially the same source of funds, determined without regard to guarantees from parties unrelated to the obligor.

(2) through (4)(ii) [Reserved]. For guidance see § 1.150–1 (c)(3) through (c)(4)(ii).

(c)(4)(iii) *Certain general obligation bonds.* Bonds are part of the same issue if secured by a pledge of the issuer's full faith and credit (or a substantially similar pledge) and sold and issued on the same dates pursuant to a single offering document.

(5) [Reserved]. For guidance see § 1.150–1(c)(5).

(6) *Sale date.* The sale date of a bond is the first day on which there is a

binding contract in writing for the sale or exchange of the bond.

[T.D. 8538, 59 FR 24046, May 10, 1994. Redesignated by T.D. 8718, 62 FR 25513, May 9, 1997]

DEDUCTIONS FOR PERSONAL EXEMPTIONS

§ 1.151–1 Deductions for personal exemptions.

(a) *In general.* (1) In computing taxable income, an individual is allowed a deduction for the exemptions specified in section 151. Such exemptions are: (i) The exemptions for an individual taxpayer and spouse (the so-called personal exemptions); (ii) the additional exemptions for a taxpayer attaining the age of 65 years and spouse attaining the age of 65 years (the so-called old-age exemptions); (iii) the additional exemptions for a blind taxpayer and a blind spouse; and (iv) the exemptions for dependents of the taxpayer.

(2) A nonresident alien individual who is a bona fide resident of Puerto Rico during the entire taxable year and subject to tax under section 1 or 1201(b) is allowed as deductions the exemptions specified in section 151, even though as to the United States such individual is a nonresident alien. See section 876 and the regulations thereunder, relating to alien residents of Puerto Rico.

(b) *Exemptions for individual taxpayer and spouse (so-called personal exemptions).* Section 151(b) allows an exemption for the taxpayer and an additional exemption for the spouse of the taxpayer if a joint return is not made by the taxpayer and his spouse, and if the spouse, for the calendar year in which the taxable year of the taxpayer begins, has no gross income and is not the dependent of another taxpayer. Thus, a husband is not entitled to an exemption for his wife on his separate return for the taxable year beginning in a calendar year during which she has any gross income (though insufficient to require her to file a return). Since, in the case of a joint return, there are two taxpayers (although under section 6013 there is only one income for the two taxpayers on such return, *i.e.*, their aggregate income), two exemptions are allowed on such return, one for each taxpayer spouse. If in any case a joint return is made by the taxpayer and his spouse, no other person is allowed an exemption for such spouse even though such other person would have been entitled to claim an exemption for such spouse as a dependent if such joint return had not been made.

(c) *Exemptions for taxpayer attaining the age of 65 and spouse attaining the age of 65 (so-called old-age exemptions).* (1) Section 151(c) provides an additional exemption for the taxpayer if he has attained the age of 65 before the close of his taxable year. An additional exemption is also allowed to the taxpayer for his spouse if a joint return is not made by the taxpayer and his spouse and if the spouse has attained the age of 65 before the close of the taxable year of the taxpayer and, for the calendar year in which the taxable year of the taxpayer begins, the spouse has no gross income and is not the dependent of another taxpayer. If a husband and wife make a joint return, an old-age exemption will be allowed as to each taxpayer spouse who has attained the age of 65 before the close of the taxable year for which the joint return is made. The exemptions under section 151(c) are in addition to the exemptions for the taxpayer and spouse under section 151(b).

(2) In determining the age of an individual for the purposes of the exemption for old age, the last day of the taxable year of the taxpayer is the controlling date. Thus, in the event of a separate return by a husband, no additional exemption for old age may be claimed for his spouse unless such spouse has attained the age of 65 on or before the close of the taxable year of the husband. In no event shall the additional exemption for old age be allowed with respect to a spouse who dies before attaining the age of 65 even though such spouse would have attained the age of 65 before the close of the taxable year of the taxpayer. For the purposes of the old-age exemption, an individual attains the age of 65 on the first moment of the day preceding his sixty-fifth birthday. Accordingly, an individual whose sixty-fifth birthday falls on January 1 in a given year attains the age of 65 on the last day of the calendar year immediately preceding.

(d) *Exemptions for the blind.* (1) Section 151(d) provides an additional exemption for the taxpayer if he is blind at the close of his taxable year. An additional exemption is also allowed to the taxpayer for his spouse if the spouse is blind and, for the calendar year in which the taxable year of the taxpayer begins, has no gross income and is not the dependent of another taxpayer. The determination of whether the spouse is blind shall be made as of the close of the taxable year of the taxpayer, unless the spouse dies during such taxable year, in which case such determination shall be made as of the time of such death.

(2) The exemptions for the blind are in addition to the exemptions for the taxpayer and spouse under section 151(b) and are also in addition to the exemptions under section 151(c) for taxpayers and spouses attaining the age of 65 years. Thus, a single individual who has attained the age of 65 before the close of his taxable year and who is blind at the close of his taxable year is entitled, in addition to the so-called personal exemption, to two further exemptions, one by reason of his age and the other by reason of his blindness. If a husband and wife make a joint return, an exemption for the blind will be allowed as to each taxpayer spouse who is blind at the close of the taxable year for which the joint return is made.

(3) A taxpayer claiming an exemption allowed by section 151(d) for a blind taxpayer and a blind spouse shall, if the individual for whom the exemption is claimed is not totally blind as of the last day of the taxable year of the taxpayer (or, in the case of a spouse who dies during such taxable year, as of the time of such death), attach to his return a certificate from a physician skilled in the diseases of the eye or a registered optometrist stating that as of the applicable status determination date in the opinion of such physician or optometrist (i) the central visual acuity of the individual for whom the exemption is claimed did not exceed 20/200 in the better eye with correcting lenses or (ii) such individual's visual acuity was accompanied by a limitation in the fields of vision such that the widest diameter of the visual field subtends an angle no greater than 20 degrees. If such individual is totally blind as of the status determination date there shall be attached to the return a statement by the person or persons making the return setting forth such fact.

(4) Notwithstanding subparagraph (3) of this paragraph, this subparagraph may be applied where the individual for whom an exemption under section 151(d) is claimed is not totally blind, and in the certified opinion of an examining physician skilled in the diseases of the eye there is no reasonable probability that the individual's visual acuity will ever improve beyond the minimum standards described in subparagraph (3) of this paragraph. In this event, if the examination occurs during a taxable year for which the exemption is claimed, and the examining physician certifies that, in his opinion, the condition is irreversible, and a copy of this certification is filed with the return for that taxable year, then a statement described in subparagraph (3) of this paragraph need not be attached to such individual's return for subsequent taxable years so long as the condition remains irreversible. The taxpayer shall retain a copy of the certified opinion in his records, and a statement referring to such opinion shall be attached to future returns claiming the section 151(d) exemption.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 7114, 36 FR 9018, May 18, 1971; T.D. 7230, 37 FR 28288, Dec. 22, 1972]

§ 1.151–2 Additional exemptions for dependents.

(a) Section 151(e) allows to a taxpayer an exemption for each dependent (as defined in section 152) whose gross income (as defined in section 61) for the calendar year in which the taxable year of the taxpayer begins is less than the amount provided in section 151(e)(1)(A) applicable to the taxable year of the taxpayer, or who is a child of the taxpayer and who—

(1) The taxable year of the taxpayer begins, or

(2) Is a student, as defined in paragraph (b) of § 1.151–3.

No exemption shall be allowed under section 151(e) for any dependent who has made a joint return with his spouse under section 6013 for the taxable year beginning in the calendar year in which the taxable year of the taxpayer begins. The amount provided in section 151(e)(1)(A) is $750 in the case of a taxable year beginning after December 31, 1972; $700 in the case of a taxable year beginning after December 31, 1971, and before January 1, 1973; $650 in the case of a taxable year beginning after December 31, 1970, and before January 1, 1972; $625 in the case of a taxable year beginning after December 31, 1969, and before January 1, 1971; and $600 in the case of a taxable year beginning before January 1, 1970. For special rules in the case of a taxpayer whose taxable year is a fiscal year ending after December 31, 1969, and beginning before January 1, 1973, see section 21(d) and the regulations thereunder.

(b) The only exemption allowed for a dependent of the taxpayer is that provided by section 151(e). The exemptions provided by section 151(c) (old-age exemptions) and section 151(d) (exemptions for the blind) are allowed only for the taxpayer or his spouse. For example, where a taxpayer provides the entire support for his father who meets all the requirements of a dependent, he is entitled to only one exemption for his father (section 151(e)), even though his father is over the age of 65.

[T.D. 7114, 36 FR 9019, May 18, 1971]

§ 1.151–3 Definitions.

(a) *Child.* For purposes of sections 151(e), 152, and the regulations thereunder, the term ''child'' means a son, stepson, daughter, stepdaughter, adopted son, adopted daughter, or for taxable years beginning after December 31, 1958, a child who is a member of an individual's household if the child was placed with the individual by an authorized placement agency for legal adoption pursuant to a formal application filed by the individual with the agency (see paragraph (c)(2) of § 1.152–2), or, for taxable years beginning after December 31, 1969, a foster child (if such foster child satisfies the requirements set forth in paragraph (b) of § 1.152–1 with respect to the taxpayer) of the taxpayer.

(b) *Student.* For purposes of section 151(e) and section 152(d), and the regulations thereunder, the term ''student'' means an individual who during each of 5 calendar months during the calendar year in which the taxable year of the taxpayer begins is a full-time student at an educational institution or is pursuing a full-time course of institutional on-farm training under the supervision of an accredited agent of an educational institution or of a State or political subdivision of a State. An example of ''institutional on-farm training'' is that authorized by 38 U.S.C. 1652 (formerly section 252 of the Veterans' Readjustment Assistance Act of 1952), as described in section 252 of such act. A full-time student is one who is enrolled for some part of 5 calendar months for the number of hours or courses which is considered to be full-time attendance. The 5 calendar months need not be consecutive. School attendance exclusively at night does not constitute full-time attendance. However, full-time attendance at an educational institution may include some attendance at night in connection with a full-time course of study.

(c) *Educational institution.* For purposes of sections 151(e) and 152, and the regulations thereunder, the term ''educational institution'' means a school maintaining a regular faculty and established curriculum, and having an organized body of students in attendance. It includes primary and secondary schools, colleges, universities, normal schools, technical schools, mechanical schools, and similar institutions, but does not include noneducational institutions, on-the-job training, correspondence schools, night schools, and so forth.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 7051, 35 FR 11020, July 9, 1970]

§ 1.151–4 Amount of deduction for each exemption under section 151.

The amount allowed as a deduction for each exemption under section 151 is (a) $750 in the case of a taxable year beginning after December 31, 1972; (b) $700 in the case of a taxable year beginning after December 31, 1971, and before January 1, 1973; (c) $650 in the case of a taxable year beginning after December 31, 1970, and before January 1, 1972; (d) $625 in the case of a taxable year beginning after December 31, 1969, and before January 1, 1971; and (e) $600 in the case of a taxable year beginning before January 1, 1970. For special rules in the case of a fiscal year ending after December 31, 1969, and beginning before January 1, 1973, see section 21(d) and the regulations thereunder.

[T.D. 7114, 36 FR 9019, May 18, 1971]

§ 1.152–1 General definition of a dependent.

(a)(1) For purposes of the income taxes imposed on individuals by chapter 1 of the Code, the term ''dependent'' means any individual described in paragraphs (1) through (10) of section 152(a) over half of whose support, for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer.

(2)(i) For purposes of determining whether or not an individual received, for a given calendar year, over half of his support from the taxpayer, there shall be taken into account the amount of support received from the taxpayer as compared to the entire amount of support which the individual received from all sources, including support which the individual himself supplied. The term ''support'' includes food, shelter, clothing, medical and dental care, education, and the like. Generally, the amount of an item of support will be the amount of expense incurred by the one furnishing such item. If the item of support furnished an individual is in the form of property or lodging, it will be necessary to measure the amount of such item of support in terms of its fair market value.

(ii) In computing the amount which is contributed for the support of an individual, there must be included any amount which is contributed by such individual for his own support, including income which is ordinarily excludable from gross income, such as benefits received under the Social Security Act (42 U.S.C. ch. 7). For example, a father receives $800 social security benefits, $400 interest, and $1,000 from his son during 1955, all of which sums represent his sole support during that year. The fact that the social security benefits of $800 are not includible in the father's gross income does not prevent such amount from entering into the computation of the total amount contributed for the father's support. Consequently, since the son's contribution of $1,000 was less than one-half of the father's support ($2,200) he may not claim his father as a dependent.

(iii)(*a*) For purposes of determining the amount of support furnished for a child (or children) by a taxpayer for a given calendar year, an arrearage payment made in a year subsequent to a calendar year for which there is an unpaid liability shall not be treated as paid either during that calendar year or in the year of payment, but no amount shall be treated as an arrearage payment to the extent that there is an unpaid liability (determined without regard to such payment) with respect to the support of a child for the taxable year of payment; and

(*b*) Similarly, payments made prior to any calendar year (whether or not made in the form of a lump sum payment in settlement of the parent's liability for support) shall not be treated as made during such calendar year, but payments made during any calendar year from amounts set aside in trust by a parent in a prior year, shall be treated as made during the calendar year in which paid.

(b) Section 152(a)(9) applies to any individual (other than an individual who at any time during the taxable year was the spouse, determined without regard to section 153, of the taxpayer) who lives with the taxpayer and is a member of the taxpayer's household during the entire taxable year of the taxpayer. An individual is not a member of the taxpayer's household if at any time during the taxable year of the taxpayer the relationship between such individual and the taxpayer is in violation of local law. It is not necessary under section 152(a)(9) that the dependent be related to the taxpayer. For example, foster children may qualify as dependents. It is necessary, however, that the taxpayer both maintain and occupy the household. The taxpayer and dependent will be considered as occupying the household for such entire taxable year notwithstanding temporary absences from the household due to special circumstances. A nonpermanent failure to occupy the common abode by reason of illness, education, business, vacation, military service, or a custody agreement under which the dependent is absent for less than six months in the taxable year of the taxpayer, shall be considered temporary absence due to special circumstances. The fact that the dependent dies during the year shall not deprive the taxpayer of the deduction if the dependent lived in the household for the entire part of the year preceding his death. Likewise, the period during the taxable year preceding the birth of an individual shall not prevent such individual from qualifying as a dependent under section 152(a)(9). Moreover, a child who actually becomes a member of the taxpayer's household during the taxable year shall not be prevented from being considered a member of such household for the entire taxable year, if the child is required to remain in a hospital for a period following its birth, and if such child would otherwise have been a member of the taxpayer's household during such period.

(c) In the case of a child of the taxpayer who is under 19 or who is a student, the taxpayer may claim the dependency exemption for such child provided he has furnished more than one-half of the support of such child for the calendar year in which the taxable year of the taxpayer begins, even though the income of the child for such calendar year may be equal to or in excess of the amount determined pursuant to §1.151–2 applicable to such calendar year. In such a case, there may be two exemptions claimed for the child: One on the parent's (or stepparent's) return, and one on the child's return. In determining whether the taxpayer does in fact furnish more than one-half of the support of an individual who is a child, as defined in paragraph (a) of §1.151–3, of the taxpayer and who is a student, as defined in paragraph (b) of §1.151–3, a special rule regarding scholarships applies. Amounts received as scholarships, as defined in paragraph (a) of §1.117–3, for study at an educational institution shall not be considered in determining whether the taxpayer furnishes more than one-half the support of such individual. For example, A has a child who receives a $1,000 scholarship to the X college for 1 year. A contributes $500, which constitutes the balance of the child's support for that year. A may claim the child as a dependent, as the $1,000 scholarship is not counted in determining the support of the child. For purposes of this paragraph, amounts received for tuition payments and allowances by a veteran under the provisions of the Servicemen's Readjustment Act of 1944 (58 Stat. 284) or the Veterans' Readjustment Assistance Act of 1952 (38 U.S.C. ch. 38) are not amounts received as scholarships. See also §1.117–4. For definition of the terms "child", "student", and "educational institution", as used in this paragraph, see §1.151–3.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6603, 28 FR 7094, July 11, 1963; T.D. 7099, 36 FR 5337, Mar. 20, 1971; T.D. 7114, 36 FR 9019, May 18, 1971]

§ 1.152–2 Rules relating to general definition of dependent.

(a)(1) Except as provided in subparagraph (2) of this paragraph, to qualify as a dependent an individual must be a citizen or resident of the United States or be a resident of the Canal Zone, the Republic of Panama, Canada, or Mexico, or, for taxable years beginning after December 31, 1971, a national of the United States, at some time during the calendar year in which the taxable year of the taxpayer begins. A resident of the Republic of the Philippines who was born to or legally adopted by the taxpayer in the Philippine Islands before January 1, 1956, at a time when the taxpayer was a member of the Armed Forces of the United States, may also be claimed as a dependent if such resident otherwise qualifies as a dependent. For definition of "Armed Forces of the United States," see section 7701(a)(15).

(2)(i) For any taxable year beginning after December 31, 1957, a taxpayer who is a citizen, or, for any taxable year beginning after December 31, 1971, a national, of the United States is permitted under section 152(b)(3)(B) to treat as a dependent his legally adopted child who lives with him, as a member of his household, for the entire taxable year and who, but for the citizenship, nationality, or residence requirements of section 152(b)(3) and subparagraph (1) of this paragraph, would qualify as a dependent of the taxpayer for such taxable year.

(ii) Under section 152(b)(3)(B) and this subparagraph, it is necessary that the taxpayer both maintain and occupy the household. The taxpayer and his legally adopted child will be considered as occupying the household for the entire taxable year of the taxpayer notwithstanding temporary absences from the household due to special circumstances. A nonpermanent failure to occupy the common abode by reason of illness, education, business, vacation, military service, or a custody agreement under which the legally adopted child is absent for less than six months in the taxable year of the taxpayer shall be considered temporary absence due to special circumstances. The fact that a legally adopted child dies during the year shall not deprive the taxpayer of the deduction if the child lived in the household for the entire part of the year preceding his death. The period during the taxable year preceding the birth of a child shall not prevent such child from qualifying as a dependent under this subparagraph. Moreover, a legally adopted child who actually becomes a member of the taxpayer's household during the taxable year shall not be prevented from being considered a member of such household for the entire taxable year, if the child is required to remain in a hospital for a period following its birth and if such child would otherwise have been a member of the taxpayer's household during such period.

(iii) For purposes of section 152(b)(3)(B) and this subparagraph, any child whose legal adoption by the taxpayer (a citizen or national of the United States) becomes final at any time before the end of the taxable year of the taxpayer shall not be disqualified as a dependent of such taxpayer by reason of his citizenship, nationality, or residence, provided the child lived with the taxpayer and was a member of the taxpayer's household for the entire taxable year in which the legal adoption became final. For example, A, a citizen of the United States who makes his income tax returns on the basis of the calendar year, is employed in Brazil by an agency of the United States Government. In October 1958 he takes into his household C, a resident of Brazil who is not a citizen of the United States, for the purpose of initiating adoption proceedings. C lives with A and is a member of his household for the remainder of 1958 and for the entire calendar year 1959. On July 1, 1959, the adoption proceedings were completed and C became the legally adopted child of A. If C otherwise qualifies as a dependent, he may be claimed as a dependent by A for 1959.

(b) A payment to a wife which is includible in her gross income under section 71 or section 682 shall not be considered a payment by her husband for the support of any dependent.

(c)(1) For purposes of determining the existence of any of the relationships specified in section 152 (a) or (b)(1), a legally adopted child of an individual shall be treated as a child of such individual by blood.

(2) For any taxable year beginning after December 31, 1958, a child who is a member of an individual's household also shall be treated as a child of such individual by blood if the child was placed with the individual by an authorized placement agency for legal adoption pursuant to a formal application filed by the individual with the agency. For purposes of this subparagraph an authorized placement agency is any agency which is authorized by a State, the District of Columbia, a possession of the United States, a foreign country, or a political subdivision of any of the foregoing to place children for adoption. A taxpayer who claims as a dependent a child placed with him for adoption shall attach to his income tax return a statement setting forth the name of the child for whom the dependency deduction is claimed, the name and address of the authorized placement agency, and the date the formal application was filed with the agency.

(3) The application of this paragraph may be illustrated by the following example:

Example. On March 1, 1959, D, a resident of the United States, made formal application to an authorized child placement agency for the placement of E, a resident of the United States, with him for legal adoption. On June 1, 1959, E was placed with D for legal adoption. During the year 1959 E received over one-half of his support from D. D may claim E as a dependent for 1959. Since E was a resident of the United States, his qualification as a dependent is in no way based on the provisions of section 152(b)(3)(B). Therefore, it is immaterial that E was not a member of D's household during the entire taxable year.

(4) For purposes of determining the existence of any of the relationships specified in section 152 (a) or (b)(1), a foster child of an individual (if such foster child satisfies the requirements set forth in paragraph (b) of §1.152–1 with respect to such individual) shall, for taxable years beginning after December 31, 1969, be treated as a child of such individual by blood. For purposes of this subparagraph, a foster child is a child who is in the care of a person or persons (other than the parents or adopted parents of the child) who care for the child as their own child. Status as a foster child is not dependent upon or affected by the circumstances under which the child became a member of the household.

(d) In the case of a joint return it is not necessary that the prescribed relationship exist between the person claimed as a dependent and the spouse who furnishes the support; it is sufficient if the prescribed relationship exists with respect to either spouse. Thus, a husband and wife making a joint return may claim as a dependent a daughter of the wife's brother (wife's niece) even though the husband is the one who furnishes the chief support. The relationship of affinity once existing will not terminate by divorce or the death of a spouse. For example, a widower may continue to claim his deceased wife's father (his father-in-law) as a dependent provided he meets the other requirements of section 151.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6603, 28 FR 7094, July 11, 1963; T.D. 7051, 35 FR 11020, July 9, 1970; T.D. 7291, 38 FR 33396, Dec. 4, 1973]

§ 1.152–3 Multiple support agreements.

(a) Section 152(c) provides that a taxpayer shall be treated as having contributed over half of the support of an individual for the calendar year (in cases where two or more taxpayers contributed to the support of such individual) if—

(1) No one person contributed over half of the individual's support,

(2) Each member of the group which collectively contributed more than half of the support of the individual would have been entitled to claim the individual as a dependent but for the fact that he did not contribute more than one-half of such support.

(3) The member of the group claiming the individual as a dependent contributed more than 10 percent of the individual's support, and

(4) Each other person in the group who contributed more than 10 percent of such support furnishes to the taxpayer claiming the dependent a written declaration that such other person will not claim the individual as a dependent for any taxable year beginning in such calendar year.

(b) *Examples.* Application of the rule contained in paragraph (a) of this section may be illustrated by the following examples:

Example 1. During the taxable year, brothers A, B, C, and D contributed the entire support of their mother in the following percentages: A, 30 percent; B, 20 percent; C, 29 percent; and D, 21 percent. Any one of the brothers, except for the fact that he did not contribute more than half of her support, would have been entitled to claim his mother as a dependent. Consequently, any one of the brothers could claim a deduction for the exemption of the mother if he obtained a written declaration (as provided in paragraph (a)(4) of this section) from each of the other brothers. Even though A and D together contributed more than one-half the support of the mother, A, if he wished to claim his mother as a dependent, would be required to obtain written declarations from B, C, and D, since each of those three contributed more than 10 percent of the support and, but for the failure to contribute more than half of the mother's support, would have been entitled to claim his mother as a dependent.

Example 2. During the taxable year, E, an individual who resides with his son, S, received his entire support for that year as follows:

Source	Percentage of total
Social Security	25

Source	Percentage of total
N, an unrelated neighbor	11
B, a brother	14
D, a daughter	10
S, a son	40
Total received by E	100

B, D, and S are persons each of whom, but for the fact that none contributed more than half of E's support, could claim E as a dependent for the taxable year. The three together contributed 64 percent of E's support, and, thus, each is a member of the group to be considered for the purpose of section 152(c). B and S are the only members of such group who can meet all the requirements of section 152(c), and either one could claim E as a dependent for his taxable year if he obtained a written declaration (as provided in paragraph (a)(4) of this section) signed by the other, and furnished the other information required by the return with respect to all the contributions to E. Inasmuch as D did not contribute more than 10 percent of E's support, she is not entitled to claim E as a dependent for the taxable year nor is she required to furnish a written declaration with respect to her contributions to E. N contributed over 10 percent of the support of E, but, since he is an unrelated neighbor, he does not qualify as a member of the group for the purpose of the multiple support agreement under section 152(c).

(c)(1) The member of a group of contributors who claims an individual as a dependent for a taxable year beginning before January 1, 2002, under the multiple support agreement provisions of section 152(c) must attach to the member's income tax return for the year of the deduction a written declaration from each of the other persons who contributed more than 10 percent of the support of such individual and who, but for the failure to contribute more than half of the support of the individual, would have been entitled to claim the individual as a dependent.

(2) The taxpayer claiming an individual as a dependent for a taxable year beginning after December 31, 2001, under the multiple support agreement provisions of section 152(c) must provide with the income tax return for the year of the deduction—

(i) A statement identifying each of the other persons who contributed more than 10 percent of the support of the individual and who, but for the failure to contribute more than half of the support of the individual, would have been entitled to claim the individual as a dependent; and

(ii) A statement indicating that the taxpayer obtained a written declaration from each of the persons described in section 152(c)(2) waiving the right to claim the individual as a dependent.

(3) The taxpayer claiming the individual as a dependent for a taxable year beginning after December 31, 2001, must retain the waiver declarations and should be prepared to furnish the waiver declarations and any other information necessary to substantiate the claim, which may include a statement showing the names of all contributors (whether or not members of the group described in section 152(c)(2)) and the amount contributed by each to the support of the claimed dependent.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6603, 28 FR 7094, July 11, 1963; T.D. 8989, 67 FR 20031, Apr. 24, 2002; T.D. 9040, 68 FR 4920, Jan. 31, 2003]

§ 1.152–4 Special rule for a child of divorced or separated parents or parents who live apart.

(a) *In general.* A taxpayer may claim a dependency deduction for a child (as defined in section 152(f)(1)) only if the child is the qualifying child of the taxpayer under section 152(c) or the qualifying relative of the taxpayer under section 152(d). Section 152(c)(4)(B) provides that a child who is claimed as a qualifying child by parents who do not file a joint return together is treated as the qualifying child of the parent with whom the child resides for a longer period of time during the taxable year or, if the child resides with both parents for an equal period of time, of the parent with the higher adjusted gross income. However, a child is treated as the qualifying child or qualifying relative of the noncustodial parent if the custodial parent releases a claim to the exemption under section 152(e) and this section.

(b) *Release of claim by custodial parent*—(1) *In general.* Under section 152(e)(1), notwithstanding section 152(c)(1)(B), (c)(4), or (d)(1)(C), a child is treated as the qualifying child or qualifying relative of the noncustodial parent (as defined in paragraph (d) of this section) if the requirements of paragraphs (b)(2) and (b)(3) of this section are met.

(2) *Support, custody, and parental status*—(i) *In general.* The requirements of this paragraph (b)(2) are met if the parents of the child provide over one-half of the child's support for the calendar year, the child is in the custody of one or both parents for more than one-half of the calendar year, and the parents—

(A) Are divorced or legally separated under a decree of divorce or separate maintenance;

(B) Are separated under a written separation agreement; or

(C) Live apart at all times during the last 6 months of the calendar year whether or not they are or were married.

(ii) *Multiple support agreement.* The requirements of this paragraph (b)(2) are not met if over one-half of the support of the child is treated as having been received from a taxpayer under section 152(d)(3).

(3) *Release of claim to child.* The requirements of this paragraph (b)(3) are met for a calendar year if—

(i) The custodial parent signs a written declaration that the custodial parent will not claim the child as a dependent for any taxable year beginning in that calendar year and the noncustodial parent attaches the declaration to the noncustodial parent's return for the taxable year; or

(ii) A qualified pre-1985 instrument, as defined in section 152(e)(3)(B), applicable to the taxable year beginning in that calendar year, provides that the noncustodial parent is entitled to the dependency exemption for the child and the noncustodial parent provides at least $600 for the support of the child during the calendar year.

(c) *Custody.* A child is in the custody of one or both parents for more than one-half of the calendar year if one or both parents have the right under state law to physical custody of the child for more than one-half of the calendar year.

(d) *Custodial parent*—(1) *In general.* The *custodial parent* is the parent with whom the child resides for the greater number of nights during the calendar year, and the *noncustodial parent* is the parent who is not the custodial parent. A child is treated as residing with neither parent if the child is emancipated under state law. For purposes of this section, a child resides with a parent for a night if the child sleeps—

(i) At the residence of that parent (whether or not the parent is present); or

(ii) In the company of the parent, when the child does not sleep at a parent's residence (for example, the parent and child are on vacation together).

(2) *Night straddling taxable years.* A night that extends over two taxable years is allocated to the taxable year in which the night begins.

(3) *Absences.* (i) Except as provided in paragraph (d)(3)(ii) of this section, for purposes of this paragraph (d), a child who does not reside (within the meaning of paragraph (d)(1) of this section) with a parent for a night is treated as residing with the parent with whom the child would have resided for the night but for the absence.

(ii) A child who does not reside (within the meaning of paragraph (d)(1) of this section) with a parent for a night is treated as not residing with either parent for that night if it cannot be determined with which parent the child would have resided or if the child would not have resided with either parent for the night.

(4) *Special rule for equal number of nights.* If a child is in the custody of one or both parents for more than one-half of the calendar year and the child resides with each parent for an equal number of nights during the calendar year, the parent with the higher adjusted gross income for the calendar year is treated as the custodial parent.

(5) *Exception for a parent who works at night.* If, in a calendar year, due to a parent's nighttime work schedule, a child resides for a greater number of days but not nights with the parent who works at night, that parent is treated as the custodial parent. On a school day, the child is treated as residing at the primary residence registered with the school.

(e) *Written declaration*—(1) *Form of declaration*—(i) *In general.* The written declaration under paragraph (b)(3)(i) of this section must be an unconditional release of the custodial parent's claim to the child as a dependent for the year or years for which the declaration is effective. A declaration is not unconditional if the custodial parent's release of the right to claim the child as a dependent requires the satisfaction of any condition, including the noncustodial parent's meeting of an obligation such as the payment of support. A written declaration must name the noncustodial parent to whom the exemption is released. A written declaration must specify the year or years for which it is effective. A written declaration that specifies all future years is treated as specifying the first taxable year after the taxable year of execution and all subsequent taxable years.

(ii) *Form designated by IRS.* A written declaration may be made on Form 8332, Release/Revocation of Release of Claim to Exemption for Child by Custodial Parent, or successor form designated by the IRS. A written declaration not on the form designated by the IRS must conform to the substance of that form and must be a document executed for the sole purpose of serving as a written declaration under this section. A court order or decree or a separation agreement may not serve as a written declaration.

(2) *Attachment to return.* A noncustodial parent must attach a copy of the written declaration to the parent's return for each taxable year in which the child is claimed as a dependent.

(3) *Revocation of written declaration*—(i) *In general.* A parent may revoke a written declaration described in paragraph (e)(1) of this section by providing written notice of the revocation to the other parent. The parent revoking the written declaration must make reasonable efforts to provide actual notice to the other parent. The revocation may be effective no earlier than the taxable year that begins in the first calendar year after the calendar year in which the parent revoking the written declaration provides, or makes reasonable efforts to provide, the written notice.

(ii) *Form of revocation.* The revocation may be made on Form 8332, Release/Revocation of Release of Claim to Exemption for Child by Custodial Parent, or successor form designated by the IRS whether or not the written declaration was made on a form designated by the IRS. A revocation not on that form must conform to the substance of the form and must be a document executed for the sole purpose of serving as a revocation under this section. The revocation must specify the year or years for which the revocation is effective. A revocation that specifies all future years is treated as specifying the first taxable year after the taxable year the revocation is executed and all subsequent taxable years.

(iii) *Attachment to return.* The parent revoking the written declaration must attach a copy of the revocation to the parent's return for each taxable year for which the parent claims a child as a dependent as a result of the revocation. The parent revoking the written declaration must keep a copy of the revocation and evidence of delivery of the notice to the other parent, or of the reasonable efforts to provide actual notice.

(4) *Ineffective declaration or revocation.* A written declaration or revocation that fails to satisfy the requirements of this paragraph (e) has no effect.

(5) *Written declaration executed in a taxable year beginning on or before July 2, 2008.* A written declaration executed in a taxable year beginning on or before July 2, 2008, that satisfies the requirements for the form of a written declaration in effect at the time the written declaration is executed, will be treated as meeting the requirements of paragraph (e)(1) of this section. Paragraph (e)(3) of this section applies without regard to whether a custodial parent executed the written declaration in a taxable year beginning on or before July 2, 2008.

(f) *Coordination with other sections.* If section 152(e) and this section apply, a child is treated as the dependent of both parents for purposes of sections 105(b), 132(h)(2)(B), and 213(d)(5).

(g) *Examples.* The provisions of this section are illustrated by the following examples that assume, unless otherwise provided, that each taxpayer's taxable year is the calendar year, one or both of the child's parents provide over one-half of the child's support for the calendar year, one or both parents have the right under state law to physical custody of the child for more than one-half of the calendar year, and the child otherwise meets the requirements of a qualifying child under section 152(c) or a qualifying relative under section 152(d). In addition, in each of the examples, no qualified pre-1985 instrument or multiple support agreement is in effect. The examples are as follows:

Example 1. (i) B and C are the divorced parents of Child. In 2009, Child resides with B for 210 nights and with C for 155 nights. B executes a Form 8332 for 2009 releasing B's right to claim Child as a dependent for that year, which C attaches to C's 2009 return.

(ii) Under paragraph (d) of this section, B is the custodial parent of Child in 2009 because B is the parent with whom Child resides for the greater number of nights in 2009. Because the requirements of paragraphs (b)(2) and (3) of this section are met, C may claim Child as a dependent.

Example 2. The facts are the same as in *Example 1* except that B does not execute a Form 8332 or similar declaration for 2009. Therefore, section 152(e) and this section do not apply. Whether Child is the qualifying child or qualifying relative of B or C is determined under section 152(c) or (d).

Example 3. (i) D and E are the divorced parents of Child. Under a custody decree, Grandmother has the right under state law to physical custody of Child from January 1 to July 31, 2009.

(ii) Because D and E do not have the right under state law to physical custody of Child for over one-half of the 2009 calendar year, under paragraph (c) of this section, Child is not in the custody of one or both parents for over one-half of the calendar year. Therefore, section 152(e) and this section do not apply, and whether Child is the qualifying child or qualifying relative of D, E, or Grandmother is determined under section 152(c) or (d).

Example 4. (i) The facts are the same as in *Example 3,* except that Grandmother has the right to physical custody of Child from January 1 to March 31, 2009, and, as a result, Child resides with Grandmother during this period. D and E jointly have the right to physical custody of Child from April 1 to December 31, 2009. During this period, Child resides with D for 180 nights and with E for 95 nights. D executes a Form 8332 for 2009 releasing D's right to claim Child as a dependent for that year, which E attaches to E's 2009 return.

(ii) Under paragraph (c) of this section, Child is in the custody of D and E for over one-half of the calendar year, because D and E have the right under state law to physical custody of Child for over one-half of the calendar year.

(iii) Under paragraph (d)(3)(ii) of this section, the nights that Child resides with Grandmother are not allocated to either parent. Child resides with D for a greater number of nights than with E during the calendar year and, under paragraph (d)(1) of this section, D is the custodial parent.

(iv) Because the requirements of paragraphs (b)(2) and (3) of this section are met, section 152(e) and this section apply, and E may claim Child as a dependent.

Example 5. (i) The facts are the same as in *Example 4,* except that D is away on military service from April 10 to June 15, 2009, and September 6 to October 20, 2009. During these periods Child resides with Grandmother in Grandmother's residence. Child would have resided with D if D had not been away on military service. Grandmother claims Child as a dependent on Grandmother's 2009 return.

(ii) Under paragraph (d)(3)(i) of this section, Child is treated as residing with D for the nights that D is away on military service. Because the requirements of paragraphs (b)(2) and (3) of this section are met, section 152(e) and this section apply, and E, not Grandmother, may claim Child as a dependent.

Example 6. F and G are the divorced parents of Child. In May of 2009, Child turns age 18 and is emancipated under the law of the state where Child resides. Therefore, in 2009 and later years, F and G do not have the right under state law to physical custody of Child for over one-half of the calendar year, and Child is not in the custody of F and G for over one-half of the calendar year. Section 152(e) and this section do not apply, and whether Child is the qualifying child or qualifying relative of F or G is determined under section 152(c) or (d).

Example 7. (i) The facts are the same as in *Example 6,* except that Child turns age 18 and is emancipated under state law on August 1, 2009, resides with F from January 1, 2009, through May 31, 2009, and resides with G from June 1, 2009, through December 31, 2009. F executes a Form 8332 releasing F's right to claim Child as a dependent for 2009, which G attaches to G's 2009 return.

(ii) Under paragraph (c) of this section, Child is in the custody of F and G for over one-half of the calendar year.

(iii) Under paragraph (d)(1) of this section, Child is treated as not residing with either parent after Child's emancipation. Therefore, Child resides with F for 151 nights and with G for 61 nights. Because the requirements of paragraphs (b)(2) and (3) of this section are met, section 152(e) and this section apply, and G may claim Child as a dependent.

Example 8. H and J are the divorced parents of Child. Child generally resides with H during the week and with J every other weekend. Child resides with J in H's residence for 10 consecutive nights while H is hospitalized. Under paragraph (d)(1)(i) of this section, Child resides with H for the 10 nights.

Example 9. K and L, who are separated under a written separation agreement, are the parents of Child. In August 2009, K and

Child spend 10 nights together in a hotel while on vacation. Under paragraph (d)(1)(ii) of this section, Child resides with K for the 10 nights that K and Child are on vacation.

Example 10. M and N are the divorced parents of Child. On December 31, 2009, Child attends a party at M's residence. After midnight on January 1, 2010, Child travels to N's residence, where Child sleeps. Under paragraph (d)(1) of this section, Child resides with N for the night of December 31, 2009, to January 1, 2010, because Child sleeps at N's residence that night. However, under paragraph (d)(2) of this section, the night of December 31, 2009, to January 1, 2010, is allocated to taxable year 2009 for purposes of determining whether Child resides with M or N for a greater number of nights in 2009.

Example 11. O and P, who never married, are the parents of Child. In 2009, Child spends alternate weeks residing with O and P. During a week that Child is residing with O, O gives Child permission to spend a night at the home of a friend. Under paragraph (d)(3)(i) of this section, the night Child spends at the friend's home is treated as a night that Child resides with O.

Example 12. The facts are the same as in *Example 11*, except that Child also resides at summer camp for 6 weeks. Because Child resides with each parent for alternate weeks, Child would have resided with O for 3 weeks and with P for 3 weeks of the period that Child is at camp. Under paragraph (d)(3)(i) of this section, Child is treated as residing with O for 3 weeks and with P for 3 weeks.

Example 13. The facts are the same as in *Example 12*, except that Child does not spend alternate weeks residing with O and P, and it cannot be determined whether Child would have resided with O or P for the period that Child is at camp. Under paragraph (d)(3)(ii) of this section, Child is treated as residing with neither parent for the 6 weeks.

Example 14. (i) Q and R are the divorced parents of Child. Q works from 11 PM to 7 AM Sunday through Thursday nights. Because of Q's nighttime work schedule, Child resides with R Sunday through Thursday nights and with Q Friday and Saturday nights. Therefore, in 2009, Child resides with R for 261 nights and with Q for 104 nights. Child spends all daytime hours when Child is not in school with Q and Q's address is registered with Child's school as Child's primary residence. Q executes a Form 8332 for 2009 releasing Q's right to claim Child as a dependent for that year, which R attaches to R's 2009 return.

(ii) Under paragraph (d) of this section, Q is the custodial parent of Child in 2009. Child resides with R for a greater number of nights than with Q due to Q's nighttime work schedule, and Child spends a greater number of days with Q. Therefore, paragraph (d)(5) of this section applies rather than paragraph (d)(1) of this section. Because the requirements of paragraphs (b)(2) and (3) of this section are met, R may claim Child as a dependent.

Example 15. (i) In 2009, S and T, the parents of Child, execute a written separation agreement. The agreement provides that Child will live with S and that T will make monthly child support payments to S. In 2009, Child resides with S for 335 nights and with T for 30 nights. S executes a letter declaring that S will not claim Child as a dependent in 2009 and in subsequent alternate years. The letter contains all the information requested on Form 8332, does not require the satisfaction of any condition such as T's payment of support, and has no purpose other than to serve as a written declaration under section 152(e) and this section. T attaches the letter to T's return for 2009 and 2011.

(ii) In 2010, T fails to provide support for Child, and S executes a Form 8332 revoking the release of S's right to claim Child as a dependent for 2011. S delivers a copy of the Form 8332 to T, attaches a copy of the Form 8332 to S's tax return for 2011, and keeps a copy of the Form 8332 and evidence of delivery of the written notice to T.

(iii) T may claim Child as a dependent for 2009 because S releases the right to claim Child as a dependent under paragraph (b)(3) of this section by executing the letter, which conforms to the requirements of paragraph (e)(1) of this section, and T attaches the letter to T's return in accordance with paragraph (e)(2) of this section. In 2010, S revokes the release of the claim in accordance with paragraph (e)(3) of this section, and the revocation takes effect in 2011, the taxable year that begins in the first calendar year after S provides written notice of the revocation to T. Therefore, in 2011, section 152(e) and this section do not apply, and whether Child is the qualifying child or qualifying relative of S or T is determined under section 152(c) or (d).

Example 16. The facts are the same as *Example 15*, except that the letter expressly states that S releases the right to claim Child as a dependent only if T is current in the payment of support for Child at the end of the calendar year. The letter does not qualify as a written declaration under paragraph (b)(3) of this section because S's agreement not to claim Child as a dependent is conditioned on T's payment of support and, under paragraph (e)(1)(i) of this section, a written declaration must be unconditional. Therefore, section 152(e) and this section do not apply, and whether Child is the qualifying child or qualifying relative of S or T for 2009 as well as 2011 is determined under section 152(c) or (d).

Example 17. (i) U and V are the divorced parents of Child. Child resides with U for more nights than with V in 2009 through 2011. In 2009, U provides a written statement to V declaring that U will not claim Child as a dependent, but the statement does not specify the year or years it is effective. V attaches the statement to V's returns for 2009 through 2011.

(ii) Because the written statement does not specify a year or years, under paragraph (e)(1) of this section, it is not a written declaration that conforms to the substance of Form 8332. Under paragraph (e)(4) of this section, the statement has no effect. Section 152(e) and this section do not apply, and whether Child is the qualifying child or qualifying relative of U or V is determined under section 152(c) or (d).

Example 18. (i) W and X are the divorced parents of Child. In 2009, Child resides solely with W. The divorce decree requires X to pay child support to W and requires W to execute a Form 8332 releasing W's right to claim Child as a dependent. W fails to sign a Form 8332 for 2009, and X attaches an unsigned Form 8332 to X's return for 2009.

(ii) The order in the divorce decree requiring W to execute a Form 8332 is ineffective to allocate the right to claim Child as a dependent to X. Furthermore, under paragraph (e)(1) of this section, the unsigned Form 8332 does not conform to the substance of Form 8332, and under paragraph (e)(4) of this section, the Form 8332 has no effect. Therefore, section 152(e) and this section do not apply, and whether Child is the qualifying child or qualifying relative of W or X is determined under section 152(c) or (d).

(iii) If, however, W executes a Form 8332 for 2009, and X attaches the Form 8332 to X's return, then X may claim Child as a dependent in 2009.

Example 19. (i) Y and Z are the divorced parents of Child. In 2003, Y and Z enter into a separation agreement, which is incorporated into a divorce decree, under which Y, the custodial parent, releases Y's right to claim Child as a dependent for all future years. The separation agreement satisfies the requirements for the form of a written declaration in effect at the time it is executed. Z attaches a copy of the separation agreement to Z's returns for 2003 through 2009.

(ii) Under paragraph (e)(1)(ii) of this section, a separation agreement may not serve as a written declaration. However, under paragraph (e)(5) of this section, a written declaration executed in a taxable year beginning on or before July 2, 2008, that satisfies the requirements for the form of a written declaration in effect at the time the written declaration is executed, will be treated as meeting the requirements of paragraph (e)(1) of this section. Therefore, the separation agreement may serve as the written declaration required by paragraph (b)(3)(i) of this section for 2009, and Z may claim Child as a dependent in 2009 and later years.

Example 20. (i) The facts are the same as in *Example 19*, except that in 2009 Y executes a Form 8332 revoking the release of Y's right to claim Child as a dependent for 2010. Y complies with all the requirements of paragraph (e)(3) of this section.

(ii) Although Y executes the separation agreement releasing Y's right to claim Child as a dependent in a taxable year beginning on or before July 2, 2008, under paragraph (e)(5) of this section, Y's execution of the Form 8332 in 2009 is effective to revoke the release. Therefore, section 152(e) and this section do not apply in 2010, and whether Child is the qualifying child or qualifying relative of Y or Z is determined under section 152(c) or (d).

(h) *Effective/applicability date.* This section applies to taxable years beginning after July 2, 2008.

[T.D. 9408, 73 FR 37801, July 2, 2008]

§ 1.153–1 Determination of marital status.

For the purpose of determining the right of an individual to claim an exemption for his spouse under section 151(b), the determination of whether such individual is married shall be made as of the close of his taxable year, unless his spouse dies during such year, in which case the determination shall be made as of the time of such death. An individual legally separated from his spouse under a decree of divorce or separate maintenance shall not be considered as married. The provisions of this section may be illustrated by the following examples:

Example 1. A, who files his returns on the basis of a calendar year, married B on December 31, 1956. B, who had never previously married, had no gross income for the calendar year 1956 nor was she the dependent of another taxpayer for such year. A may claim an exemption for B for 1956.

Example 2. C and his wife, D, were married in 1940. They remained married until July 1956 at which time D was granted a decree of divorce. C, who files his income tax returns on a calendar year basis, cannot claim an exemption for D on his 1956 return as C and D were not married on the last day of C's taxable year. Had D died instead of being divorced, C could have claimed an exemption for D for 1956 as their marital status would have been determined as of the date of D's death.

§ 1.154 Statutory provisions; cross references.

SEC. 154. *Cross references.* (1) For definitions of "husband" and "wife", as used in section 152(b)(4), see section 7701(a)(17).

(2) For deductions of estates and trusts, in lieu of the exemptions under section 151, see section 642(b).

(3) For exemptions of nonresident aliens, see section 873(b)(3).

(4) For exemptions of citizens deriving income mainly from sources within possessions of the United States, see section 931(e).

(Sec. 154 as amended by sec. 103(c)(2), Foreign Investors Tax Act 1966 (80 Stat. 1551))

[T.D. 6500, 25 FR 11402, Nov. 26, 1960; 25 FR 14021, Dec. 21, 1960, as amended by T.D. 7332, 39 FR 44216, Dec. 23, 1974]

ITEMIZED DEDUCTIONS FOR INDIVIDUALS AND CORPORATIONS

§ 1.161–1 Allowance of deductions.

Section 161 provides for the allowance as deductions, in computing taxable income under section 63(a), of the items specified in Part VI (section 161 and following), Subchapter B, Chapter 1 of the Code, subject to the exceptions provided in Part IX (section 261 and following), of such Subchapter B, relating to items not deductible. Double deductions are not permitted. Amounts deducted under one provision of the Internal Revenue Code of 1954 cannot again be deducted under any other provision thereof. See also section 7852(c), relating to the taking into account, both in computing a tax under Subtitle A of the Internal Revenue Code of 1954 and a tax under Chapter 1 or 2 of the Internal Revenue Code of 1939, of the same item of deduction.

§ 1.162–1 Business expenses.

(a) *In general.* Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, except items which are used as the basis for a deduction or a credit under provisions of law other than section 162. The cost of goods purchased for resale, with proper adjustment for opening and closing inventories, is deducted from gross sales in computing gross income. See paragraph (a) of § 1.161–3. Among the items included in business expenses are management expenses, commissions (but see section 263 and the regulations thereunder), labor, supplies, incidental repairs, operating expenses of automobiles used in the trade or business, traveling expenses while away from home solely in the pursuit of a trade or business (see § 1.162–2), advertising and other selling expenses, together with insurance premiums against fire, storm, theft, accident, or other similar losses in the case of a business, and rental for the use of business property. No such item shall be included in business expenses, however, to the extent that it is used by the taxpayer in computing the cost of property included in its inventory or used in determining the gain or loss basis of its plant, equipment, or other property. See section 1054 and the regulations thereunder. A deduction for an expense paid or incurred after December 30, 1969, which would otherwise be allowable under section 162 shall not be denied on the grounds that allowance of such deduction would frustrate a sharply defined public policy. See section 162(c), (f), and (g) and the regulations thereunder. The full amount of the allowable deduction for ordinary and necessary expenses in carrying on a business is deductible, even though such expenses exceed the gross income derived during the taxable year from such business. In the case of any sports program to which section 114 (relating to sports programs conducted for the American National Red Cross) applies, expenses described in section 114(a)(2) shall be allowable as deductions under section 162(a) only to the extent that such expenses exceed the amount excluded from gross income under section 114(a).

(b) *Cross references.* (1) For charitable contributions by individuals and corporations not deductible under section 162, see § 1.162–15.

(2) For items not deductible, see sections 261–276, inclusive, and the regulations thereunder.

(3) For research and experimental expenditures, see section 174 and regulations thereunder.

(4) For soil and water conservation expenditures, see section 175 and regulations thereunder.

(5) For expenditures attributable to grant or loan by United States for encouragement of exploration for, or development or mining of, critical and strategic minerals or metals, see section 621 and regulations thereunder.

(6) For treatment of certain rental payments with respect to public utility property, see section 167(l) and §1.167(l)–3.

(7) For limitations on the deductibility of miscellaneous itemized deductions, see section 67 and §§1.67–1T through 1.67–4T.

(8) For the timing of deductions with respect to notional principal contracts. see §1.446–3.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6690, 28 FR 12253, Nov. 19, 1963; T.D. 6996, 34 FR 835, Jan. 18, 1969; T.D. 7315, 39 FR 20203, June 7, 1974; T.D. 7345, 40 FR 7437, Feb. 20, 1975; T.D. 8189, 53 FR 9881, Mar. 28, 1988; T.D. 8491, 58 FR 53128, Oct. 14, 1993]

§ 1.162–2 Traveling expenses.

(a) Traveling expenses include travel fares, meals and lodging, and expenses incident to travel such as expenses for sample rooms, telephone and telegraph, public stenographers, etc. Only such traveling expenses as are reasonable and necessary in the conduct of the taxpayer's business and directly attributable to it may be deducted. If the trip is undertaken for other than business purposes, the travel fares and expenses incident to travel are personal expenses and the meals and lodging are living expenses. If the trip is solely on business, the reasonable and necessary traveling expenses, including travel fares, meals and lodging, and expenses incident to travel, are business expenses. For the allowance of traveling expenses as deductions in determining adjusted gross income, see section 62(2)(B) and the regulations thereunder.

(b)(1) If a taxpayer travels to a destination and while at such destination engages in both business and personal activities, traveling expenses to and from such destination are deductible only if the trip is related primarily to the taxpayer's trade or business. If the trip is primarily personal in nature, the traveling expenses to and from the destination are not deductible even though the taxpayer engages in business activities while at such destination. However, expenses while at the destination which are properly allocable to the taxpayer's trade or business are deductible even though the traveling expenses to and from the destination are not deductible.

(2) Whether a trip is related primarily to the taxpayer's trade or business or is primarily personal in nature depends on the facts and circumstances in each case. The amount of time during the period of the trip which is spent on personal activity compared to the amount of time spent on activities directly relating to the taxpayer's trade or business is an important factor in determining whether the trip is primarily personal. If, for example, a taxpayer spends one week while at a destination on activities which are directly related to his trade or business and subsequently spends an additional five weeks for vacation or other personal activities, the trip will be considered primarily personal in nature in the absence of a clear showing to the contrary.

(c) Where a taxpayer's wife accompanies him on a business trip, expenses attributable to her travel are not deductible unless it can be adequately shown that the wife's presence on the trip has a bona fide business purpose. The wife's performance of some incidental service does not cause her expenses to qualify as deductible business expenses. The same rules apply to any other members of the taxpayer's family who accompany him on such a trip.

(d) Expenses paid or incurred by a taxpayer in attending a convention or other meeting may constitute an ordinary and necessary business expense under section 162 depending upon the facts and circumstances of each case. No distinction will be made between self-employed persons and employees. The fact that an employee uses vacation or leave time or that his attendance at the convention is voluntary will not necessarily prohibit the allowance of the deduction. The allowance of deductions for such expenses will depend upon whether there is a sufficient relationship between the taxpayer's trade of business and his attendance at the convention or other meeting so that he is benefiting or advancing the interests of his trade or business by such attendance. If the convention is for political, social or other purposes unrelated to the taxpayer's trade or business, the expenses are not deductible.

(e) Commuters' fares are not considered as business expenses and are not deductible.

(f) For rules with respect to the reporting and substantiation of traveling and other business expenses of employees for taxable years beginning after December 31, 1957, see § 1.162–17.

§ 1.162–3 Materials and supplies.

(a) through (k) [Reserved] For further guidance, see § 1.163–3T(a) through (k).

[T.D. 9564, 77 FR 18687, Mar. 28, 2012]

§ 1.162–3T Materials and supplies (temporary).

(a) *In general*—(1) *Non-incidental materials and supplies.* Amounts paid to acquire or produce materials and supplies are deductible in the taxable year in which the materials and supplies are used or consumed in the taxpayer's operations.

(2) *Incidental materials and supplies.* Amounts paid to acquire or produce incidental materials and supplies that are carried on hand and for which no record of consumption is kept or of which physical inventories at the beginning and end of the taxable year are not taken, are deductible in the taxable year in which these amounts are paid, provided taxable income is clearly reflected.

(3) *Use or consumption of rotable and temporary spare parts.* Except as provided in paragraphs (d), (e), and (f) of this section, for purposes of paragraph (a)(1) of this section, rotable and temporary spare parts (defined under paragraph (c)(2) of this section) are used or consumed in the taxpayer's operations in the taxable year in which the taxpayer disposes of the parts.

(b) *Coordination with other provisions of the Internal Revenue Code.* Nothing in this section changes the treatment of any amount that is specifically provided for under any provision of the Internal Revenue Code or regulations other than section 162(a) or section 212 and the regulations under those sections. For example, see section § 1.263(a)–3T, which requires taxpayers to capitalize amounts paid to improve tangible property and section 263A and the regulations under section 263A, which require taxpayers to capitalize the direct and allocable indirect costs, including the cost of materials and supplies, to property produced or to property acquired for resale. See also § 1.471–1, which requires taxpayers to include in inventory certain materials and supplies.

(c) *Definitions*—(1) *Materials and supplies.* For purposes of this section, *materials and supplies* means tangible property that is used or consumed in the taxpayer's operations that is not inventory and that—

(i) Is a component acquired to maintain, repair, or improve a unit of tangible property (as determined under § 1.263(a)–3T(e)) owned, leased, or serviced by the taxpayer and that is not acquired as part of any single unit of tangible property;

(ii) Consists of fuel, lubricants, water, and similar items, that are reasonably expected to be consumed in 12 months or less, beginning when used in taxpayer's operations;

(iii) Is a unit of property as determined under § 1.263(a)–3T(e) that has an economic useful life of 12 months or less, beginning when the property is used or consumed in the taxpayer's operations;

(iv) Is a unit of property as determined under § 1.263(a)-3T(e) that has an acquisition cost or production cost (as determined under section 263A) of $100 or less (or other amount as identified in published guidance in the FEDERAL REGISTER or in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(*b*) of this chapter)); or

(v) Is identified in published guidance in the FEDERAL REGISTER or in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(*b*) of this chapter) as materials and supplies for which treatment is permitted under this section.

(2) *Rotable and temporary spare parts.* For purposes of this section, rotable spare parts are materials and supplies under paragraph (c)(1)(i) of this section that are acquired for installation on a unit of property, removable from that unit of property, generally repaired or

improved, and either reinstalled on the same or other property or stored for later installation. Temporary spare parts are materials and supplies under paragraph (c)(1)(i) of this section that are used temporarily until a new or repaired part can be installed and then are removed and stored for later (emergency or temporary) installation.

(3) *Economic useful life*—(i) *General rule.* The economic useful life of a unit of property is not necessarily the useful life inherent in the property but is the period over which the property may reasonably be expected to be useful to the taxpayer or, if the taxpayer is engaged in a trade or business or an activity for the production of income, the period over which the property may reasonably be expected to be useful to the taxpayer in its trade or business or for the production of income, as applicable. See §1.167(a)–1(b) for the factors to be considered in determining this period.

(ii) *Taxpayers with an applicable financial statement.* For taxpayers with an applicable financial statement (as defined in paragraph (c)(3)(iii) of this section), the economic useful life of a unit of property, solely for the purposes of applying the provisions of paragraph (c)(1)(iii) of this section, is the useful life initially used by the taxpayer for purposes of determining depreciation in its applicable financial statement, regardless of any salvage value of the property. If a taxpayer does not have an applicable financial statement for the taxable year in which a unit of property was originally acquired or produced, the economic useful life of the unit of property must be determined under paragraph (c)(3)(i) of this section. Further, if a taxpayer treats amounts paid for a unit of property as an expense in its applicable financial statement on a basis other than the useful life of the property or if a taxpayer does not depreciate the unit of property on its applicable financial statement, the economic useful life of the unit of property must be determined under paragraph (c)(3)(i) of this section. For example, if a taxpayer has a policy of treating as an expense on its applicable financial statement amounts paid for a unit of property costing less than a certain dollar amount, notwithstanding that the unit of property has a useful life of more than one year, the economic useful life of the unit of property must be determined under paragraph (c)(3)(i) of this section.

(iii) *Definition of applicable financial statement.* The taxpayer's applicable financial statement is the taxpayer's financial statement listed in paragraphs (c)(3)(iii)(A) through (C) of this section that has the highest priority (including within paragraph (c)(3)(iii)(B) of this section). The financial statements are, in descending priority—

(A) A financial statement required to be filed with the Securities and Exchange Commission (SEC) (the 10–K or the Annual Statement to Shareholders);

(B) A certified audited financial statement that is accompanied by the report of an independent CPA (or in the case of a foreign entity, by the report of a similarly qualified independent professional), that is used for—

(*1*) Credit purposes;

(*2*) Reporting to shareholders, partners, or similar persons; or

(*3*) Any other substantial non-tax purpose; or

(C) A financial statement (other than a tax return) required to be provided to the Federal or a state government or any Federal or state agencies (other than the SEC or the Internal Revenue Service).

(4) *Amount paid.* For purposes of this section, in the case of a taxpayer using an accrual method of accounting, the terms *amount paid* and *payment* mean a liability incurred (within the meaning of §1.446–1(c)(1)(ii)). A liability may not be taken into account under this section prior to the taxable year during which the liability is incurred.

(5) *Produce.* For purposes of this section, *produce* means construct, build, install, manufacture, develop, create, raise, or grow. This definition is intended to have the same meaning as the definition used for purposes of section 263A(g)(1) and §1.263A–2(a)(1)(i), except that improvements are excluded from the definition in this paragraph (c)(5) and are separately defined and addressed in §1.263(a)–3T. Amounts paid to produce materials and supplies are subject to section 263A.

(d) *Election to capitalize and depreciate*—(1) *In general.* A taxpayer may elect to treat as a capital expenditure and to treat as an asset subject to the allowance for depreciation the cost of any material or supply as defined in paragraph (c)(1) of this section. Except as specified in paragraph (d)(2) of this section, an election made under this paragraph (d) applies to amounts paid during the taxable year to acquire or produce any material or supply to which paragraph (a) of this section would apply (but for the election under this paragraph (d)). Any asset for which this election is made shall not be treated as a material or a supply.

(2) *Exceptions.* A taxpayer may not elect to capitalize and depreciate under paragraph (d) of this section—

(i) Any amount paid to acquire or produce a material or supply described in paragraph (c)(1)(i) of this section if—

(A) The material or supply is intended to be used as a component of a unit of property that is a material or supply under paragraph (c)(1)(iii), (iv), or (v) of this section; and

(B) The taxpayer has not elected to capitalize and depreciate that unit of property under this paragraph (d); or

(ii) Any amount paid to acquire or produce a rotable or temporary spare part if the taxpayer has applied the optional method of accounting for rotable and temporary spare parts under paragraph (e) of this section.

(3) *Manner of electing.* A taxpayer makes the election under paragraph (d) of this section by capitalizing the amounts paid to acquire or produce a material or supply in the taxable year the amounts are paid and by beginning to recover the costs when the asset is placed in service by the taxpayer for the purposes of determining depreciation under the applicable provisions of Internal Revenue Code and regulations thereunder. A taxpayer must make this election in its timely filed original Federal income tax return (including extensions) for the taxable year the asset is placed in service by the taxpayer for purposes of determining depreciation. See §1.263(a)–2T for the treatment of amounts paid to acquire or produce real or personal tangible property. In the case of a pass-through entity, the election is made by the pass-through entity, and not by the shareholders or partners. A taxpayer may make an election for each material or supply that qualifies for the election under this paragraph (d). A taxpayer may revoke an election made under this paragraph (d) with respect to a material or supply only by filing a request for a private letter ruling and obtaining the Commissioner's consent to revoke the election. The Commissioner may grant a request to revoke this election if the taxpayer can demonstrate good cause for the revocation. An election may not be made or revoked through the filing of an application for change in accounting method or, before obtaining the Commissioner's consent to make the late election or to revoke the election, by filing an amended Federal income tax return.

(e) *Optional method of accounting for rotable and temporary spare parts*—(1) *In general.* This paragraph (e) provides an optional method of accounting for rotable and temporary spare parts (the optional method for rotables). A taxpayer may use the optional method for rotables, instead of the general rule under paragraph (a)(3) of this section, to account for its rotable and temporary spare parts as defined in paragraph (c)(2) of this section. A taxpayer that uses the optional method for rotables must use this method for all of its rotable and temporary spare parts in the same trade or business. The optional method for rotables is a method of accounting under section 446(a). Under the optional method for rotables, the taxpayer must apply the rules in this paragraph (e) to each rotable or temporary spare part (part) upon the taxpayer's initial installation, removal, repair, maintenance or improvement, reinstallation, and disposal of each part.

(2) *Description of optional method for rotables*—(i) *Initial installation.* The taxpayer must deduct the amount paid to acquire or produce the part in the taxable year that the part is first installed on a unit of property for use in the taxpayer's operations.

(ii) *Removal from unit of property.* In each taxable year in which the part is removed from a unit of property to which it was initially or subsequently installed, the taxpayer must—

(A) Include in gross income the fair market value of the part; and

(B) Include in the basis of the part the fair market value of the part included in income under paragraph (e)(2)(ii)(A) of this section and the amount paid to remove the part from the unit of property.

(iii) *Repair, maintenance, or improvement of part.* The taxpayer may not currently deduct and must include in the basis of the part any amounts paid to maintain, repair, or improve the part in the taxable year these amounts are paid.

(iv) *Reinstallation of part.* The taxpayer must deduct the amounts paid to reinstall the part and those amounts included in the basis of the part under paragraphs (e)(2)(ii)(B) and (e)(2)(iii) of this section, to the extent that those amounts have not been previously deducted under this paragraph (e)(2)(iv), in the taxable year that the part is reinstalled on a unit of property.

(v) *Disposal of the part.* The taxpayer must deduct the amounts included in the basis of the part under paragraphs (e)(2)(ii)(B) and (e)(2)(iii) of this section, to the extent that those amounts have not been previously deducted under paragraph (e)(2)(iv) of this section, in the taxable year in which the part is disposed of by the taxpayer.

(f) *Election to apply de minimis rule*—(1) *In general.* A taxpayer may elect to apply the de minimis rule under §1.263(a)–2T(g) to any material or supply defined in paragraph (c)(1) this section. Any material or supply to which the taxpayer elects to apply the de minimis rule under §1.263(a)–2T(g) is not treated as a material or supply under this section. *See* §1.263(a)–2T(g)(5).

(2) *Manner of electing.* A taxpayer makes the election by deducting the amounts paid to acquire or produce a material or supply in the taxable year that the amounts are paid and by complying with the requirements set out in §1.263(a)–2T(g). A taxpayer must make this election in its timely filed original Federal income tax return (including extensions) for the taxable year that amounts are paid for the material or supply. In the case of a pass-through entity, the election is made by the pass-through entity and not by the shareholders or partners. A taxpayer may make an election for each material or supply that qualifies for the election under paragraph (f) of this section. A taxpayer may revoke an election made under paragraph (f) of this section with respect to a material or supply only by filing a request for a private letter ruling and obtaining the Commissioner's consent to revoke the election. The Commissioner may grant a request to revoke this election if the taxpayer can demonstrate good cause for the revocation. An election may not be made or revoked through the filing of an application for change in accounting method or, before obtaining the Commissioner's consent to make the late election or to revoke the election, by filing an amended Federal income tax return.

(g) *Sale or disposition of materials and supplies.* Upon sale or other disposition, materials and supplies as defined in this section are not treated as a capital asset under section 1221 or as property used in the trade or business under section 1231. Any asset for which the taxpayer makes the election to capitalize and depreciate under paragraph (d) of this section shall not be treated as a material or supply.

(h) *Examples.* The rules of this section are illustrated by the following examples, in which it is assumed (unless otherwise stated) that the property is not an incidental material or supply, that the taxpayer is a calendar year, accrual method taxpayer, and that the taxpayer has not elected to capitalize under paragraph (d) of this section or to apply the de minimis rule under paragraph (f) of this section.

Example 1. Non-rotable components. X owns a fleet of aircraft that it operates in its business. In Year 1, X purchases a stock of spare parts, which it uses to maintain and repair its aircraft. X keeps a record of consumption of these spare parts. In Year 2, X uses the spare parts for the repair and maintenance of one of its aircraft. Assume each aircraft is a unit of property under §1.263(a)–3T(e) and that spare parts are not rotable or temporary spare parts under paragraph (c)(2) of this section. Assume these repair and maintenance activities do not improve the aircraft under §1.263(a)–3T. These parts are materials and supplies under paragraph (c)(1)(i) of this section because they are components acquired and used to maintain and repair X's aircraft. Under paragraph (a)(1) of this section, the amounts that X paid for the spare parts in Year 1 are deductible in Year 2, the taxable year in which the spare parts are used to repair and maintain the aircraft.

Example 2. Rotable spare parts. X operates a fleet of specialized vehicles that it uses in its service business. Assume that each vehicle is a unit of property under §1.263(a)–3T(e). At the time that it acquires a new type of vehicle, X also acquires a substantial number of rotable spare parts that it will keep on hand to quickly replace similar parts in X's vehicles as those parts break down or wear out. These rotable parts are removable from the vehicles and are repaired so that they can be reinstalled on the same or similar vehicles. X does not use the optional method of accounting for rotable and temporary spare parts provided in paragraph (e) of this section. In Year 1, X acquires several vehicles and a number of rotable spare parts to be used as replacement parts in these vehicles. In Year 2, X repairs several vehicles by using these rotable spare parts to replace worn or damaged parts. In Year 3, X removes these rotable spare parts from its vehicles, repairs the parts, and reinstalls them on other similar vehicles. In Year 5, X can no longer use the rotable parts it acquired in Year 1 and disposes of them as scrap. Under paragraph (c)(1)(i) of this section, the rotable spare parts acquired in Year 1 are materials and supplies. Under paragraph (a)(3) of this section, rotable spare parts are generally used or consumed in the taxable year in which the taxpayer disposes of the parts. Therefore, under paragraph (a)(1) of this section, the amounts that X paid for the rotable spare parts in Year 1 are deductible in Year 5, the taxable year in which X disposes of the parts.

Example 3. Rotable spare parts; application of optional method of accounting. Assume the same facts as in *Example 2*, except X uses the optional method of accounting for all its rotable and temporary spare parts under paragraph (e) of this section. In Year 1, X acquires several vehicles and a number of rotable spare parts (the ''Year 1 rotables'') to be used as replacement parts in these vehicles. In Year 2, X repairs several vehicles and uses the Year 1 rotables to replace worn or damaged parts. In Year 3, X pays amounts to remove these Year 1 rotables from its vehicles. In Year 4, X pays amounts to maintain, repair, or improve the Year 1 rotables. In Year 5, X pays amounts to reinstall the Year 1 rotables on other similar vehicles. In Year 8, X removes the Year 1 rotables from these vehicles and stores these parts for possible later use. In Year 9, X disposes of the Year 1 rotables. Under paragraph (e) of this section, X must deduct the amounts paid to acquire and install the Year 1 rotables in Year 2, the taxable year in which the rotable spare parts are first installed by X in X's vehicles. In Year 3, when X removes the Year 1 rotables from its vehicles, X must include in its gross income the fair market value of each part. Also, in Year 3, X must include in the basis of each Year 1 rotable the fair market value of the rotable and the amount paid to remove the rotable from the vehicle. In Year 4, X must include in the basis of each Year 1 rotable the amounts paid to maintain, repair, or improve each rotable. In Year 5, the year that X reinstalls the Year 1 rotables (as repaired or improved) in other vehicles, X must deduct the reinstallation costs and the amounts previously included in the basis of each part. In Year 8, the year that X removes the Year 1 rotables from the vehicles, X must include in income the fair market value of each rotable part removed. In addition, in Year 8, X must include in the basis of each part the fair market value of that part and the amount paid to remove the each rotable from the vehicle. In Year 9, the year that X disposes of the Year 1 rotables, X may deduct the amounts remaining in the basis of each rotable.

Example 4. Rotable part acquired as part of a single unit of property; not material or supply. X operates a fleet of aircraft. In Year 1, X acquires a new aircraft, which includes two new aircraft engines. The aircraft costs $500,000 and has an economic useful life of more than 12 months, beginning when it is placed in service. In Year 5, after the aircraft is operated for several years in X's business, X removes the engines from the aircraft, repairs or improves the engines, and either reinstalls the engines on a similar aircraft or stores the engines for later reinstallation. Assume the aircraft purchased in Year 1, including its two engines, is a unit of property under §1.263(a)–3T(e). Because the engines were acquired as part of the aircraft, a single unit of property, the engines are not materials or supplies under paragraph (c)(1)(i) of this section nor rotable or temporary spare parts under paragraph (c)(2) of this section. Accordingly, X may not apply the rules of this section to the aircraft engines upon the original acquisition of the aircraft nor after the removal of the engines from the aircraft for use in the same or similar aircraft. Rather, X must apply the rules under §§1.263(a)–2T and 1.263(a)–3T to the aircraft, including its engines, to determine the treatment of amounts paid to acquire, produce, or improve the unit of property.

Example 5. Components of real property. X owns an apartment building that it leases in its business operation and discovers that a window in one of the apartments is broken. Assume that the building, including its windows, is a unit of property under §1.263(a)–3T(e) and the window is not a rotable or temporary spare part under paragraph (c)(2) of this section. X pays for the acquisition and delivery of a new window to replace the broken window. In the same taxable year, the new window is installed. Assume that the replacement of the window does not improve the property under §1.263(a)–3T and that X does not recognize gain or loss on the disposition of the broken window. The new window is a material or supply under paragraph (c)(1)(i) of this section because it is a component acquired and used to repair a unit of property owned by X and used in X's operations. Under paragraph (a)(1) of this section, the amounts X paid for the acquisition and delivery of the window are deductible in the taxable year in which the window is installed in the apartment building. See §1.168(i)–8T for the treatment of the disposition of the broken window.

Example 6. Consumable property. X operates a fleet of aircraft that carries freight for its customers. X has several storage tanks on its premises, which hold jet fuel for its aircraft. Assume that once the jet fuel is placed in X's aircraft, the jet fuel is reasonably expected to be consumed within 12 months or less. On December 31, Year 1, X purchases a two-year supply of jet fuel. In Year 2, X uses a portion of the jet fuel purchased on December 31, Year 1, to fuel the aircraft used in its business. The jet fuel that X purchased in Year 1 is a material or supply under paragraph (c)(1)(ii) of this section because it is reasonably expected to be consumed within 12 months or less from the time it is placed in X's aircraft. Under paragraph (a)(1) of this section, X may deduct in Year 2 the amounts paid for the portion of jet fuel used in the operation of X's aircraft in Year 2.

Example 7. Unit of property that costs $100 or less. X operates a business that rents out a variety of small individual items to customers (rental items). X maintains a supply of rental items on hand. In Year 1, X purchases a large quantity of rental items to use in its rental business. Assume that each rental item is a unit of property under §1.263(a)–3T(e) and costs $100 or less. In Year 2, X begins using all the rental items purchased in Year 1 by providing them to customers of its rental business. X does not sell or exchange these items on established retail markets at any time after the items are used in the rental business. The rental items are materials and supplies under paragraph (c)(1)(iv) of this section. Under paragraph (a)(1) of this section, the amounts that X paid for the rental items in Year 1 are deductible in Year 2, the taxable year in which the rental items are used in X's business.

Example 8. Unit of property that costs $100 or less. X provides billing services to its customers. In Year 1, X pays amounts to purchase 50 facsimile machines to be used by its employees. Assume each facsimile machine is a unit of property under §1.263(a)–3T(e) and costs less than $100. In Year 1, X's employees begin using 35 of the facsimile machines, and X stores the remaining 15 machines for use in a later taxable year. The facsimile machines are materials and supplies under paragraph (c)(1)(iv) of this section. Under paragraph (a)(1) of this section, the amounts X paid for 35 of the facsimile machines are deductible in Year 1, the taxable year in which X uses those machines. The amounts that X paid for each of the remaining 15 machines are deductible in the taxable year in which each machine is used.

Example 9. Materials and supplies used in improvements; coordination with §1.263(a)–3T. X owns various machines that are used in its business. Assume that each machine is a unit of property under §1.263(a)–3T(e). In Year 1, X purchases a supply of spare parts for its machines. X acquired the parts to use in the repair or maintenance of the machines under §1.162–4T or in the improvement of the machines under §1.263(a)–3T. The spare parts are not rotable or temporary spare parts under paragraph (c)(2) of this section. In Year 2, X uses all of these spare parts in an activity that improves a machine under §1.263(a)–3T. Under paragraph (c)(1)(i) of this section, the spare parts purchased by X in Year 1 are materials and supplies. Under paragraph (a)(1) of this section, the amounts paid for the spare parts are otherwise deductible as materials and supplies in Year 2, the taxable year in which X uses those parts. However, because these materials and supplies are used to improve X's machine, X is required to capitalize the amounts paid for those spare parts under §1.263(a)–3T. See also section 263A for the requirement to capitalize the direct and allocable indirect costs of property produced or property acquired for resale.

Example 10. Cost of producing materials and supplies; coordination with section 263A. X is a manufacturer that produces liquid waste as part of its operations. X determines that its current liquid waste disposal process is inadequate. To remedy the problem, in Year 1, X constructs a leaching pit to provide a draining area for the liquid waste. Assume the leaching pit is a unit of property under §1.263(a)–3T(e) and has an economic useful life 12 months or less, starting on the date that X begins to use the leaching pit as a draining area. At the end of this period, X's factory will be connected to the local sewer system. In Year 2, X starts using the leaching pit in its operations. The amounts paid to construct the leaching pit (including the direct and allocable indirect costs of property produced under section 263A) are amounts paid for a material or supply under paragraph (c)(1)(iii) of this section. Under paragraph (a)(1) of this section, the amounts paid for the leaching pit are otherwise deductible as materials and supplies in Year 2, the taxable year in which X uses the leaching pit. However, because the amounts paid to construct the leaching pit directly benefit or are incurred by reason of X's manufacturing operations, X must capitalize those costs under section 263A to the property produced. *See* §1.263A–1(e)(3)(ii)(E).

Example 11. Costs of acquiring materials and supplies for production of property; coordination with section 263A. In Year 1, X purchases jigs, dies, molds, and patterns for use in the manufacture of X's products. Assume each jig, die, mold, and pattern is a unit of property under §1.263(a)–3T(e). The economic useful life of each jig, die, mold, and pattern is 12 months or less, beginning when each item is used in the manufacturing process. The jigs, dies, molds, and patterns are not components acquired to maintain, repair, or improve any of X's equipment under paragraph (c)(1)(i) of this section. X begins using the jigs, dies, molds and patterns in Year 2 to manufacture its products. These items are materials and supplies under paragraph (c)(1)(iii) of this section. Under paragraph (a)(1) of this section, the amounts paid for the items are otherwise deductible in Year 2, the taxable year in which X uses those items. However, because the amounts paid for these materials and supplies directly benefit or are incurred by reason of X's manufacturing operations, X must capitalize the costs under section 263A to the property produced. *See* §1.263A–1(e)(3)(ii)(E).

Example 12. Election to capitalize and depreciate. X operates a rental business that rents out a variety of items (rental items) to its customers. Assume each rental item is a separate unit of property as determined under §1.263(a)–3T(e). X does not sell or exchange these items on established retail markets at any time after the items are used in the rental business. X purchases various rental items, each of which costs less than $100 or has an economic useful life of 12 months or less, beginning when the items are used or consumed. The rental items are materials and supplies under paragraph (c)(1)(iii) or (c)(1)(iv) of this section. Under paragraph (a)(1) of this section, the amount paid for each rental item is deductible in the taxable year in which the item is used in the rental business. However, X would prefer to treat the cost of each rental item as a capital expenditure subject to depreciation. Under paragraph (d) of this section, X may elect not to apply the rule contained in paragraph (a)(1) of this section to the rental items. X makes this election by capitalizing the amounts paid for each rental item in the taxable year that X purchases the item and by beginning to recover the costs of each item on its timely filed Federal income tax return for the taxable year that X places the item in service for purposes of determining depreciation under the applicable provisions of the Internal Revenue Code and the regulations thereunder. See §1.263(a)–2T(h) for the treatment of capital expenditures.

Example 13. Election to capitalize and depreciate. X is an electric utility. X acquires certain temporary spare parts, which it keeps on hand to avoid operational time loss in the event it must make emergency repairs to a unit of property that is subject to depreciation. These parts are not used to improve property under §1.263(a)–3T(d). These temporary spare parts are used until a new or repaired part can be installed and then are removed and stored for later emergency installation. X does not use the optional method of accounting for rotable and temporary spare parts in paragraph (e) of this section for any of its rotable or temporary spare parts. The temporary spare parts are materials and supplies under paragraph (c)(1)(i) of this section. Under paragraphs (a)(1) and (a)(3) of this section, the amounts paid for the temporary spare parts are deductible in the taxable year in which they are disposed of by the taxpayer. However, because it is unlikely that the temporary spare parts will be disposed of in the near future, X would prefer to treat the amounts paid for the spare parts as capital expenditures subject to depreciation. X may elect under paragraph (d) of this section not to apply the rule contained in paragraph (a)(1) of this section to each of its temporary spare parts. X makes this election by capitalizing the amounts paid for each spare part in the taxable year that X acquires the spare parts and by beginning to recover the costs of each part on its timely filed Federal income tax return for the taxable year in which the part is placed in service for purposes of determining depreciation under the applicable provisions of the Internal Revenue Code and the regulations thereunder. See §1.263(a)–2T(h) for the treatment of capital expenditures and section 263A for the requirement to capitalize the direct and allocable indirect costs of property produced or property acquired for resale.

Example 14. Election to apply de minimis rule. X provides consulting services to its customers. X purchases 50 office chairs to be used by its employees. Each office chair is a unit of property that costs $80. Also in the same taxable year, X pays amounts to purchase 50 customized briefcases. Assume each briefcase is a unit of property under §1.263(a)–3T(e), costs $120, and has an economic useful life of 12 months or less, beginning when used and consumed. X has an applicable financial statement (as defined in §1.263(a)–2T(g)(6)), and X has a written policy at the beginning of the taxable year to expense amounts paid for units of property costing less than $300. The briefcases and the office chairs are materials and supplies under paragraph (c)(1)(iii) and (c)(1)(iv), respectively, of this section. Under paragraph (a)(1) of this section, the amounts paid for the office chairs and briefcases are deductible in the taxable year in which they are used or consumed. However, assuming X meets all the requirements of §1.263(a)–2T(g), X may elect under paragraph (f) of this section to apply the de minimis rule under

§ 1.263(a)–2T(g) to amounts paid for the office chairs and briefcases, rather than treat these amounts as the costs of materials and supplies under § 1.162–3T.

(i) *Accounting method changes.* Except as otherwise provided in this section, a change to comply with this section is a change in method of accounting to which the provisions of sections 446 and 481, and the regulations thereunder, apply. A taxpayer seeking to change to a method of accounting permitted in this section must secure the consent of the Commissioner in accordance with § 1.446–1(e) and follow the administrative procedures issued under § 1.446–1(e)(3)(ii) for obtaining the Commissioner's consent to change its accounting method.

(j) *Effective/applicability date*—(1) *In general.* This section generally applies to amounts paid or incurred (to acquire or produce property) in taxable years beginning on or after January 1, 2014. However, a taxpayer may apply paragraph (e) of this section (the optional method of accounting for rotable and temporary spare parts) to taxable years beginning on or after January 1, 2014. Section 1.162–3 as contained in 26 CFR part 1 edition revised as of April 1, 2011, applies to taxable years beginning before January 1, 2014.

(2) *Optional early application.* Except for paragraph (e) of this section, a taxpayer may choose to apply this section to amounts paid or incurred (to acquire or produce property) in taxable years beginning on or after January 1, 2012. A taxpayer may choose to apply paragraph (e) of this section (the optional method of accounting for rotable and temporary spare parts) to taxable years beginning on or after January 1, 2012.

(k) *Expiration date.* The applicability of this section expires on December 23, 2014.

[T.D. 9564, 76 FR 81080, Dec. 27, 2011; 77 FR 18687, Mar. 28, 2012; 77 FR 74584, Dec. 17, 2012]

§ 1.162–4 Repairs.

(a) through (d) [Reserved] For further guidance, see § 1.162–4T(a) through (d).

[T.D. 9564, 76 FR 81084, Dec. 27, 2011]

§ 1.162–4T Repairs (temporary).

(a) *In general.* A taxpayer may deduct amounts paid for repairs and maintenance to tangible property if the amounts paid are not otherwise required to be capitalized.

(b) *Accounting method changes.* Except as otherwise provided in this section, a change to comply with this section is a change in method of accounting to which the provisions of sections 446 and 481, and the regulations thereunder, apply. A taxpayer seeking to change to a method of accounting permitted in this section must secure the consent of the Commissioner in accordance with § 1.446–1(e) and follow the administrative procedures issued under § 1.446–1(e)(3)(ii) for obtaining the Commissioner's consent to change its accounting method.

(c) *Effective/applicability date*—(1) *In general.* This section applies to taxable years beginning on or after January 1, 2014. Section 1.162–4 as contained in 26 CFR part 1 edition revised as of April 1, 2011, applies to taxable years beginning before January 1, 2014.

(2) *Optional early application.* A taxpayer may choose to apply this section to taxable years beginning on or after January 1, 2012.

(d) *Expiration date.* The applicability of this section expires on December 23, 2014

[T.D. 9564, 76 FR 81084, Dec. 27, 2011, as amended at 77 FR 74584, Dec. 17, 2012]

§ 1.162–5 Expenses for education.

(a) *General rule.* Expenditures made by an individual for education (including research undertaken as part of his educational program) which are not expenditures of a type described in paragraph (b) (2) or (3) of this section are deductible as ordinary and necessary business expenses (even though the education may lead to a degree) if the education—

(1) Maintains or improves skills required by the individual in his employment or other trade or business, or

(2) Meets the express requirements of the individual's employer, or the requirements of applicable law or regulations, imposed as a condition to the retention by the individual of an established employment relationship, status, or rate of compensation.

(b) *Nondeductible educational expenditures*—(1) *In general.* Educational expenditures described in subparagraphs (2) and (3) of this paragraph are personal expenditures or constitute an inseparable aggregate of personal and capital expenditures and, therefore, are not deductible as ordinary and necessary business expenses even though the education may maintain or improve skills required by the individual in his employment or other trade or business or may meet the express requirements of the individual's employer or of applicable law or regulations.

(2) *Minimum educational requirements.* (i) The first category of nondeductible educational expenses within the scope of subparagraph (1) of this paragraph are expenditures made by an individual for education which is required of him in order to meet the minimum educational requirements for qualification in his employment or other trade or business. The minimum education necessary to qualify for a position or other trade or business must be determined from a consideration of such factors as the requirements of the employer, the applicable law and regulations, and the standards of the profession, trade, or business involved. The fact that an individual is already performing service in an employment status does not establish that he has met the minimum educational requirements for qualification in that employment. Once an individual has met the minimum educational requirements for qualification in his employment or other trade or business (as in effect when he enters the employment or trade or business), he shall be treated as continuing to meet those requirements even though they are changed.

(ii) The minimum educational requirements for qualification of a particular individual in a position in an educational institution is the minimum level of education (in terms of aggregate college hours or degree) which under the applicable laws or regulations, in effect at the time this individual is first employed in such position, is normally required of an individual initially being employed in such a position. If there are no normal requirements as to the minimum level of education required for a position in an educational institution, then an individual in such a position shall be considered to have met the minimum educational requirements for qualification in that position when he becomes a member of the faculty of the educational institution. The determination of whether an individual is a member of the faculty of an educational institution must be made on the basis of the particular practices of the institution. However, an individual will ordinarily be considered to be a member of the faculty of an institution if (*a*) he has tenure or his years of service are being counted toward obtaining tenure; (*b*) the institution is making contributions to a retirement plan (other than Social Security or a similar program) in respect of his employment; or (*c*) he has a vote in faculty affairs.

(iii) The application of this subparagraph may be illustrated by the following examples:

Example 1. General facts:State X requires a bachelor's degree for beginning secondary school teachers which must include 30 credit hours of professional educational courses. In addition, in order to retain his position, a secondary school teacher must complete a fifth year of preparation within 10 years after beginning his employment. If an employing school official certifies to the State Department of Education that applicants having a bachelor's degree and the required courses in professional education cannot be found, he may hire individuals as secondary school teachers if they have completed a minimum of 90 semester hours of college work. However, to be retained in his position, such an individual must obtain his bachelor's degree and complete the required professional educational courses within 3 years after his employment commences. Under these facts, a bachelor's degree, without regard to whether it includes 30 credit hours of professional educational courses, is considered to be the minimum educational requirement for qualification as a secondary school teacher in State X. This is the case notwithstanding the number of teachers who are actually hired without such a degree. The following are examples of the application of these facts in particular situations:

Situation 1. A, at the time he is employed as a secondary school teacher in State X, has a bachelor's degree including 30 credit hours of professional educational courses. After his employment, A completes a fifth college year of education and, as a result, is issued a standard certificate. The fifth college year of education undertaken by A is not education required to meet the minimum educational requirements for qualification as a secondary school teacher. Accordingly, the expenditures for such education are deductible unless the expenditures are for education which is part of a program of study being pursued by A which will lead to qualifying him in a new trade or business.

Situation 2. Because of a shortage of applicants meeting the stated requirements, B, who has a bachelor's degree, is employed as a secondary school teacher in State X even though he has only 20 credit hours of professional educational courses. After his employment, B takes an additional 10 credit hours of professional educational courses. Since these courses do not constitute education required to meet the minimum educational requirements for qualification as a secondary school teacher which is a bachelor's degree and will not lead to qualifying B in a new trade or business, the expenditures for such courses are deductible.

Situation 3. Because of a shortage of applicants meeting the stated requirements, C is employed as a secondary school teacher in State X although he has only 90 semester hours of college work toward his bachelor's degree. After his employment, C undertakes courses leading to a bachelor's degree. These courses (including any courses in professional education) constitute education required to meet the minimum educational requirements for qualification as a secondary school teacher. Accordingly, the expenditures for such education are not deductible.

Situation 4. Subsequent to the employment of A, B, and C, but before they have completed a fifth college year of education, State X changes its requirements affecting secondary school teachers to provide that beginning teachers must have completed 5 college years of preparation. In the cases of A, B, and C, a fifth college year of education is not considered to be education undertaken to meet the minimum educational requirements for qualifications as a secondary school teacher. Accordingly, expenditures for a fifth year of college will be deductible unless the expenditures are for education which is part of a program being pursued by A, B, or C which will lead to qualifying him in a new trade or business.

Example 2. D, who holds a bachelor's degree, obtains temporary employment as an instructor at University Y and undertakes graduate courses as a candidate for a graduate degree. D may become a faculty member only if he obtains a graduate degree and may continue to hold a position as instructor only so long as he shows satisfactory progress towards obtaining this graduate degree. The graduate courses taken by D constitute education required to meet the minimum educational requirements for qualification in D's trade or business and, thus, the expenditures for such courses are not deductible.

Example 3. E, who has completed 2 years of a normal 3-year law school course leading to a bachelor of laws degree (LL.B.), is hired by a law firm to do legal research and perform other functions on a full-time basis. As a condition to continued employment, E is required to obtain an LL.B. and pass the State bar examination. E completes his law school education by attending night law school, and he takes a bar review course in order to prepare for the State bar examination. The law courses and bar review course constitute education required to meet the minimum educational requirements for qualification in E's trade or business and, thus, the expenditures for such courses are not deductible.

(3) *Qualification for new trade or business.* (i) The second category of nondeductible educational expenses within the scope of subparagraph (1) of this paragraph are expenditures made by an individual for education which is part of a program of study being pursued by him which will lead to qualifying him in a new trade or business. In the case of an employee, a change of duties does not constitute a new trade or business if the new duties involve the same general type of work as is involved in the individual's present employment. For this purpose, all teaching and related duties shall be considered to involve the same general type of work. The following are examples of changes in duties which do not constitute new trades or businesses:

(*a*) Elementary to secondary school classroom teacher.

(*b*) Classroom teacher in one subject (such as mathematics) to classroom teacher in another subject (such as science).

(*c*) Classroom teacher to guidance counselor.

(*d*) Classroom teacher to principal.

(ii) The application of this subparagraph to individuals other than teachers may be illustrated by the following examples:

Example 1. A, a self-employed individual practicing a profession other than law, for example, engineering, accounting, etc., attends law school at night and after completing his law school studies receives a bachelor of laws degree. The expenditures made by A in attending law school are nondeductible because this course of study qualifies him for a new trade or business.

Example 2. Assume the same facts as in example (1) except that A has the status of an employee rather than a self-employed individual, and that his employer requires him to obtain a bachelor of laws degree. A intends to continue practicing his nonlegal profession as an employee of such employer. Nevertheless, the expenditures made by A in attending law school are not deductible since this course of study qualifies him for a new trade or business.

Example 3. B, a general practitioner of medicine, takes a 2-week course reviewing new developments in several specialized fields of medicine. B's expenses for the course are deductible because the course maintains or improves skills required by him in his trade or business and does not qualify him for a new trade or business.

Example 4. C, while engaged in the private practice of psychiatry, undertakes a program of study and training at an accredited psychoanalytic institute which will lead to qualifying him to practice psychoanalysis. C's expenditures for such study and training are deductible because the study and training maintains or improves skills required by him in his trade or business and does not qualify him for a new trade or business.

(c) *Deductible educational expenditures*—(1) *Maintaining or improving skills.* The deduction under the category of expenditures for education which maintains or improves skills required by the individual in his employment or other trade or business includes refresher courses or courses dealing with current developments as well as academic or vocational courses provided the expenditures for the courses are not within either category of nondeductible expenditures described in paragraph (b) (2) or (3) of this section.

(2) *Meeting requirements of employer.* An individual is considered to have undertaken education in order to meet the express requirements of his employer, or the requirements of applicable law or regulations, imposed as a condition to the retention by the taxpayer of his established employment relationship, status, or rate of compensation only if such requirements are imposed for a bona fide business purpose of the individual's employer. Only the minimum education necessary to the retention by the individual of his established employment relationship, status, or rate of compensation may be considered as undertaken to meet the express requirements of the taxpayer's employer. However, education in excess of such minimum education may qualify as education undertaken in order to maintain or improve the skills required by the taxpayer in his employment or other trade or business (see subparagraph (1) of this paragraph). In no event, however, is a deduction allowable for expenditures for education which, even though for education required by the employer or applicable law or regulations, are within one of the categories of nondeductible expenditures described in paragraph (b) (2) and (3) of this section.

(d) *Travel as a form of education.* Subject to the provisions of paragraph (b) and (e) of this section, expenditures for travel (including travel while on sabbatical leave) as a form of education are deductible only to the extent such expenditures are attributable to a period of travel that is directly related to the duties of the individual in his employment or other trade or business. For this purpose, a period of travel shall be considered directly related to the duties of an individual in his employment or other trade or business only if the major portion of the activities during such period is of a nature which directly maintains or improves skills required by the individual in such employment or other trade or business. The approval of a travel program by an employer or the fact that travel is accepted by an employer in the fulfillment of its requirements for retention of rate of compensation, status or employment, is not determinative that the required relationship exists between the travel involved and the duties of the individual in his particular position.

(e) *Travel away from home.* (1) If an individual travels away from home primarily to obtain education the expenses of which are deductible under this section, his expenditures for travel, meals, and lodging while away from home are deductible. However, if as an incident of such trip the individual engages in some personal activity such as sightseeing, social visiting, or entertaining, or other recreation, the portion of the expenses attributable to such personal activity constitutes nondeductible personal or living expenses and is not allowable as a deduction. If the individual's travel away from home is primarily personal, the individual's expenditures for travel, meals and lodging (other than meals and lodging during the time spent in participating in deductible education pursuits) are not deductible. Whether a particular trip is primarily person or primarily to obtain education the expenses of which are deductible under this section depends upon all the facts and circumstances of each case. An important factor to be taken into consideration in making the determination is the relative amount of time devoted to personal activity as compared with the time devoted to educational pursuits. The rules set forth in this paragraph are subject to the provisions of section 162(a)(2), relating to deductibility of certain traveling expenses, and section 274 (c) and (d), relating to allocation of certain foreign travel expenses and substantiation required, respectively, and the regulations thereunder.

(2) *Examples.* The application of this subsection may be illustrated by the following examples:

Example 1. A, a self-employed tax practitioner, decides to take a 1-week course in new developments in taxation, which is offered in City X, 500 miles away from his home. His primary purpose in going to X is to take the course, but he also takes a side trip to City Y (50 miles from X) for 1 day, takes a sightseeing trip while in X, and entertains some personal friends. A's transportation expenses to City X and return to his home are deductible but his transportation expenses to City Y are not deductible. A's expenses for meals and lodging while away from home will be allocated between his educational pursuits and his personal activities. Those expenses which are entirely personal, such as sightseeing and entertaining friends, are not deductible to any extent.

Example 2. The facts are the same as in example (1) except that A's primary purpose in going to City X is to take a vacation. This purpose is indicated by several factors, one of which is the fact that he spends only 1 week attending the tax course and devotes 5 weeks entirely to personal activities. None of A's transportation expenses are deductible and his expenses for meals and lodging while away from home are not deductible to the extent attributable to personal activities. His expenses for meals and lodging allocable to the week attending the tax course are, however, deductible.

Example 3. B, a high school mathematics teacher in New York City, in the summertime travels to a university in California in order to take a mathematics course the expense of which is deductible under this section. B pursues only one-fourth of a full course of study and the remainder of her time is devoted to personal activities the expense of which is not deductible. Absent a showing by B of a substantial nonpersonal reason for taking the course in the university in California, the trip is considered taken primarily for personal reasons and the cost of traveling from New York City to California and return would not be deductible. However, one-fourth of the cost of B's meals and lodging while attending the university in California may be considered properly allocable to deductible educational pursuits and, therefore, is deductible.

[T.D. 6918, 32 FR 6679, May 2, 1967]

§ 1.162–7 Compensation for personal services.

(a) There may be included among the ordinary and necessary expenses paid or incurred in carrying on any trade or business a reasonable allowance for salaries or other compensation for personal services actually rendered. The test of deductibility in the case of compensation payments is whether they are reasonable and are in fact payments purely for services.

(b) The test set forth in paragraph (a) of this section and its practical application may be further stated and illustrated as follows:

(1) Any amount paid in the form of compensation, but not in fact as the purchase price of services, is not deductible. An ostensible salary paid by a corporation may be a distribution of a dividend on stock. This is likely to occur in the case of a corporation having few shareholders, practically all of whom draw salaries. If in such a case the salaries are in excess of those ordinarily paid for similar services and the excessive payments correspond or bear a close relationship to the stockholdings of the officers or employees, it would seem likely that the salaries are not paid wholly for services rendered, but that the excessive payments are a distribution of earnings upon the

stock. An ostensible salary may be in part payment for property. This may occur, for example, where a partnership sells out to a corporation, the former partners agreeing to continue in the service of the corporation. In such a case it may be found that the salaries of the former partners are not merely for services, but in part constitute payment for the transfer of their business.

(2) The form or method of fixing compensation is not decisive as to deductibility. While any form of contingent compensation invites scrutiny as a possible distribution of earnings of the enterprise, it does not follow that payments on a contingent basis are to be treated fundamentally on any basis different from that applying to compensation at a flat rate. Generally speaking, if contingent compensation is paid pursuant to a free bargain between the employer and the individual made before the services are rendered, not influenced by any consideration on the part of the employer other than that of securing on fair and advantageous terms the services of the individual, it should be allowed as a deduction even though in the actual working out of the contract it may prove to be greater than the amount which would ordinarily be paid.

(3) In any event the allowance for the compensation paid may not exceed what is reasonable under all the circumstances. It is, in general, just to assume that reasonable and true compensation is only such amount as would ordinarily be paid for like services by like enterprises under like circumstances. The circumstances to be taken into consideration are those existing at the date when the contract for services was made, not those existing at the date when the contract is questioned.

(4) For disallowance of deduction in the case of certain transfers of stock pursuant to employees stock options, see section 421 and the regulations thereunder.

§ 1.162–8 Treatment of excessive compensation.

The income tax liability of the recipient in respect of an amount ostensibly paid to him as compensation, but not allowed to be deducted as such by the payor, will depend upon the circumstances of each case. Thus, in the case of excessive payments by corporations, if such payments correspond or bear a close relationship to stockholdings, and are found to be a distribution of earnings or profits, the excessive payments will be treated as a dividend. If such payments constitute payment for property, they should be treated by the payor as a capital expenditure and by the recipient as part of the purchase price. In the absence of evidence to justify other treatment, excessive payments for salaries or other compensation for personal services will be included in gross income of the recipient.

§ 1.162–9 Bonuses to employees.

Bonuses to employees will constitute allowable deductions from gross income when such payments are made in good faith and as additional compensation for the services actually rendered by the employees, provided such payments, when added to the stipulated salaries, do not exceed a reasonable compensation for the services rendered. It is immaterial whether such bonuses are paid in cash or in kind or partly in cash and partly in kind. Donations made to employees and others, which do not have in them the element of compensation or which are in excess of reasonable compensation for services, are not deductible from gross income.

§ 1.162–10 Certain employee benefits.

(a) *In general.* Amounts paid or accrued by a taxpayer on account of injuries received by employees and lump sum amounts paid or accrued as compensation for injuries, are proper deductions as ordinary and necessary expenses. Such deductions are limited to the amount not compensated for by insurance or otherwise. Amounts paid or accrued within the taxable year for dismissal wages, unemployment benefits, guaranteed annual wages, vacations, or a sickness, accident, hospitalization, medical expense, recreational, welfare, or similar benefit plan, are deductible under section 162(a) if they are ordinary and necessary expenses of the trade or business. However, except as provided in paragraph (b) of this section, such amounts shall not be deductible under section 162(a) if, under any circumstances, they may be used to provide benefits under a stock bonus, pension, annuity, profit-sharing, or other deferred compensation plan of the type referred to in section 404(a). In such an event, the extent to which these amounts are deductible from gross income shall be governed by the provisions of section 404 and the regulations issued thereunder.

(b) *Certain negotiated plans.* (1) Subject to the limitations set forth in subparagraphs (2) and (3) of this paragraph, contributions paid by an employer under a plan under which such contributions are held in a welfare trust for the purpose of paying (either from principal or income or both) for the benefit of employees, their families, and dependents, at least medical or hospital care, and pensions on retirement or death of employees, are deductible when paid as business expenses under section 162(a).

(2) For the purpose of subparagraph (1) of this paragraph, the word ''plan'' means any plan established prior to January 1, 1954, as a result of an agreement between employee representatives and the Government of the United States, during a period of Government operation, under seizure powers, of a major part of the productive facilities of the industry in which the employer claiming the deduction is engaged. The phrase ''plan established prior to January 1, 1954, as a result of an agreement'' is intended primarily to cover a trust established under the terms of such an agreement. It also includes a trust established under a plan of an employer, or group of employers, who, by reason of producing the same commodity, are in competition with the employers whose facilities were seized and who would therefore be expected to establish such a trust as a reasonable measure to maintain a sound position in the labor market producing the commodity. For example, if a trust was established under such an agreement in the bituminous coal industry, a similar trust established in the anthracite coal industry within a reasonable time, but before January 1, 1954, would qualify under subparagraph (1) of this paragraph.

(3) If any trust described in subparagraph (2) of this paragraph becomes qualified for exemption from tax under the provisions of section 501(a), the deductibility of contributions by an employer to such trust on or after any date of such qualification shall no longer be governed by the provisions of section 162, even though the trust may later lose its exemption from tax under section 501(a).

(c) *Other plans providing deferred compensation.* For rules relating to the deduction of amounts paid to or under a stock bonus, pension, annuity, or profit-sharing plan or amounts paid or accrued under any other plan deferring the receipt of compensation, see section 404 and the regulations thereunder.

§ 1.162–10T Questions and answers relating to the deduction of employee benefits under the Tax Reform Act of 1984; certain limits on amounts deductible (temporary).

Q–1: How does the amendment of section 404(b) by the Tax Reform Act of 1984 affect the deduction of employee benefits under section 162 of the Internal Revenue Code?

A–1: As amended by the Tax Reform Act of 1984, section 404(b) clarifies that section 404(a) and (d) (in the case of employees and nonemployees, respectively) shall govern the deduction of contributions paid or compensation paid or incurred under a plan, or method or arrangement, deferring the receipt of compensation or providing for deferred benefits. Section 404(a) and (d) requires that such a contribution or compensation be paid or incurred for purposes of section 162 or 212 and satisfy the requirements for deductibility under either of these sections. However, notwithstanding the above, section 404 does not apply to contributions paid or accrued with respect to a ''welfare benefit fund'' (as defined in section 419(e)) after July 18, 1984, in taxable years of employers (and payors) ending after that date.

Also, section 463 shall govern the deduction of vacation pay by a taxpayer that has elected the application of such section. Section 404(b), as amended, generally applies to contributions paid and compensation paid or incurred after July 18, 1984, in taxable years of employers (and payors) ending after that date. See Q&A–3 of §1.404(b)–1T. For rules relating to the deduction of contributions attributable to the provision of deferred benefits, see section 404 (a), (b) and (d) and §1.404(a)–1T, §1.404(b)–1T and §1.404(d)–1T. For rules relating to the deduction of contributions paid or accrued with respect to a welfare benefit fund, see section 419, §1.419–1T and §1.419A–2T. For rules relating to the deduction of vacation pay for which an election is made under section 463, see §301.9100–16T of this chapter and §1.463–1T.

Q–2: How does the enactment of section 419 by the Tax Reform Act of 1984 affect the deduction of employee benefits under section 162?

A–2: As enacted by the Tax Reform Act of 1984, section 419 shall govern the deduction of contributions paid or accrued by an employer (or a person receiving services under section 419(g)) with respect to a ''welfare benefit fund'' (within the meaning of section 419(e)) after December 31, 1985, in taxable years of the employer (or person receiving the services) ending after that date. Section 419(a) requires that such a contribution be paid or accrued for purposes of section 162 or 212 and satisfy the requirements for deductibility under either of those sections. Generally, subject to a binding contract exception (as described in section 511(e)(5) of the Tax Reform Act of 1984), section 419 shall also govern the deduction of the contribution of a facility (or other contribution used to acquire or improve a facility) to a welfare benefit fund after June 22, 1984. See Q&A–11 of §1.419–1T. In the case of a welfare benefit fund maintained pursuant to a collective bargaining agreement, section 419 applies to the extent provided under the special effective date rule described in Q&A–2 of §1.419–1T and the special rules of §1.419A–2T. For rules relating to the deduction of contributions paid or accrued with respect to a welfare benefit fund, see section 419 and §1.419–1T.

[T.D. 8073, 51 FR 4319, Feb. 4, 1986, as amended by T.D. 8435, 57 FR 43896, Sept. 23, 1992]

§ 1.162–11 Rentals.

(a) *Acquisition of a leasehold.* If a leasehold is acquired for business purposes for a specified sum, the purchaser may take as a deduction in his return an aliquot part of such sum each year, based on the number of years the lease has to run. Taxes paid by a tenant to or for a landlord for business property are additional rent and constitute a deductible item to the tenant and taxable income to the landlord, the amount of the tax being deductible by the latter. For disallowance of deduction for income taxes paid by a lessee corporation pursuant to a lease arrangement with the lessor corporation, see section 110 and the regulations thereunder. See section 178 and the regulations thereunder for rules governing the effect to be given renewal options in amortizing the costs incurred after July 28, 1958 of acquiring a lease. See §1.197–2 for rules governing the amortization of costs to acquire limited interests in section 197 intangibles.

(b) [Reserved] For further guidance, see §1.162–11T(b).

(c) [Reserved] For further guidance, see §1.162–11T(c).

(d) [Reserved] For further guidance, see §1.162–11T(d).

[T.D. 6520, 25 FR 13692, Dec. 24, 1960, as amended by T.D. 8865, 65 FR 3825, Jan. 25, 2000; T.D. 9564, 76 FR 81084, Dec. 27, 2011]

§ 1.162–11T Rentals (temporary).

(a) [Reserved] For further guidance, see §1.162–11(a).

(b) *Improvements by lessee on lessor's property.* The cost to a taxpayer of erecting buildings or making permanent improvements on property of which the taxpayer is a lessee is a capital expenditure and is not deductible as a business expense. For the rules regarding improvements to leased property where the improvements are tangible property, see §1.263(a)–3T(f)(1). For the rules regarding depreciation or amortization deductions for leasehold improvements, see §1.167(a)–4T.

(c) *Effective/applicability date*—(1) *In general.* This section applies to taxable years beginning on or after January 1, 2014. Section 1.162–11 as contained in 26 CFR part 1 edition revised as of April 1, 2011, applies to taxable years beginning before January 1, 2014.

(2) *Optional early application*. A taxpayer may choose to apply this section to taxable years beginning on or after January 1, 2012.

(d) *Expiration date*. The applicability of this section expires on December 23, 2014.

[T.D. 9564, 76 FR 81084, Dec. 27, 2011, as amended at 77 FR 74584, Dec. 17, 2012]

§ 1.162–12 Expenses of farmers.

(a) *Farms engaged in for profit*. A farmer who operates a farm for profit is entitled to deduct from gross income as necessary expenses all amounts actually expended in the carrying on of the business of farming. The cost of ordinary tools of short life or small cost, such as hand tools, including shovels, rakes, etc., may be deducted. The purchase of feed and other costs connected with raising livestock may be treated as expense deductions insofar as such costs represent actual outlay, but not including the value of farm produce grown upon the farm or the labor of the taxpayer. For rules regarding the capitalization of expenses of producing property in the trade or business of farming, see section 263A and the regulations thereunder. For taxable years beginning after July 12, 1972, where a farmer is engaged in producing crops and the process of gathering and disposal of such crops is not completed within the taxable year in which such crops were planted, expenses deducted may, with the consent of the Commissioner (see section 446 and the regulations thereunder), be determined upon the crop method, and such deductions must be taken in the taxable year in which the gross income from the crop has been realized. For taxable years beginning on or before July 12, 1972, where a farmer is engaged in producing crops which take more than a year from the time of planting to the process of gathering and disposal, expenses deducted may, with the consent of the Commissioner (see section 446 and the regulations thereunder), be determined upon the crop method, and such deductions must be taken in the taxable year in which the gross income from the crop has been realized. If a farmer does not compute income upon the crop method, the cost of seeds and young plants which are purchased for further development and cultivation prior to sale in later years may be deducted as an expense for the year of purchase, provided the farmer follows a consistent practice of deducting such costs as an expense from year to year. The preceding sentence does not apply to the cost of seeds and young plants connected with the planting of timber (see section 611 and the regulations thereunder). For rules regarding the capitalization of expenses of producing property in the trade or business of farming, see section 263A of the Internal Revenue Code and § 1.263A–4. The cost of farm machinery, equipment, and farm buildings represents a capital investment and is not an allowable deduction as an item of expense. Amounts expended in the development of farms, orchards, and ranches prior to the time when the productive state is reached may, at the election of the taxpayer, be regarded as investments of capital. For the treatment of soil and water conservation expenditures as expenses which are not chargeable to capital account, see section 175 and the regulations thereunder. For taxable years beginning after December 31, 1959, in the case of expenditures paid or incurred by farmers for fertilizer, lime, etc., see section 180 and the regulations thereunder. Amounts expended in purchasing work, breeding, dairy, or sporting animals are regarded as investments of capital, and shall be depreciated unless such animals are included in an inventory in accordance with § 1.61–4. The purchase price of an automobile, even when wholly used in carrying on farming operations, is not deductible, but is regarded as an investment of capital. The cost of gasoline, repairs, and upkeep of an automobile if used wholly in the business of farming is deductible as an expense; if used partly for business purposes and partly for the pleasure or convenience of the taxpayer or his family, such cost may be apportioned according to the extent of the use for purposes of business and pleasure or convenience, and only the proportion of such cost justly attributable to business purposes is deductible as a necessary expense.

(b) *Farms not engaged in for profit; taxable years beginning before January 1, 1970*—(1) *In general.* If a farm is operated for recreation or pleasure and not on a commercial basis, and if the expenses incurred in connection with the farm are in excess of the receipts therefrom, the entire receipts from the sale of farm products may be ignored in rendering a return of income, and the expenses incurred, being regarded as personal expenses, will not constitute allowable deductions.

(2) *Effective date.* The provisions of this paragraph shall apply with respect to taxable years beginning before January 1, 1970.

(3) *Cross reference.* For provisions relating to activities not engaged in for profit, applicable to taxable years beginning after December 31, 1969, see section 183 and the regulations thereunder.

[T.D. 7198, 37 FR 13679, July 13, 1972, as amended by T.D. 8729, 62 FR 44546, Aug. 22, 1997; T.D. 8897, 65 FR 50643, Aug. 21, 2000]

§ 1.162–13 Depositors' guaranty fund.

Banking corporations which pursuant to the laws of the State in which they are doing business are required to set apart, keep, and maintain in their banks the amount levied and assessed against them by the State authorities as a ''Depositors' guaranty fund,'' may deduct from their gross income the amount so set apart each year to this fund provided that such fund, when set aside and carried to the credit of the State banking board or duly authorized State officer, ceases to be an asset of the bank and may be withdrawn in whole or in part upon demand by such board or State officer to meet the needs of these officers in reimbursing depositors in insolvent banks, and provided further that no portion of the amount thus set aside and credited is returnable under the laws of the State to the assets of the banking corporation. If, however, such amount is simply set up on the books of the bank as a reserve to meet a contingent liability and remains an asset of the bank, it will not be deductible except as it is actually paid out as required by law and upon demand of the proper State officers.

§ 1.162–14 Expenditures for advertising or promotion of good will.

A corporation which has, for the purpose of computing its excess profits tax credit under Subchapter E, Chapter 2, or Subchapter D, Chapter 1 of the Internal Revenue Code of 1939, elected under section 733 or section 451 (applicable to the excess profits tax imposed by Subchapter E of Chapter 2, and Subchapter D of Chapter 1, respectively) to charge to capital account for taxable years in its base period expenditures for advertising or the promotion of good will which may be regarded as capital investments, may not deduct similar expenditures for the taxable year. See section 263(b). Such a taxpayer has the burden of proving that expenditures for advertising or the promotion of good will which it seeks to deduct in the taxable year may not be regarded as capital investments under the provisions of the regulations prescribed under section 733 or section 451 of the Internal Revenue Code of 1939. See 26 CFR, 1938 ed., 35.733–2 (Regulations 112) and 26 CFR (1939) 40.451–2 (Regulations 130). For the disallowance of deductions for the cost of advertising in programs of certain conventions of political parties, or in publications part of the proceeds of which directly or indirectly inures (or is intended to inure) to or for the use of a political party or political candidate, see § 1.276–1.

[T.D. 6996, 34 FR 835, Jan. 18, 1969]

§ 1.162–15 Contributions, dues, etc.

(a) *Contributions to organizations described in section 170*—(1) *In general.* No deduction is allowable under section 162(a) for a contribution or gift by an individual or a corporation if any part thereof is deductible under section 170. For example, if a taxpayer makes a contribution of $5,000 and only $4,000 of this amount is deductible under section 170(a) (whether because of the percentage limitation under either section 170(b) (1) or (2), the requirement as to time of payment, or both) no deduction is allowable under section 162(a) for the remaining $1,000.

(2) *Scope of limitations.* The limitations provided in section 162(b) and this paragraph apply only to payments

which are in fact contributions or gifts to organizations described in section 170. For example, payments by a transit company to a local hospital (which is a charitable organization within the meaning of section 170) in consideration of a binding obligation on the part of the hospital to provide hospital services and facilities for the company's employees are not contributions or gifts within the meaning of section 170 and may be deductible under section 162(a) if the requirements of section 162(a) are otherwise satisfied.

(b) *Other contributions.* Donations to organizations other than those described in section 170 which bear a direct relationship to the taxpayer's business and are made with a reasonable expectation of a financial return commensurate with the amount of the donation may constitute allowable deductions as business expenses, provided the donation is not made for a purpose for which a deduction is not allowable by reason of the provisions of paragraph (b)(1)(i) or (c) of § 1.162–20. For example, a transit company may donate a sum of money to an organization (of a class not referred to in section 170) intending to hold a convention in the city in which it operates, with a reasonable expectation that the holding of such convention will augment its income through a greater number of people using its transportation facilities.

(c) *Dues.* Dues and other payments to an organization, such as a labor union or a trade association, which otherwise meet the requirements of the regulations under section 162, are deductible in full. For limitations on the deductibility of dues and other payments, see paragraph (b) and (c) of § 1.162–20.

(d) *Cross reference.* For provisions dealing with expenditures for institutional or ''good will'' advertising, see § 1.162–20.

[T.D. 6819, 30 FR 5580, Apr. 20, 1965]

§ 1.162–16 Cross reference.

For special rules relating to expenses in connection with subdividing real property for sale, see section 1237 and the regulations thereunder.

§ 1.162–17 Reporting and substantiation of certain business expenses of employees.

(a) *Introductory.* The purpose of the regulations in this section is to provide rules for the reporting of information on income tax returns by taxpayers who pay or incur ordinary and necessary business expenses in connection with the performance of services as an employee and to furnish guidance as to the type of records which will be useful in compiling such information and in its substantiation, if required. The rules prescribed in this section do not apply to expenses paid or incurred for incidentals, such as office supplies for the employer or local transportation in connection with an errand. Employees incurring such incidental expenses are not required to provide substantiation for such amounts. The term ''ordinary and necessary business expenses'' means only those expenses which are ordinary and necessary in the conduct of the taxpayer's business and are directly attributable to such business. The term does not include nondeductible personal, living or family expenses.

(b) *Expenses for which the employee is required to account to his employer*—(1) *Reimbursements equal to expenses.* The employee need not report on his tax return (either itemized or in total amount) expenses for travel, transportation, entertainment, and similar purposes paid or incurred by him solely for the benefit of his employer for which he is required to account and does account to his employer and which are charged directly or indirectly to the employer (for example, through credit cards) or for which the employee is paid through advances, reimbursements, or otherwise, provided the total amount of such advances, reimbursements, and charges is equal to such expenses. In such a case the taxpayer need only state in his return that the total of amounts charged directly or indirectly to his employer through credit cards or otherwise and received from the employer as advances or reimbursements did not exceed the ordinary and necessary business expenses paid or incurred by the employee.

(2) *Reimbursements in excess of expenses.* In case the total of amounts

charged directly or indirectly to the employer and received from the employer as advances, reimbursements, or otherwise, exceeds the ordinary and necessary business expenses paid or incurred by the employee and the employee is required to and does account to his employer for such expenses, the taxpayer must include such excess in income and state on his return that he has done so.

(3) *Expenses in excess of reimbursements.* If the employee's ordinary and necessary business expenses exceed the total of the amounts charged directly or indirectly to the employer and received from the employer as advances, reimbursements, or otherwise, and the employee is required to and does account to his employer for such expenses, the taxpayer may make the statement in his return required by subparagraph (1) of this paragraph unless he wishes to claim a deduction for such excess. If, however, he wishes to secure a deduction for such excess, he must submit a statement showing the following information as part of his tax return:

(i) The total of any charges paid or borne by the employer and of any other amounts received from the employer for payment of expenses whether by means of advances, reimbursements or otherwise; and

(ii) The nature of his occupation, the number of days away from home on business, and the total amount of ordinary and necessary business expenses paid or incurred by him (including those charged directly or indirectly to the employer through credit cards or otherwise) broken down into such broad categories as transportation, meals and lodging while away from home overnight, entertainment expenses, and other business expenses.

(4) To "account" to his employer as used in this section means to submit an expense account or other required written statement to the employer showing the business nature and the amount of all the employee's expenses (including those charged directly or indirectly to the employer through credit cards or otherwise) broken down into such broad categories as transportation, meals and lodging while away from home overnight, entertainment expenses, and other business expenses. For this purpose, the Commissioner in his discretion may approve reasonable business practices under which mileage, per diem in lieu of subsistence, and similar allowances providing for ordinary and necessary business expenses in accordance with a fixed scale may be regarded as equivalent to an accounting to the employer.

(c) *Expenses for which the employee is not required to account to his employer.* If the employee is not required to account to his employer for his ordinary and necessary business expenses, e.g., travel, transportation, entertainment, and similar items, or, though required, fails to account for such expenses, he must submit, as a part of his tax return, a statement showing the following information:

(1) The total of all amounts received as advances or reimbursements from his employer in connection with the ordinary and necessary business expenses of the employee, including amounts charged directly or indirectly to the employer through credit cards or otherwise; and

(2) The nature of his occupation, the number of days away from home on business, and the total amount of ordinary and necessary business expenses paid or incurred by him (including those charged directly or indirectly to the employer through credit cards or otherwise) broken down into such broad categories as transportation, meals and lodging while away from home overnight, entertainment expenses, and other business expenses.

(d) *Substantiation of items of expense.* (1) Although the Commissioner may require any taxpayer to substantiate such information concerning expense accounts as may appear to be pertinent in determining tax liability, taxpayers ordinarily will not be called upon to substantiate expense account information except those in the following categories:

(i) A taxpayer who is not required to account to his employer, or who does not account;

(ii) A taxpayer whose expenses exceed the total of amounts charged to his employer and amounts received through advances, reimbursements or otherwise and who claims a deduction on his return for such excess;

(iii) A taxpayer who is related to his employer within the meaning of section 267(b); and

(iv) Other taxpayers in cases where it is determined that the accounting procedures used by the employer for the reporting and substantiation of expenses by employees are not adequate.

(2) The Code contemplates that taxpayers keep such records as will be sufficient to enable the Commissioner to correctly determine income tax liability. Accordingly, it is to the advantage of taxpayers who may be called upon to substantiate expense account information to maintain as adequate and detailed records of travel, transportation, entertainment, and similar business expenses as practical since the burden of proof is upon the taxpayer to show that such expenses were not only paid or incurred but also that they constitute ordinary and necessary business expenses. One method for substantiating expenses incurred by an employee in connection with his employment is through the preparation of a daily diary or record of expenditures, maintained in sufficient detail to enable him to readily identify the amount and nature of any expenditure, and the preservation of supporting documents, especially in connection with large or exceptional expenditures. Nevertheless, it is recognized that by reason of the nature of certain expenses or the circumstances under which they are incurred, it is often difficult for an employee to maintain detailed records or to preserve supporting documents for all his expenses. Detailed records of small expenditures incurred in traveling or for transportation, as for example, tips, will not be required.

(3) Where records are incomplete or documentary proof is unavailable, it may be possible to establish the amount of the expenditures by approximations based upon reliable secondary sources of information and collateral evidence. For example, in connection with an item of traveling expense a taxpayer might establish that he was in a travel status a certain number of days but that it was impracticable for him to establish the details of all his various items of travel expense. In such a case rail fares or plane fares can usually be ascertained with exactness and automobile costs approximated on the basis of mileage covered. A reasonable approximation of meals and lodging might be based upon receipted hotel bills or upon average daily rates for such accommodations and meals prevailing in the particular community for comparable accommodations. Since detailed records of incidental items are not required, deductions for these items may be based upon a reasonable approximation. In cases where a taxpayer is called upon to substantiate expense account information, the burden is on the taxpayer to establish that the amounts claimed as a deduction are reasonably accurate and constitute ordinary and necessary business expenses paid or incurred by him in connection with his trade or business. In connection with the determination of factual matters of this type, due consideration will be given to the reasonableness of the stated expenditures for the claimed purposes in relation to the taxpayer's circumstances (such as his income and the nature of his occupation), to the reliability and accuracy of records in connection with other items more readily lending themselves to detailed recordkeeping, and to all of the facts and circumstances in the particular case.

(e) *Applicability.* (1) Except as provided in subparagraph (2) of this paragraph, the provisions of the regulations in this section are supplemental to existing regulations relating to information required to be submitted with income tax returns, and shall be applicable with respect to taxable years beginning after December 31, 1957, notwithstanding any existing regulation to the contrary.

(2) With respect to taxable years ending after December 31, 1962, but only in respect of periods after such date, the provisions of the regulations in this section are superseded by the regulations under section 274(d) to the extent inconsistent therewith. See § 1.274–5.

(3) For taxable years beginning on or after January 1, 1989, the provisions of

this section are superseded by the regulations under section 62(c) to the extent this section is inconsistent with those regulations. See § 1.62–2.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6630, 27 FR 12935, Dec. 29, 1962; T.D. 8276, 54 FR 51026, Dec. 12, 1989; T.D. 8324, 55 FR 51695, Dec. 17, 1990]

§ 1.162–18 Illegal bribes and kickbacks.

(a) *Illegal payments to government officials or employees*—(1) *In general.* No deduction shall be allowed under section 162(a) for any amount paid or incurred, directly or indirectly, to an official or employee of any government, or of any agency or other instrumentality of any government, if—

(i) In the case of a payment made to an official or employee of a government other than a foreign government described in subparagraph (3) (ii) or (iii) of this paragraph, the payment constitutes an illegal bribe or kickback, or

(ii) In the case of a payment made to an official or employee of a foreign government described in subparagraph (3) (ii) or (iii) of this paragraph, the making of the payment would be unlawful under the laws of the United States (if such laws were applicable to the payment and to the official or employee at the time the expenses were paid or incurred).

No deduction shall be allowed for an accrued expense if the eventual payment thereof would fall within the prohibition of this section. The place where the expenses are paid or incurred is immaterial. For purposes of subdivision (ii) of this subparagraph, lawfulness, or unlawfulness of the payment under the laws of the foreign country is immaterial.

(2) *Indirect payment.* For purposes of this paragraph, an indirect payment to an individual shall include any payment which inures to his benefit or promotes his interests, regardless of the medium in which the payment is made and regardless of the identity of the immediate recipient or payor. Thus, for example, payment made to an agent, relative, or independent contractor of an official or employee, or even directly into the general treasury of a foreign country of which the beneficiary is an official or employee, may be treated as an indirect payment to the official or employee, if in fact such payment inures or will inure to his benefit or promotes or will promote his financial or other interests. A payment made by an agent or independent contractor of the taxpayer which benefits the taxpayer shall be treated as an indirect payment by the taxpayer to the official or employee.

(3) *Official or employee of a government.* Any individual officially connected with—

(i) The Government of the United States, a State, a territory or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico,

(ii) The government of a foreign country, or

(iii) A political subdivision of, or a corporation or other entity serving as an agency or instrumentality of, any of the above,

in whatever capacity, whether on a permanent or temporary basis, and whether or not serving for compensation, shall be included within the term ''official or employee of a government'', regardless of the place of residence or post of duty of such individual. An independent contractor would not ordinarily be considered to be an official or employee. For purposes of section 162(c) and this paragraph, the term ''foreign country'' shall include any foreign nation, whether or not such nation has been accorded diplomatic recognition by the United States. Individuals who purport to act on behalf of or as the government of a foreign nation, or an agency or instrumentality thereof, shall be treated under this section as officials or employees of a foreign government, whether or not such individuals in fact control such foreign nation, agency, or instrumentality, and whether or not such individuals are accorded diplomatic recognition. Accordingly, a group in rebellion against an established government shall be treated as officials or employees of a foreign government, as shall officials or employees of the government against which the group is in rebellion.

(4) *Laws of the United States.* The term ''laws of the United States'', to which reference is made in paragraph (a)(1)(ii)

of this section, shall be deemed to include only Federal statutes, including State laws which are assimilated into Federal law by Federal statute, and legislative and interpretative regulations thereunder. The term shall also be limited to statutes which prohibit some act or acts, for the violation of which there is a civil or criminal penalty.

(5) *Burden of proof.* In any proceeding involving the issue of whether, for purposes of section 162(c)(1), a payment made to a government official or employee constitutes an illegal bribe or kickback (or would be unlawful under the laws of the United States) the burden of proof in respect of such issue shall be upon the Commissioner to the same extent as he bears the burden of proof in civil fraud cases under section 7454 (*i.e.*, he must prove the illegality of the payment by clear and convincing evidence).

(6) *Example.* The application of this paragraph may be illustrated by the following example:

Example. X Corp. is in the business of selling hospital equipment in State Y. During 1970, X Corp. employed A who at the time was employed full time by State Y as Superintendent of Hospitals. The purpose of A's employment by X Corp. was to procure for it an improper advantage over other concerns in the making of sales to hospitals in respect of which A, as Superintendent, had authority. X Corp. paid A $5,000 during 1970. The making of this payment was illegal under the laws of State Y. Under section 162(c)(1), X Corp. is precluded from deducting as a trade or business expense the $5,000 paid to A.

(b) *Other illegal payments*—(1) *In general.* No deduction shall be allowed under section 162(a) for any payment (other than a payment described in paragraph (a) of this section) made, directly or indirectly, to any person, if the payment constitutes an illegal bribe, illegal kickback, or other illegal payment under the laws of the United States (as defined in paragraph (a)(4) of this section), or under any State law (but only if such State law is generally enforced), which subjects the payor to a criminal penalty or the loss (including a suspension) of license or privilege to engage in a trade or business (whether or not such penalty or loss is actually imposed upon the taxpayer). For purposes of this paragraph, a kickback includes a payment in consideration of the referral of a client, patient, or customer. This paragraph applies only to payments made after December 30, 1969.

(2) *State law.* For purposes of this paragraph, State law means a statute of a State or the District of Columbia.

(3) *Generally enforced.* For purposes of this paragraph, a State law shall be considered to be generally enforced unless it is never enforced or the only persons normally charged with violations thereof in the State (or the District of Columbia) enacting the law are infamous or those whose violations are extraordinarily flagrant. For example, a criminal statute of a State shall be considered to be generally enforced unless violations of the statute which are brought to the attention of appropriate enforcement authorities do not result in any enforcement action in the absence of unusual circumstances.

(4) *Burden of proof.* In any proceeding involving the issue of whether, for purposes of section 162(c)(2), a payment constitutes an illegal bribe, illegal kickback, or other illegal payment the burden of proof in respect of such issue shall be upon the Commissioner to the same extent as he bears the burden of proof in civil fraud cases under section 7454 (*i.e.*, he must prove the illegality of the payment by clear and convincing evidence).

(5) *Example.* The application of this paragraph may be illustrated by the following example:

Example. X Corp., a calendar-year taxpayer, is engaged in the ship repair business in State Y. During 1970, repairs on foreign ships accounted for a substantial part of its total business. It was X Corp.'s practice to kick back approximately 10 percent of the repair bill to the captain and chief engineer of all foreign-owned vessels, which kickbacks are illegal under a law of State Y (which is generally enforced) and potentially subject X Corp. to fines. During 1970, X Corp. paid $50,000 in such kickbacks. On X Corp.'s return for 1970, a deduction under section 162 was taken for the $50,000. The deduction of the $50,000 of illegal kickbacks during 1970 is disallowed under section 162(c)(2), whether or not X Corp. is prosecuted with respect to the kickbacks.

(c) *Kickbacks, rebates, and bribes under medicare and medicaid.* No deduction shall be allowed under section 162(a) for any kickback, rebate, or bribe (whether or not illegal) made on or after December 10, 1971, by any provider of services, supplier, physician, or other person who furnishes items or services for which payment is or may be made under the Social Security Act, as amended, or in whole or in part out of Federal funds under a State plan approved under such Act, if such kickback, rebate, or bribe is made in connection with the furnishing of such items or services or the making or receipt of such payments. For purposes of this paragraph, a kickback includes a payment in consideration of the referral of a client, patient, or customer.

[T.D. 7345, 40 FR 7437, Feb. 20, 1975; 40 FR 8948, Mar. 4, 1975]

§ 1.162–19 Capital contributions to Federal National Mortgage Association.

(a) *In general.* The initial holder of stock of the Federal National Mortgage Association (FNMA) which is issued pursuant to section 303(c) of the Federal National Mortgage Association Charter Act (12 U.S.C., section 1718) in a taxable year beginning after December 31, 1959, shall treat the excess, if any, of the issuance price (the amount of capital contributions evidenced by a share of stock) over the fair market value of the stock as of the issue date of such stock as an ordinary and necessary business expense paid or incurred during the year in which occurs the date of issuance of the stock. To the extent that a sale to FNMA of mortgage paper gives rise to the issuance of a share of FNMA stock during a taxable year beginning after December 31, 1959, such sale is to be treated in a manner consistent with the purpose for, and the legislative intent underlying the enactment of, the provisions of section 8, Act of September 14, 1960 (Pub. L. 86–779, 74 Stat. 1003). Thus, for the purpose of determining an initial holder's gain or loss from the sale to FNMA of mortgage paper, with respect to which a share of FNMA stock is issued in a taxable year beginning after December 31, 1959 (irrespective of when the sale is made), the amount realized by the initial holder from the sale of the mortgage paper is the amount of the ''FNMA purchase price''. The ''FNMA purchase price'' is the gross amount of the consideration agreed upon between FNMA and the initial holder for the purchase of the mortgage paper, without regard to any deduction therefrom as, for example, a deduction representing a capital contribution or a purchase or marketing fee. The date of issuance of the stock is the date which appears on the stock certificates of the initial holder as the date of issue. The initial holder is the original purchaser who is issued stock of the Federal National Mortgage Association pursuant to section 303(c) of the Act, and who appears on the books of FNMA as the initial holder. In determining the period for which the initial holder has held such stock, such period shall begin with the date of issuance.

(b) *Examples.* The provisions of paragraph (a) of this section may be illustrated by the following examples:

Example 1. A, a banking institution which reports its income on a calendar year basis, sold mortgage paper with an outstanding principal balance of $12,500 to FNMA on October 17, 1960. The FNMA purchase price was $11,500. A's basis for the mortgage paper was $10,500. In accordance with the terms of the contract, FNMA deducted $375 ($250 representing capital contribution and $125 representing purchase and marketing fee) from the amount of the purchase price. FNMA credited A's account with the amount of the capital contribution. A stock certificate evidencing two shares of FNMA common stock of $100 par value was mailed to A and FNMA deducted $200 from A's account, leaving a net balance of $50 in such account. The stock certificate, bearing an issue date of November 1, 1960, was received by A on November 7, 1960. The fair market value of a share of FNMA stock on October 17, 1960, was $65, on November 1, 1960, was $67, and on November 7, 1960, was $68. A may deduct $66 the difference between the issuance price ($200) and the fair market value ($134) of the two shares of stock on the date of issuance (November 1, 1960), as a business expense for the taxable year 1960. The basis of each share of stock issued as of November 1, 1960 will be $67. See section 1054 and § 1.1054–1. A's gain from the sale of the mortgage paper is $875 computed as follows:

Amount realized in FNMA purchase price		$11,500
A's basis in mortgage paper	$10,500	
Purchase and marketing fee	125	
		10,625
Gain on sale		875

Example 2. Assume the same facts as in Example (1), and, in addition, that A sold to FNMA on December 15, 1960, additional mortgage paper having an outstanding principal balance of $12,500. FNMA deducted from the FNMA purchase price $250 representing capital contribution and credited A's account with this amount. A then had a total credit of $300 to his account consisting of the $50 balance from the transaction described in Example (1) and $250 from the December 15th transaction. A stock certificate evidencing three shares of FNMA common stock of $100 par value was mailed to A and FNMA deducted $300 from A's account. The stock certificate, bearing an issue date of January 1, 1961, was received by A on January 9, 1961. The fair market value of a share of FNMA stock on January 1, 1961, was $69. A may deduct $93, the difference between the issuance price ($300) and the fair market value ($207) of the three shares of stock on the date of issuance (January 1, 1961), as a business expense for the taxable year 1961. The gain or loss on the sale of mortgage paper on December 15, 1960, is reportable for the taxable year 1960.

[T.D. 6690, 28 FR 12253, Nov. 19, 1963]

§ 1.162–20 Expenditures attributable to lobbying, political campaigns, attempts to influence legislation, etc., and certain advertising.

(a) *In general*—(1) *Scope of section.* This section contains rules governing the deductibility or nondeductibility of expenditures for lobbying purposes, for the promotion or defeat of legislation, for political campaign purposes (including the support of or opposition to any candidate for public office) or for carrying on propaganda (including advertising) related to any of the foregoing purposes. For rules applicable to such expenditures in respect of taxable years beginning before January 1, 1963, and for taxable years beginning after December 31, 1962, see paragraphs (b) and (c), respectively, of this section. This section also deals with expenditures for institutional or ''good will'' advertising.

(2) *Institutional or ''good will'' advertising.* Expenditures for institutional or ''good will'' advertising which keeps the taxpayer's name before the public are generally deductible as ordinary and necessary business expenses provided the expenditures are related to the patronage the taxpayer might reasonably expect in the future. For example, a deduction will ordinarily be allowed for the cost of advertising which keeps the taxpayer's name before the public in connection with encouraging contributions to such organizations as the Red Cross, the purchase of United States Savings Bonds, or participation in similar causes. In like fashion, expenditures for advertising which presents views on economic, financial, social, or other subjects of a general nature, but which does not involve any of the activities specified in paragraph (b) or (c) of this section for which a deduction is not allowable, are deductible if they otherwise meet the requirements of the regulations under section 162.

(b) *Taxable years beginning before January 1, 1963*—(1) *In general.* (i) For taxable years beginning before January 1, 1963, expenditures for lobbying purposes, for the promotion or defeat of legislation, for political campaign purposes (including the support of or opposition to any candidate for public office), or for carrying on propaganda (including advertising) related to any of the foregoing purposes are not deductible from gross income. For example, the cost of advertising to promote or defeat legislation or to influence the public with respect to the desirability or undesirability of proposed legislation is not deductible as a business expense, even though the legislation may directly affect the taxpayer's business.

(ii) If a substantial part of the activities of an organization, such as a labor union or a trade association, consists of one or more of the activities specified in the first sentence of this subparagraph, deduction will be allowed only for such portion of the dues or other payments to the organization as the taxpayer can clearly establish is attributable to activities other than those so specified. The determination of whether such specified activities constitute a substantial part of an organization's activities shall be based on all the facts and circumstances. In no event shall special assessments or similar payments (including an increase in dues) made to any organization for any of such specified purposes be deductible. For other provisions relating to the deductibility of dues and other payments to an organization, such as a labor union or a trade association, see paragraph (c) of § 1.162–15.

(2) *Expenditures for promotion or defeat of legislation.* For purposes of this paragraph, expenditures for the promotion or the defeat of legislation include, but shall not be limited to, expenditures for the purpose of attempting to—

(i) Influence members of a legislative body directly, or indirectly by urging or encouraging the public to contact such members for the purpose of proposing, supporting, or opposing legislation, or

(ii) Influence the public to approve or reject a measure in a referendum, initiative, vote on a constitutional amendment, or similar procedure.

(c) *Taxable years beginning after December 31, 1962*—(1) *In general.* For taxable years beginning after December 31, 1962, certain types of expenses incurred with respect to legislative matters are deductible under section 162(a) if they otherwise meet the requirements of the regulations under section 162. These deductible expenses are described in subparagraph (2) of this paragraph. All other expenditures for lobbying purposes, for the promotion or defeat of legislation (see paragraph (b)(2) of this section), for political campaign purposes (including the support of or opposition to any candidate for public office), or for carrying on propaganda (including advertising) relating to any of the foregoing purposes are not deductible from gross income for such taxable years. For the disallowance of deductions for bad debts and worthless securities of a political party, see §1.271–1. For the disallowance of deductions for certain indirect political contributions, such as the cost of certain advertising and the cost of admission to certain dinners, programs, and inaugural events, see §1.276–1.

(2) *Appearances, etc., with respect to legislation*—(i) *General rule.* Pursuant to the provisions of section 162(e), expenses incurred with respect to legislative matters which may be deductible are those ordinary and necessary expenses (including, but not limited to, traveling expenses described in section 162(a)(2) and the cost of preparing testimony) paid or incurred by the taxpayer during a taxable year beginning after December 31, 1962, in carrying on any trade or business which are in direct connection with—

(*a*) Appearances before, submission of statements to, or sending communications to, the committees, or individual members of Congress or of any legislative body of a State, a possession of the United States, or a political subdivision of any of the foregoing with respect to legislation or proposed legislation of direct interest to the taxpayer, or

(*b*) Communication of information between the taxpayer and an organization of which he is a member with respect to legislation or proposed legislation of direct interest to the taxpayer and to such organization.

For provisions relating to dues paid or incurred with respect to an organization of which the taxpayer is a member, see subparagraph (3) of this paragraph.

(ii) *Legislation or proposed legislation of direct interest to the taxpayer—(a) Legislation or proposed legislation.* The term ''legislation or proposed legislation'' includes bills and resolutions introduced by a member of Congress or other legislative body referred to in subdivision (i)(*a*) of this subparagraph for consideration by such body as well as oral or written proposals for legislative action submitted to the legislative body or to a committee or member of such body.

(*b*) *Direct interest*—(*1*) *In general.* (*i*) Legislation or proposed legislation is of direct interest to a taxpayer if the legislation or proposed legislation is of such a nature that it will, or may reasonably be expected to, affect the trade or business of the taxpayer. It is immaterial whether the effect, or expected effect, on the trade or business will be beneficial or detrimental to the trade or business or whether it will be immediate. If legislation or proposed legislation has such a relationship to a trade or business that the expenses of any appearance or communication in connection with the legislation meets the ordinary and necessary test of section 162(a), then such legislation ordinarily meets the direct interest test of section 162(e). However, if the nature of the legislation or proposed legislation is such that the likelihood of its having an effect on the trade or business of the taxpayer is remote or speculative, the legislation or proposed legislation is not of direct interest to the taxpayer. Legislation or proposed legislation which will not affect the trade or business of the taxpayer is not of direct interest to the taxpayer even though such legislation will affect the personal, living, or family activities or expenses of the taxpayer. Legislation or proposed legislation is not of direct interest to a taxpayer merely because it may affect business in general; however, if the legislation or proposed legislation will, or may reasonably be expected to, affect the taxpayer's trade or business it will be of direct interest to the taxpayer even though it also will affect the trade or business of other taxpayers or business in general. To meet the direct interest test, it is not necessary that all provisions of the legislation or proposed legislation have an effect, or expected effect, on the taxpayer's trade or business. The test will be met if one of the provisions of the legislation has the specified effect. Legislation or proposed legislation will be considered to be of direct interest to a membership organization if it is of direct interest to the organization, as such, or if it is of direct interest to one or more of its members.

(*ii*) Legislation which would increase or decrease the taxes applicable to the trade or business, increase or decrease the operating costs or earnings of the trade or business, or increase or decrease the administrative burdens connected with the trade or business meets the direct interest test. Legislation which would increase the social security benefits or liberalize the right to such benefits meets the direct interest test because such changes in the social security benefits may reasonably be expected to affect the retirement benefits which the employer will be asked to provide his employees or to increase his taxes. Legislation which would impose a retailer's sales tax is of direct interest to a retailer because, although the tax may be passed on to his customers, collection of the tax will impose additional burdens on the retailer, and because the increased cost of his products to the consumer may reduce the demand for them. Legislation which would provide an income tax credit or exclusion for shareholders is of direct interest to a corporation, because those tax benefits may increase the sources of capital available to the corporation. Legislation which would favorably or adversely affect the business of a competitor so as to affect the taxpayer's competitive position is of direct interest to the taxpayer. Legislation which would improve the school system of a community is of direct interest to a membership organization comprised of employers in the community because the improved school system is likely to make the community more attractive to prospective employees of such employers. On the other hand, proposed legislation relating to Presidential succession in the event of the death of the President has only a remote and speculative effect on any trade or business and therefore does not meet the direct interest test. Similarly, if a corporation is represented before a congressional committee to oppose an appropriation bill merely because of a desire to bring increased Government economy with the hope that such economy will eventually cause a reduction in the Federal income tax, the legislation does not meet the direct interest test because any effect it may have upon the corporation's trade or business is highly speculative.

(*2*) *Appearances, etc., by expert witnesses.* (*i*) An appearance or communication (of a type described in paragraph (c)(2)(i)(*a*) of this section) by an individual in connection with legislation or proposed legislation shall be considered to be with respect to legislation of direct interest to such individual if the legislation is in a field in which he specializes as an employee, if the appearance or communication is not on behalf of his employer, and if it is customary for individuals in his type of employment to publicly express their views in respect of matters in their field of competence. Expenses incurred by such an individual in connection with such an appearance of communication, including traveling expenses properly allocable thereto, represent ordinary and necessary business expenses and are, therefore, deductible under section 162. For example, if a university professor who teaches in the field of money and banking appears, on his own behalf, before a legislative committee to testify on proposed legislation regarding the banking system, his expenses incurred in connection with such appearance are deductible under section 162 since university professors customarily take an active part in the development of the law in their field of competence and publicly communicate the results of their work.

(*ii*) An appearance or communication (of a type described in paragraph (c)(2)(i)(*a*) of this section) by an employee or self-employed individual in connection with legislation or proposed legislation shall be considered to be with respect to legislation of direct interest to such person if the legislation is in the field in which he specializes in his business (or as an employee) and if the appearance or communication is made pursuant to an invitation extended to him individually for the purpose of receiving his expert testimony. Expenses incurred by an employee or self-employed individual in connection with such an appearance or communication, including traveling expenses properly allocable thereto, represent ordinary and necessary business expenses and are, therefore, deductible under section 162. For example, if a self-employed individual is personally invited by a congressional committee to testify on proposed legislation in the field in which he specializes in his business, his expenses incurred in connection with such appearance are deductible under section 162. If a self-employed individual makes an appearance, on his own behalf, before a legislative committee without having been extended an invitation his expenses will be deductible to the extent otherwise provided in this paragraph.

(*3) Nominations, etc.* A taxpayer does not have a direct interest in matters such as nominations, appointments, or the operation of the legislative body.

(iii) *Allowable expenses.* To be deductible under section 162(a), expenditures which meet the tests of deductibility under the provisions of this paragraph must also qualify as ordinary and necessary business expenses under section 162(a) and, in addition, be in direct connection with the carrying on of the activities specified in subdivision (i)(*a*) or (i)(*b*) of this subparagraph. For example, a taxpayer appearing before a committee of the Congress to present testimony concerning legislation or proposed legislation in which he has a direct interest may deduct the ordinary and necessary expenses directly connected with his appearance, such as traveling expenses described in section 162(a)(2), and the cost of preparing testimony.

(3) *Deductibility of dues and other payments to an organization.* If a substantial part of the activities of an organization, such as a labor union or a trade association, consists of one or more of the activities to which this paragraph relates (legislative matters, political campaigns, etc.), exclusive of any activity constituting an appearance or communication with respect to legislation or proposed legislation of direct interest to the organization (see subparagraph (c)(2)(ii)(*b*)(*1*)), a deduction will be allowed only for such portion of the dues or other payments to the organization as the taxpayer can clearly establish is attributable to activities to which this paragraph does not relate and to any activity constituting an appearance or communication with respect to legislation or proposed legislation of direct interest to the organization. The determination of whether a substantial part of an organization's activities consists of one or more of the activities to which this paragraph relates (exclusive of appearances or communications with respect to legislation or proposed legislation of direct interest to the organization) shall be based on all the facts and circumstances. In no event shall a deduction be allowed for that portion of a special assessment or similar payment (including an increase in dues) made to any organization for any activity to which this paragraph relates if the activity does not constitute an appearance or communication with respect to legislation or proposed legislation of direct interest to the organization. If an organization pays or incurs expenses allocable to legislative activities which meet the tests of subdivisions (i) and (ii) of subparagraph (2) of this paragraph (appearances or communications with respect to legislation or proposed legislation of direct interest to the organization), on behalf of its members, the dues paid by a taxpayer are deductible

to the extent used for such activities. Dues paid by a taxpayer will be considered to be used for such an activity, and thus deductible, although the legislation or proposed legislation involved is not of direct interest to the taxpayer, if, pursuant to the provisions of subparagraph (2)(ii)(*b*)(*1*) of this paragraph, the legislation or proposed legislation is of direct interest to the organization, as such, or is of direct interest to one or more members of the organization. For other provisions relating to the deductibility of dues and other payments to an organization, such as a labor union or a trade association, see paragraph (c) of § 1.162–15.

(4) *Limitations.* No deduction shall be allowed under section 162(a) for any amount paid or incurred (whether by way of contribution, gift, or otherwise) in connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums. For example, no deduction shall be allowed for any expenses incurred in connection with ''grassroot'' campaigns or any other attempts to urge or encourage the public to contact members of a legislative body for the purpose of proposing, supporting, or opposing legislation.

(5) *Expenses paid or incurred after December 31, 1993, in connection with influencing legislation other than certain local legislation.* The provisions of paragraphs (c)(1) through (3) of this section are superseded for expenses paid or incurred after December 31, 1993, in connection with influencing legislation (other than certain local legislation) to the extent inconsistent with section 162(e)(1)(A) (as limited by section 162(e)(2)) and §§ 1.162–20(d) and 1.162–29.

(d) *Dues allocable to expenditures after 1993.* No deduction is allowed under section 162(a) for the portion of dues or other similar amounts paid by the taxpayer to an organization exempt from tax (other than an organization described in section 501(c)(3)) which the organization notifies the taxpayer under section 6033(e)(1)(A)(ii) is allocable to expenditures to which section 162(e)(1) applies. The first sentence of this paragraph (d) applies to dues or other similar amounts whether or not paid on or before December 31, 1993. Section 1.162–20(c)(3) is superseded to the extent inconsistent with this paragraph (d).

[T.D. 6819, 30 FR 5581, Apr. 20, 1965, as amended by T.D. 6996, 34 FR 835, Jan. 18, 1969; T.D. 8602, 60 FR 37573, July 21, 1995]

§ 1.162–21 Fines and penalties.

(a) *In general.* No deduction shall be allowed under section 162(a) for any fine or similar penalty paid to—

(1) The government of the United States, a State, a territory or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico;

(2) The government of a foreign country; or

(3) A political subdivision of, or corporation or other entity serving as an agency or instrumentality of, any of the above.

(b) *Definition.* (1) For purposes of this section a fine or similar penalty includes an amount—

(i) Paid pursuant to conviction or a plea of guilty or *nolo contendere* for a crime (felony or misdemeanor) in a criminal proceeding;

(ii) Paid as a civil penalty imposed by Federal, State, or local law, including additions to tax and additional amounts and assessable penalties imposed by chapter 68 of the Internal Revenue Code of 1954;

(iii) Paid in settlement of the taxpayer's actual or potential liability for a fine or penalty (civil or criminal); or

(iv) Forfeited as collateral posted in connection with a proceeding which could result in imposition of such a fine or penalty.

(2) The amount of a fine or penalty does not include legal fees and related expenses paid or incurred in the defense of a prosecution or civil action arising from a violation of the law imposing the fine or civil penalty, nor court costs assessed against the taxpayer, or stenographic and printing charges. Compensatory damages (including damages under section 4A of the Clayton Act (15 U.S.C. 15a), as amended) paid to a government do not constitute a fine or penalty.

(c) *Examples.* The application of this section may be illustrated by the following examples:

Example 1. M Corp. was indicted under section 1 of the Sherman Anti-Trust Act (15 U.S.C. 1) for fixing and maintaining prices of certain electrical products. M Corp. was convicted and was fined $50,000. The United States sued M Corp. under section 4A of the Clayton Act (15 U.S.C. 15a) for $100,000, the amount of the actual damages resulting from the price fixing of which M Corp. was convicted. Pursuant to a final judgment entered in the civil action. M Corp. paid the United States $100,000 in damages. Section 162(f) precludes M Corp. from deducting the fine of $50,000 as a trade or business expense. Section 162(f) does not preclude it from deducting the $100,000 paid to the United States as actual damages.

Example 2. N Corp. was found to have violated 33 U.S.C. 1321(b)(3) when a vessel it operated discharged oil in harmful quantities into the navigable waters of the United States. A civil penalty under 33 U.S.C. 1321(b)(6) of $5,000 was assessed against N Corp. with respect to the discharge. N Corp. paid $5,000 to the Coast Guard in payment of the civil penalty. Section 162(f) precludes N Corp. from deducting the $5,000 penalty.

Example 3. O Corp., a manufacturer of motor vehicles, was found to have violated 42 U.S.C. 1857f–2(a)(1) by selling a new motor vehicle which was not covered by the required certificate of conformity. Pursuant to 42 U.S.C. 1857f–4, O Corp. was required to pay, and did pay, a civil penalty of $10,000. In addition, pursuant to 42 U.S.C. 1857f–5a(c)(1), O Corp. was required to expend, and did expend, $500 in order to remedy the nonconformity of that motor vehicle. Section 162(f) precludes O Corp. from deducting the $10,000 penalty as a trade or business expense, but does not preclude it from deducting the $500 which it expended to remedy the nonconformity.

Example 4. P Corp. was the operator of a coal mine in which occurred a violation of a mandatory safety standard prescribed by the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. 801 *et seq.*). Pursuant to 30 U.S.C. 819(a), a civil penalty of $10,000 was assessed against P Corp., and P Corp. paid the penalty. Section 162(f) precludes P Corp. from deducting the $10,000 penalty.

Example 5. Q Corp., a common carrier engaged in interstate commerce by railroad, hauled a railroad car which was not equipped with efficient hand brakes, in violation of 45 U.S.C. 11. Q Corp. was found to be liable for a penalty of $250 pursuant to 45 U.S.C. 13. Q Corp. paid that penalty. Section 162(f) precludes Q Corp. from deducting the $250 penalty.

Example 6. R Corp. owned and operated on the highways of State X a truck weighing in excess of the amount permitted under the law of State X. R Corp. was found to have violated the law and was assessed a fine of $85 which it paid to State X. Section 162(f) precludes R Corp. from deducting the amount so paid.

Example 7. S Corp. was found to have violated a law of State Y which prohibited the emission into the air of particulate matter in excess of a limit set forth in a regulation promulgated under that law. The Environmental Quality Hearing Board of State Y assessed a fine of $500 against S Corp. The fine was payable to State Y, and S Corp. paid it. Section 162(f) precludes S Corp. from deducting the $500 fine.

Example 8. T Corp. was found by a magistrate of City Z to be operating in such city an apartment building which did not conform to a provision of the city housing code requiring operable fire escapes on apartment buildings of that type. Upon the basis of the magistrate's finding, T Corp. was required to pay, and did pay, a fine of $200 to City Z. Section 162(f) precludes T Corp. from deducting the $200 fine.

[T.D. 7345, 40 FR 7437, Feb. 20, 1975; 40 FR 8948, Mar. 4, 1975, as amended by T.D. 7366, 40 FR 29290, July 11, 1975]

§ 1.162–22 Treble damage payments under the antitrust laws.

(a) *In general.* In the case of a taxpayer who after December 31, 1969, either is convicted in a criminal action of a violation of the Federal antitrust laws or enters a plea of guilty or *nolo contendere* to an indictment or information charging such a violation, and whose conviction or plea does not occur in a new trial following an appeal of a conviction on or before such date, no deduction shall be allowed under section 162(a) for two-thirds of any amount paid or incurred after December 31, 1969, with respect to—

(1) Any judgment for damages entered against the taxpayer under section 4 of the Clayton Act (15 U.S.C. 15), as amended, on account of such violation or any related violation of the Federal antitrust laws, provided such related violation occurred prior to the date of the final judgment of such conviction, or

(2) Settlement of any action brought under such section 4 on account of such violation or related violation.

For the purposes of this section, where a civil judgment has been entered or a settlement made with respect to a violation of the antitrust laws and a criminal proceeding is based upon the same violation, the criminal proceeding need not have been brought prior to the civil judgment or settlement. If, in his return for any taxable year, a taxpayer claims a deduction for an amount paid or incurred with respect to a judgment or settlement described in the first sentence of this paragraph and is subsequently convicted of a violation of the antitrust laws which makes a portion of such amount unallowable, then the taxpayer shall file an amended return for such taxable year on which the amount of the deduction is appropriately reduced. Attorney's fees, court costs, and other amounts paid or incurred in connection with a controversy under such section 4 which meet the requirements of section 162 are deductible under that section. For purposes of subparagraph (2) of this paragraph, the amount paid or incurred in settlement shall not include amounts attributable to the plaintiff's costs of suit and attorney's fees, to the extent that such costs or fees have actually been paid.

(b) *Conviction.* For purposes of paragraph (a) of this section, a taxpayer is convicted of a violation of the antitrust laws if a judgment of conviction (whether or not a final judgment) with respect to such violation has been entered against him, provided a subsequent final judgment of acquittal has not been entered or criminal prosecution with respect to such violation terminated without a final judgment of conviction. During the pendency of an appeal or other action directly contesting a judgment of conviction, the taxpayer should file a protective claim for credit or refund to avoid being barred by the period of limitations on credit or refund under section 6511.

(c) *Related violation.* For purposes of this section, a violation of the Federal antitrust laws is related to a subsequent violation if (1) with respect to the subsequent violation the United States obtains both a judgment in a criminal proceeding and an injunction against the taxpayer, and (2) the taxpayer's actions which constituted the prior violation would have contravened such injunction if such injunction were applicable at the time of the prior violation.

(d) *Settlement following a dismissal of an action or amendment of the complaint.* For purposes of paragraph (a)(2) of this section, an amount may be considered as paid in settlement of an action even though the action is dismissed or otherwise disposed of prior to such settlement or the complaint is amended to eliminate the claim with respect to the violation or related violation.

(e) *Antitrust laws.* The term ''antitrust laws'' as used in section 162(g) and this section shall include the Federal acts enumerated in paragraph (1) of section 1 of the Clayton Act (15 U.S.C. 12), as amended.

(f) *Examples.* The application of this section may be illustrated by the following examples:

Example 1. In 1970, the United States instituted a criminal prosecution against X Co., Y Co., A, the president of X Co., and B, the president of Y Co., under section 1 of the Sherman Anti-Trust Act, 15 U.S.C. 1. In the indictment, the defendants were charged with conspiring to fix and maintain prices of electrical transformers from 1965 to 1970. All defendants entered pleas of nolo contendere to these charges. These pleas were accepted and judgments of conviction entered. In a companion civil suit, the United States obtained an injunction prohibiting the defendants from conspiring to fix and maintain prices in the electrical transformer market. Thereafter, Z Co. sued X Co. and Y Co. for $300,000 in treble damages under section 4 of the Clayton Act. Z Co.'s complaint alleged that the criminal conspiracy between X Co. and Y Co. forced Z Co. to pay excessive prices for electrical transformers. X Co. and Y Co. each paid Z Co. $85,000 in full settlement of Z Co.'s action. Of each $85,000 paid, $10,000 was attributable to court costs and attorney's fees actually paid by Z Co. Under section 162(g), X Co. and Y Co. are each precluded from deducting as a trade or business expense more than $35,000 of the $85,000 paid to Z Co. in settlement—

$\$10,000+[(\$85,000-\$10,000)\div 3]$

Example 2. Assume the same facts as in example (1) except that Z Co.'s claim for treble damages was based on a conspiracy to fix and maintain prices in the sale of electrical transformers during 1963. Although the criminal prosecution of the defendants did not involve 1963 (a year barred by the applicable criminal statute of limitations when the prosecution was instituted), Z Co.'s pleadings alleged that the civil statute of limitations had been tolled by the defendants' fraudulent concealment of their conspiracy. Since the United States has obtained both a judgment in a criminal proceeding and an injunction against the defendants in connection with their activities from 1965 to 1970, and the alleged actions of the defendants in 1963 would have contravened such injunction if it were applicable in 1963, the alleged violation in 1963 is related to the violation from 1965 to 1970. Accordingly, the tax consequences to X Co. and Y Co. of the payments of $85,000 in settlement of Z Co.'s claim against X Co. and Y Co. are the same as in example (1).

Example 3. Assume the same facts as in example (1) except that Z Co.'s claim for treble damages was based on a conspiracy to fix and maintain prices with respect to electrical insulators for high-tension power poles. Since the civil action was not based on the same violation of the Federal antitrust laws as the criminal action, or on a related violation (a violation which would have contravened the injunction if it were applicable), X Co. and Y Co. are not precluded by section 162(g) from deducting as a trade or business expense the entire $85,000 paid by each in settlement of the civil action.

[T.D. 7217, 37 FR 23916, Nov. 10, 1972]

§ 1.162–24 Travel expenses of state legislators.

(a) *In general.* For purposes of section 162(a), in the case of any taxpayer who is a state legislator at any time during the taxable year and who makes an election under section 162(h) for the taxable year—

(1) The taxpayer's place of residence within the legislative district represented by the taxpayer is the taxpayer's home for that taxable year;

(2) The taxpayer is deemed to have expended for living expenses (in connection with the taxpayer's trade or business as a legislator) an amount determined by multiplying the number of legislative days of the taxpayer during the taxable year by the greater of—

(i) The amount generally allowable with respect to those days to employees of the state of which the taxpayer is a legislator for per diem while away from home, to the extent the amount does not exceed 110 percent of the amount described in paragraph (a)(2)(ii) of this section; or

(ii) The Federal per diem with respect to those days for the taxpayer's state capital; and

(3) The taxpayer is deemed to be away from home in the pursuit of a trade or business on each legislative day.

(b) *Legislative day.* For purposes of section 162(h)(1) and this section, for any taxpayer who makes an election under section 162(h), a legislative day is any day on which the taxpayer is a state legislator and—

(1) The legislature is in session;

(2) The legislature is not in session for a period that is not longer than 4 consecutive days, without extension for Saturdays, Sundays, or holidays;

(3) The taxpayer's attendance at a meeting of a committee of the legislature is formally recorded; or

(4) The taxpayer's attendance at any session of the legislature that only a limited number of members are expected to attend (such as a *pro forma* session), on any day not described in paragraph (b)(1) or (b)(2) of this section, is formally recorded.

(c) *Fifty mile rule.* Section 162(h) and this section do not apply to any taxpayer who is a state legislator and whose place of residence within the legislative district represented by the taxpayer is 50 or fewer miles from the capitol building of the state. For purposes of this paragraph (c), the distance between the taxpayer's place of residence within the legislative district represented by the taxpayer and the capitol building of the state is the shortest of the more commonly traveled routes between the two points.

(d) *Definitions and special rules.* The following definitions apply for purposes of section 162(h) and this section.

(1) *State legislator.* A taxpayer becomes a state legislator on the day the taxpayer is sworn into office and ceases to be a state legislator on the day following the day on which the taxpayer's term in office ends.

(2) *Living expenses.* Living expenses include lodging, meals, and incidental expenses. *Incidental expenses* has the same meaning as in 41 CFR 300–3.1.

(3) *In session*—(i) *In general.* For purposes of this section, the legislature of which a taxpayer is a member is in session on any day if, at any time during that day, the members of the legislature are expected to attend and participate as an assembled body of the legislature.

(ii) *Examples.* The following examples illustrate the rules of this paragraph (d)(3):

Example 1. B is a member of the legislature of State X. On Day 1, the State X legislature is convened and the members of the legislature are expected to attend and participate. On Day 1, the State X legislature is in session within the meaning of paragraph (d)(3)(i) of this section. B does not attend the session of the State X legislature on Day 1. However, Day 1 is a legislative day for B for purposes of section 162(h)(2)(A) and paragraph (b)(1) of this section.

Example 2. C, D, and E are members of the legislature of State X. On Day 2, the State X legislature is convened for a limited session in which not all members of the legislature are expected to attend and participate. Thus, on Day 2 the legislature is not in session within the meaning of paragraph (d)(3)(i) of this section, and Day 2 is not a legislative day under paragraph (b)(1) of this section. In addition, Day 2 is not a day described in paragraph (b)(2) of this section. C and D are the only members who are called to, and do, attend the limited session on Day 2, and their attendance at the session is formally recorded. E is not called and does not attend. Therefore, Day 2 is a legislative day as to C and D under section 162(h)(2)(B) and paragraph (b)(4) of this section. Day 2 is not a legislative day as to E.

(4) *Committee of the legislature.* A committee of the legislature is any group that includes one or more legislators and that is charged with conducting business of the legislature. Committees of the legislature include, but are not limited to, committees to which the legislature refers bills for consideration, committees that the legislature has authorized to conduct inquiries into matters of public concern, and committees charged with the internal administration of the legislature. For purposes of this section, groups that are not considered committees of the legislature include, but are not limited to, groups that promote particular issues, raise campaign funds, or are caucuses of members of a political party.

(5) *Federal per diem.* The Federal per diem for any city and day is the maximum amount allowable to employees of the executive branch of the Federal government for living expenses while away from home in pursuit of a trade or business in that city on that day. See 5 U.S.C. 5702 and the regulations under that section.

(e) *Election*—(1) *Time for making election.* A taxpayer's election under section 162(h) must be made for each taxable year for which the election is to be in effect and must be made no later than the due date (including extensions) of the taxpayer's Federal income tax return for the taxable year.

(2) *Manner of making election.* A taxpayer makes an election under section 162(h) by attaching a statement to the taxpayer's income tax return for the taxable year for which the election is made. The statement must include—

(i) The taxpayer's name, address, and taxpayer identification number;

(ii) A statement that the taxpayer is making an election under section 162(h); and

(iii) Information establishing that the taxpayer is a state legislator entitled to make the election, for example, a statement identifying the taxpayer's state and legislative district and representing that the taxpayer's place of residence in the legislative district is not 50 or fewer miles from the state capitol building.

(3) *Revocation of election.* An election under section 162(h) may be revoked only with the consent of the Commissioner. An application for consent to revoke an election must be signed by the taxpayer and filed with the submission processing center with which the election was filed, and must include—

(i) The taxpayer's name, address, and taxpayer identification number;

(ii) A statement that the taxpayer is revoking an election under section 162(h) for a specified year; and

(iii) A statement explaining why the taxpayer seeks to revoke the election.

(f) *Effect of election on otherwise deductible expenses for travel away from home*—(1) *Legislative days*—(i) *Living expenses.* For any legislative day for which an election under section 162(h) and this section is in effect, the amount of an electing taxpayer's living expenses while away from home is the greater of the amount of the living expenses—

(A) Specified in paragraph (a)(2) of this section in connection with the trade or business of being a legislator; or

(B) Otherwise allowable under section 162(a)(2) in the pursuit of any trade or business of the taxpayer.

(ii) *Other expenses.* For any legislative day for which an election under section 162(h) and this section is in effect, the amount of an electing taxpayer's expenses (other than living expenses) for travel away from home is the sum of the substantiated expenses, such as expenses for travel fares, telephone calls, and local transportation, that are otherwise deductible under section 162(a)(2) in the pursuit of any trade or business of the taxpayer.

(2) *Non-legislative days.* For any day that is not a legislative day, the amount of an electing taxpayer's expenses (including amounts for living expenses) for travel away from home is the sum of the substantiated expenses that are otherwise deductible under section 162(a)(2) in the pursuit of any trade or business of the taxpayer.

(g) *Cross references.* See §1.62–1T(e)(4) for rules regarding allocation of unreimbursed expenses of state legislators and section 274(n) for limitations on the amount allowable as a deduction for expenses for or allocable to meals.

(h) *Effective/applicability date.* This section applies to expenses paid or incurred, or deemed expended under section 162(h), in taxable years beginning after *April 8, 2010*.

[T.D. 9481, 75 FR 17856, Apr. 8, 2010]

§1.162–25 Deductions with respect to noncash fringe benefits.

(a) [Reserved]

(b) *Employee.* If an employer provides the use of a vehicle (as defined in §1.61–21(e)(2)) to an employee as a noncash fringe benefit and includes the entire value of the benefit in the employee's gross income without taking into account any exclusion for a working condition fringe allowable under section 132 and the regulations thereunder, the employee may deduct that value multiplied by the percentage of the total use of the vehicle that is in connection with the employer's trade or business (business value). For taxable years beginning before January 1, 1990, the employee may deduct the business value from gross income in determining adjusted gross income. For taxable years beginning on or after January 1, 1990, the employee may deduct the business value only as a miscellaneous itemized deduction in determining taxable income, subject to the 2-percent floor provided in section 67. If the employer determines the value of the noncash fringe benefit under a special accounting rule that allows the employer to treat the value of benefits provided during the last two months of the calendar year or any shorter period as paid during the subsequent calendar year, then the employee must determine the deduction allowable under this paragraph (b) without regard to any use of the benefit during those last two months or any shorter period. The employee may not use a cents-per-mile valuation method to determine the deduction allowable under this paragraph (b).

[T.D. 8451, 57 FR 57669, Dec. 7, 1992; 57 FR 60568, Dec. 21, 1992]

§1.162–25T Deductions with respect to noncash fringe benefits (temporary).

(a) *Employer.* If an employer includes the value of a noncash fringe benefit in an employee's gross income, the employer may not deduct this amount as compensation for services, but rather may deduct only the costs incurred by the employer in providing the benefit to the employee. The employer may be allowed a cost recovery deduction under section 168 or a deduction under section 179 for an expense not chargeable to capital account, or, if the noncash fringe benefit is property leased by the employer, a deduction for the ordinary and necessary business expense of leasing the property.

(b) [Reserved]

(c) *Examples.* The following examples illustrate the provisions of this section.

Example 1. On January 1, 1986, X Company owns and provides the use of an automobile with a fair market value of $20,000 to E, an employee, for the entire calendar year. Both X and E compute taxable income on the basis of the calendar year. Seventy percent of the use of the automobile by E is in connection with X's trade or business. If X uses the special rule provided in §1.61–2T for valuing the availability of the automobile and takes into account the amount excludable as a working condition fringe, X would include $1,680 ($5,600, the Annual Lease Value, less 70 percent of $5,600) in E's gross income for 1986. X may not deduct the amount included in E's income as compensation for services. X may, however, determine a cost recovery deduction under section 168, subject to the limitations under section 280F, for taxable year 1986.

Example 2. The facts are the same as in example (1), except that X includes $5,600 in E's gross income, the value of the noncash fringe benefit without taking into account the amount excludable as a working condition fringe. X may not deduct that amount as compensation for services, but may determine a cost recovery deduction under section 168, subject to the limitations under section 280F. For purposes of determining adjusted gross income, E may deduct $3,920 ($5,600 multiplied by the percent of business use).

[T.D. 8061, 50 FR 46013, Nov. 6, 1985, as amended by T.D. 8063, 50 FR 52312, Dec. 23, 1985; T.D. 8276, 54 FR 51026, Dec. 12, 1989; T.D. 8451, 57 FR 57669, Dec. 7, 1992]

§ 1.162–27 Certain employee remuneration in excess of $1,000,000.

(a) *Scope.* This section provides rules for the application of the $1 million deduction limit under section 162(m) of the Internal Revenue Code. Paragraph (b) of this section provides the general rule limiting deductions under section 162(m). Paragraph (c) of this section provides definitions of generally applicable terms. Paragraph (d) of this section provides an exception from the deduction limit for compensation payable on a commission basis. Paragraph (e) of this section provides an exception for qualified performance-based compensation. Paragraphs (f) and (g) of this section provide special rules for corporations that become publicly held corporations and payments that are subject to section 280G, respectively. Paragraph (h) of this section provides transition rules, including the rules for contracts that are grandfathered and not subject to section 162(m). Paragraph (j) of this section contains the effective date provisions. For rules concerning the deductibility of compensation for services that are not covered by section 162(m) and this section, see section 162(a)(1) and §1.162–7. This section is not determinative as to whether compensation meets the requirements of section 162(a)(1).

(b) *Limitation on deduction.* Section 162(m) precludes a deduction under chapter 1 of the Internal Revenue Code by any publicly held corporation for compensation paid to any covered employee to the extent that the compensation for the taxable year exceeds $1,000,000.

(c) *Definitions*—(1) *Publicly held corporation*—(i) *General rule.* A *publicly held corporation* means any corporation issuing any class of common equity securities required to be registered under section 12 of the Exchange Act. A corporation is not considered publicly held if the registration of its equity securities is voluntary. For purposes of this section, whether a corporation is publicly held is determined based solely on whether, as of the last day of its taxable year, the corporation is subject to the reporting obligations of section 12 of the Exchange Act.

(ii) *Affiliated groups.* A publicly held corporation includes an affiliated group of corporations, as defined in section 1504 (determined without regard to section 1504(b)). For purposes of this section, however, an affiliated group of corporations does not include any subsidiary that is itself a publicly held corporation. Such a publicly held subsidiary, and its subsidiaries (if any), are separately subject to this section. If a covered employee is paid compensation in a taxable year by more than one member of an affiliated group, compensation paid by each member of the affiliated group is aggregated with compensation paid to the covered employee by all other members of the group. Any amount disallowed as a deduction by this section must be prorated among the payor corporations in proportion to the amount of compensation paid to the covered employee by each such corporation in the taxable year.

(2) *Covered employee*—(i) *General rule.* A *covered employee* means any individual who, on the last day of the taxable year, is—

(A) The chief executive officer of the corporation or is acting in such capacity; or

(B) Among the four highest compensated officers (other than the chief executive officer).

(ii) *Application of rules of the Securities and Exchange Commission.* Whether an individual is the chief executive officer described in paragraph (c)(2)(i)(A) of this section or an officer described in paragraph (c)(2)(i)(B) of this section is determined pursuant to the executive compensation disclosure rules under the Exchange Act.

(3) *Compensation*—(i) *In general.* For purposes of the deduction limitation described in paragraph (b) of this section, *compensation* means the aggregate amount allowable as a deduction under chapter 1 of the Internal Revenue Code for the taxable year (determined without regard to section 162(m)) for remuneration for services performed by a covered employee, whether or not the services were performed during the taxable year.

(ii) *Exceptions. Compensation* does not include—

(A) Remuneration covered in section 3121(a)(5)(A) through section 3121(a)(5)(D) (concerning remuneration that is not treated as *wages* for purposes of the Federal Insurance Contributions Act); and

(B) Remuneration consisting of any benefit provided to or on behalf of an employee if, at the time the benefit is provided, it is reasonable to believe that the employee will be able to exclude it from gross income. In addition, compensation does not include salary reduction contributions described in section 3121(v)(1).

(4) *Compensation Committee.* The *compensation committee* means the committee of directors (including any subcommittee of directors) of the publicly held corporation that has the authority to establish and administer performance goals described in paragraph (e)(2) of this section, and to certify that performance goals are attained, as described in paragraph (e)(5) of this section. A committee of directors is not treated as failing to have the authority to establish performance goals merely because the goals are ratified by the board of directors of the publicly held corporation or, if applicable, any other committee of the board of directors. See paragraph (e)(3) of this section for rules concerning the composition of the compensation committee.

(5) *Exchange Act.* The *Exchange Act* means the Securities Exchange Act of 1934.

(6) *Examples.* This paragraph (c) may be illustrated by the following examples:

Example 1. Corporation X is a publicly held corporation with a July 1 to June 30 fiscal year. For Corporation X's taxable year ending on June 30, 1995, Corporation X pays compensation of $2,000,000 to A, an employee. However, A's compensation is not required to be reported to shareholders under the executive compensation disclosure rules of the Exchange Act because A is neither the chief executive officer nor one of the four highest compensated officers employed on the last day of the taxable year. A's compensation is not subject to the deduction limitation of paragraph (b) of this section.

Example 2. C, a covered employee, performs services and receives compensation from Corporations X, Y, and Z, members of an affiliated group of corporations. Corporation X, the parent corporation, is a publicly held corporation. The total compensation paid to C from all affiliated group members is $3,000,000 for the taxable year, of which Corporation X pays $1,500,000; Corporation Y pays $900,000; and Corporation Z pays $600,000. Because the compensation paid by all affiliated group members is aggregated for purposes of section 162(m), $2,000,000 of the aggregate compensation paid is nondeductible. Corporations X, Y, and Z each are treated as paying a ratable portion of the nondeductible compensation. Thus, two thirds of each corporation's payment will be nondeductible. Corporation X has a nondeductible compensation expense of $1,000,000 ($1,500,000×$2,000,000/$3,000,000). Corporation Y has a nondeductible compensation expense of $600,000 ($900,000×$2,000,000/$3,000,000). Corporation Z has a nondeductible compensation expense of $400,000 ($600,000×$2,000,000/$3,000,000).

Example 3. Corporation W, a calendar year taxpayer, has total assets equal to or exceeding $5 million and a class of equity security held of record by 500 or more persons on December 31, 1994. However, under the Exchange Act, Corporation W is not required to file a registration statement with respect to that security until April 30, 1995. Thus, Corporation W is not a publicly held corporation on December 31, 1994, but is a publicly held corporation on December 31, 1995.

Example 4. The facts are the same as in *Example 3*, except that on December 15, 1996, Corporation W files with the Securities and Exchange Commission to disclose that Corporation W is no longer required to be registered under section 12 of the Exchange Act and to terminate its registration of securities under that provision. Because Corporation W is no longer subject to Exchange Act reporting obligations as of December 31, 1996, Corporation W is not a publicly held corporation for taxable year 1996, even though the registration of Corporation W's securities does not terminate until 90 days after Corporation W files with the Securities and Exchange Commission.

(d) *Exception for compensation paid on a commission basis.* The deduction limit in paragraph (b) of this section shall not apply to any compensation paid on a commission basis. For this purpose, compensation is paid on a commission basis if the facts and circumstances show that it is paid solely on account of income generated directly by the individual performance of the individual to whom the compensation is paid. Compensation does not fail to be attributable directly to the individual merely because support services, such as secretarial or research services, are utilized in generating the income. However, if compensation is paid on account of broader performance standards, such as income produced by a business unit of the corporation, the compensation does not qualify for the exception provided under this paragraph (d).

(e) *Exception for qualified performance-based compensation*—

(1) *In general.* The deduction limit in paragraph (b) of this section does not apply to qualified performance-based compensation. Qualified performance-based compensation is compensation that meets all of the requirements of paragraphs (e)(2) through (e)(5) of this section.

(2) *Performance goal requirement*—(i) *Preestablished goal.* Qualified performance-based compensation must be paid solely on account of the attainment of one or more preestablished, objective performance goals. A performance goal is considered preestablished if it is established in writing by the compensation committee not later than 90 days after the commencement of the period of service to which the performance goal relates, provided that the outcome is substantially uncertain at the time the compensation committee actually establishes the goal. However, in no event will a performance goal be considered to be preestablished if it is established after 25 percent of the period of service (as scheduled in good faith at the time the goal is established) has elapsed. A performance goal is objective if a third party having knowledge of the relevant facts could determine whether the goal is met. Performance goals can be based on one or more business criteria that apply to the individual, a business unit, or the corporation as a whole. Such business criteria could include, for example, stock price, market share, sales, earnings per share, return on equity, or costs. A performance goal need not, however, be based upon an increase or positive result under a business criterion and could include, for example, maintaining the status quo or limiting economic losses (measured, in each case, by reference to a specific business criterion). A performance goal does not include the mere continued employment of the covered employee. Thus, a vesting provision based solely on continued employment would not constitute a performance goal. See paragraph (e)(2)(vi) of this section for rules on compensation that is based on an increase in the price of stock.

(ii) *Objective compensation formula.* A preestablished performance goal must state, in terms of an objective formula or standard, the method for computing the amount of compensation payable to the employee if the goal is attained. A formula or standard is objective if a third party having knowledge of the relevant performance results could calculate the amount to be paid to the employee. In addition, a formula or standard must specify the individual employees or class of employees to which it applies.

(iii) *Discretion.* (A) The terms of an objective formula or standard must preclude discretion to increase the amount of compensation payable that would otherwise be due upon attainment of the goal. A performance goal is not discretionary for purposes of this paragraph (e)(2)(iii) merely because the compensation committee reduces or eliminates the compensation or other economic benefit that was due upon attainment of the goal. However, the exercise of negative discretion with respect to one employee is not permitted to result in an increase in the amount payable to another employee. Thus, for example, in the case of a bonus pool, if the amount payable to each employee is stated in terms of a percentage of the pool, the sum of these individual percentages of the pool is not permitted to exceed 100 percent. If the terms of an objective formula or standard fail to preclude discretion to increase the amount of compensation merely because the amount of compensation to be paid upon attainment of the performance goal is based, in whole or in part, on a percentage of salary or base pay and the dollar amount of the salary or base pay is not fixed at the time the performance goal is established, then the objective formula or standard will not be considered discretionary for purposes of this paragraph (e)(2)(iii) if the maximum dollar amount to be paid is fixed at that time.

(B) If compensation is payable upon or after the attainment of a performance goal, and a change is made to accelerate the payment of compensation to an earlier date after the attainment of the goal, the change will be treated as an increase in the amount of compensation, unless the amount of compensation paid is discounted to reasonably reflect the time value of money. If compensation is payable upon or after the attainment of a performance goal, and a change is made to defer the payment of compensation to a later date, any amount paid in excess of the amount that was originally owed to the employee will not be treated as an increase in the amount of compensation if the additional amount is based either on a reasonable rate of interest or on one or more predetermined actual investments (whether or not assets associated with the amount originally owed are actually invested therein) such that the amount payable by the employer at the later date will be based on the actual rate of return of a specific investment (including any decrease as well as any increase in the value of an investment). If compensation is payable in the form of property, a change in the timing of the transfer of that property after the attainment of the goal will not be treated as an increase in the amount of compensation for purposes of this paragraph (e)(2)(iii). Thus, for example, if the terms of a stock grant provide for stock to be transferred after the attainment of a performance goal and the transfer of the stock also is subject to a vesting schedule, a change in the vesting schedule that either accelerates or defers the transfer of stock will not be treated as an increase in the amount of compensation payable under the performance goal.

(C) Compensation attributable to a stock option, stock appreciation right, or other stock-based compensation does not fail to satisfy the requirements of this paragraph (e)(2) to the extent that a change in the grant or award is made to reflect a change in corporate capitalization, such as a stock split or dividend, or a corporate transaction, such as any merger of a corporation into another corporation, any consolidation of two or more corporations into another corporation, any separation of a corporation (including a spinoff or other distribution of stock or property by a corporation), any reorganization of a corporation (whether or not such reorganization comes within the definition of such term in section 368), or any partial or complete liquidation by a corporation.

(iv) *Grant-by-grant determination.* The determination of whether compensation satisfies the requirements of this paragraph (e)(2) generally shall be made on a grant-by-grant basis. Thus, for example, whether compensation attributable to a stock option grant satisfies the requirements of this paragraph (e)(2) generally is determined on the basis of the particular grant made and without regard to the terms of any other option grant, or other grant of compensation, to the same or another employee. As a further example, except as provided in paragraph (e)(2)(vi), whether a grant of restricted stock or other stock-based compensation satisfies the requirements of this paragraph (e)(2) is determined without regard to whether dividends, dividend equivalents, or other similar distributions with respect to stock, on such stock-based compensation are payable prior to the attainment of the performance goal. Dividends, dividend equivalents, or other similar distributions with respect to stock that are treated as separate grants under this paragraph (e)(2)(iv) are not performance-based compensation unless they separately satisfy the requirements of this paragraph (e)(2).

(v) *Compensation contingent upon attainment of performance goal.* Compensation does not satisfy the requirements of this paragraph (e)(2) if the facts and circumstances indicate that the employee would receive all or part of the compensation regardless of whether the performance goal is attained. Thus, if the payment of compensation under a grant or award is only nominally or partially contingent on attaining a performance goal, none of the compensation payable under the grant or award will be considered performance-based. For example, if an employee is entitled to a bonus under either of two arrangements, where payment under a nonperformance-based arrangement is contingent upon the failure to attain the performance goals under an otherwise performance-based arrangement, then neither arrangement provides for compensation that satisfies the requirements of this paragraph (e)(2). Compensation does not fail to be qualified performance-based compensation merely because the plan allows the compensation to be payable upon death, disability, or change of ownership or control, although compensation actually paid on account of those events prior to the attainment of the performance goal would not satisfy the requirements of this paragraph (e)(2). As an exception to the general rule set forth in the first sentence of paragraph (e)(2)(iv) of this section, the facts-and-circumstances determination referred to in the first sentence of this paragraph (e)(2)(v) is made taking into account all plans, arrangements, and agreements that provide for compensation to the employee.

(vi) *Application of requirements to stock options and stock appreciation rights*—(A) *In general*. Compensation attributable to a stock option or a stock appreciation right is deemed to satisfy the requirements of this paragraph (e)(2) if the grant or award is made by the compensation committee; the plan under which the option or right is granted states the maximum number of shares with respect to which options or rights may be granted during a specified period to any employee; and, under the terms of the option or right, the amount of compensation the employee could receive is based solely on an increase in the value of the stock after the date of the grant or award. Conversely, if the amount of compensation the employee will receive under the grant or award is not based solely on an increase in the value of the stock after the date of grant or award (e.g., in the case of restricted stock, or an option that is granted with an exercise price that is less than the fair market value of the stock as of the date of grant), none of the compensation attributable to the grant or award is qualified performance-based compensation because it does not satisfy the requirement of this paragraph (e)(2)(vi)(A). Whether a stock option grant is based solely on an increase in the value of the stock after the date of grant is determined without regard to any dividend equivalent that may be payable, provided that payment of the dividend equivalent is not made contingent on the exercise of the option. The rule that the compensation attributable to a stock option or stock appreciation right must be based solely on an increase in the value of the stock after the date of grant or award does not apply if the grant or award is made on account of, or if the vesting or exercisability of the grant or award is contingent on, the attainment of a performance goal that satisfies the requirements of this paragraph (e)(2).

(B) *Cancellation and repricing*. Compensation attributable to a stock option or stock appreciation right does not satisfy the requirements of this paragraph (e)(2) to the extent that the number of options granted exceeds the maximum number of shares for which options may be granted to the employee as specified in the plan. If an option is canceled, the canceled option continues to be counted against the maximum number of shares for which options may be granted to the employee under the plan. If, after grant, the exercise price of an option is reduced, the transaction is treated as a cancellation of the option and a grant of a new option. In such case, both the option that is deemed to be canceled and the option that is deemed to be granted reduce the maximum number of shares for which options may be granted to the employee under the plan. This paragraph (e)(2)(vi)(B) also applies in the case of a stock appreciation right where, after the award is made, the base amount on which stock appreciation is calculated is reduced to reflect a reduction in the fair market value of stock.

(vii) *Examples.* This paragraph (e)(2) may be illustrated by the following examples:

Example 1. No later than 90 days after the start of a fiscal year, but while the outcome is substantially uncertain, Corporation S establishes a bonus plan under which A, the chief executive officer, will receive a cash bonus of $500,000, if year-end corporate sales are increased by at least 5 percent. The compensation committee retains the right, if the performance goal is met, to reduce the bonus payment to A if, in its judgment, other subjective factors warrant a reduction. The bonus will meet the requirements of this paragraph (e)(2).

Example 2. The facts are the same as in *Example 1,* except that the bonus is based on a percentage of Corporation S's total sales for the fiscal year. Because Corporation S is virtually certain to have some sales for the fiscal year, the outcome of the performance goal is not substantially uncertain, and therefore the bonus does not meet the requirements of this paragraph (e)(2).

Example 3. The facts are the same as in *Example 1,* except that the bonus is based on a percentage of Corporation S's total profits for the fiscal year. Although some sales are virtually certain for virtually all public companies, it is substantially uncertain whether a company will have profits for a specified future period even if the company has a history of profitability. Therefore, the bonus will meet the requirements of this paragraph (e)(2).

Example 4. B is the general counsel of Corporation R, which is engaged in patent litigation with Corporation S. Representatives of Corporation S have informally indicated to Corporation R a willingness to settle the litigation for $50,000,000. Subsequently, the compensation committee of Corporation R agrees to pay B a bonus if B obtains a formal settlement for at least $50,000,000. The bonus to B does not meet the requirement of this paragraph (e)(2) because the performance goal was not established at a time when the outcome was substantially uncertain.

Example 5. Corporation S, a public utility, adopts a bonus plan for selected salaried employees that will pay a bonus at the end of a 3-year period of $750,000 each if, at the end of the 3 years, the price of S stock has increased by 10 percent. The plan also provides that the 10-percent goal will automatically adjust upward or downward by the percentage change in a published utilities index. Thus, for example, if the published utilities index shows a net increase of 5 percent over a 3-year period, then the salaried employees would receive a bonus only if Corporation S stock has increased by 15 percent. Conversely, if the published utilities index shows a net decrease of 5 percent over a 3-year period, then the salaried employees would receive a bonus if Corporation S stock has increased by 5 percent. Because these automatic adjustments in the performance goal are preestablished, the bonus meets the requirement of this paragraph (e)(2), notwithstanding the potential changes in the performance goal.

Example 6. The facts are the same as in *Example 5,* except that the bonus plan provides that, at the end of the 3-year period, a bonus of $750,000 will be paid to each salaried employee if either the price of Corporation S stock has increased by 10 percent or the earnings per share on Corporation S stock have increased by 5 percent. If both the earnings-per-share goal and the stock-price goal are preestablished, the compensation committee's discretion to choose to pay a bonus under either of the two goals does not cause any bonus paid under the plan to fail to meet the requirement of this paragraph (e)(2) because each goal independently meets the requirements of this paragraph (e)(2). The choice to pay under either of the two goals is tantamount to the discretion to choose not to pay under one of the goals, as provided in paragraph (e)(2)(iii) of this section.

Example 7. Corporation U establishes a bonus plan under which a specified class of employees will participate in a bonus pool if certain preestablished performance goals are attained. The amount of the bonus pool is determined under an objective formula. Under the terms of the bonus plan, the compensation committee retains the discretion to determine the fraction of the bonus pool that each employee may receive. The bonus plan does not satisfy the requirements of this paragraph (e)(2). Although the aggregate amount of the bonus plan is determined under an objective formula, a third party could not determine the amount that any individual could receive under the plan.

Example 8. The facts are the same as in *Example 7,* except that the bonus plan provides that a specified share of the bonus pool is payable to each employee, and the total of these shares does not exceed 100% of the pool. The bonus plan satisfies the requirements of this paragraph (e)(2). In addition, the bonus plan will satisfy the requirements of this paragraph (e)(2) even if the compensation committee retains the discretion to reduce the compensation payable to any individual employee, provided that a reduction in the amount of one employee's bonus does not result in an increase in the amount of any other employee's bonus.

Example 9. Corporation V establishes a stock option plan for salaried employees. The terms of the stock option plan specify that no salaried employee shall receive options for more than 100,000 shares over any 3-

year period. The compensation committee grants options for 50,000 shares to each of several salaried employees. The exercise price of each option is equal to or greater than the fair market value at the time of each grant. Compensation attributable to the exercise of the options satisfies the requirements of this paragraph (e)(2). If, however, the terms of the options provide that the exercise price is less than fair market value at the date of grant, no compensation attributable to the exercise of those options satisfies the requirements of this paragraph (e)(2) unless issuance or exercise of the options was contingent upon the attainment of a preestablished performance goal that satisfies this paragraph (e)(2).

Example 10. The facts are the same as in *Example 9*, except that, within the same 3-year grant period, the fair market value of Corporation V stock is significantly less than the exercise price of the options. The compensation committee reprices those options to that lower current fair market value of Corporation V stock. The repricing of the options for 50,000 shares held by each salaried employee is treated as the grant of new options for an additional 50,000 shares to each employee. Thus, each of the salaried employees is treated as having received grants for 100,000 shares. Consequently, if any additional options are granted to those employees during the 3-year period, compensation attributable to the exercise of those additional options would not satisfy the requirements of this paragraph (e)(2). The results would be the same if the compensation committee canceled the outstanding options and issued new options to the same employees that were exercisable at the fair market value of Corporation V stock on the date of reissue.

Example 11. Corporation W maintains a plan under which each participating employee may receive incentive stock options, nonqualified stock options, stock appreciation rights, or grants of restricted Corporation W stock. The plan specifies that each participating employee may receive options, stock appreciation rights, restricted stock, or any combination of each, for no more than 20,000 shares over the life of the plan. The plan provides that stock options may be granted with an exercise price of less than, equal to, or greater than fair market value on the date of grant. Options granted with an exercise price equal to, or greater than, fair market value on the date of grant do not fail to meet the requirements of this paragraph (e)(2) merely because the compensation committee has the discretion to determine the types of awards (*i.e.*, options, rights, or restricted stock) to be granted to each employee or the discretion to issue options or make other compensation awards under the plan that would not meet the requirements of this paragraph (e)(2). Whether an option granted under the plan satisfies the requirements of this paragraph (e)(2) is determined on the basis of the specific terms of the option and without regard to other options or awards under the plan.

Example 12. Corporation X maintains a plan under which stock appreciation rights may be awarded to key employees. The plan permits the compensation committee to make awards under which the amount of compensation payable to the employee is equal to the increase in the stock price plus a percentage "gross up" intended to offset the tax liability of the employee. In addition, the plan permits the compensation committee to make awards under which the amount of compensation payable to the employee is equal to the increase in the stock price, based on the highest price, which is defined as the highest price paid for Corporation X stock (or offered in a tender offer or other arms-length offer) during the 90 days preceding exercise. Compensation attributable to awards under the plan satisfies the requirements of paragraph (e)(2)(vi) of this section, provided that the terms of the plan specify the maximum number of shares for which awards may be made.

Example 13. Corporation W adopts a plan under which a bonus will be paid to the CEO only if there is a 10% increase in earnings per share during the performance period. The plan provides that earnings per share will be calculated without regard to any change in accounting standards that may be required by the Financial Accounting Standards Board after the goal is established. After the goal is established, such a change in accounting standards occurs. Corporation W's reported earnings, for purposes of determining earnings per share under the plan, are adjusted pursuant to this plan provision to factor out this change in standards. This adjustment will not be considered an exercise of impermissible discretion because it is made pursuant to the plan provision.

Example 14. Corporation X adopts a performance-based incentive pay plan with a four-year performance period. Bonuses under the plan are scheduled to be paid in the first year after the end of the performance period (year 5). However, in the second year of the performance period, the compensation committee determines that any bonuses payable in year 5 will instead, for bona fide business reasons, be paid in year 10. The compensation committee also determines that any compensation that would have been payable in year 5 will be adjusted to reflect the delay in payment. The adjustment will be based on the greater of the future rate of return of a specified mutual fund that invests in blue chip stocks or of a specified venture capital investment over the five-year deferral period. Each of these investments, considered by itself, is a predetermined actual investment because it is based on the future rate of return of an actual investment. However, the adjustment in this case is not based on predetermined actual investments within the meaning of paragraph (e)(2)(iii)(B) of this section because the amount payable by Corporation X in year 10 will be based on the greater of the two investment returns and, thus, will not be based on the actual rate of return on either specific investment.

Example 15. The facts are the same as in *Example 14,* except that the increase will be based on Moody's Average Corporate Bond Yield over the five-year deferral period. Because this index reflects a reasonable rate of interest, the increase in the compensation payable that is based on the index's rate of return is not considered an impermissible increase in the amount of compensation payable under the formula.

Example 16. The facts are the same as in *Example 14,* except that the increase will be based on the rate of return for the Standard & Poor's 500 Index. This index does not measure interest rates and thus does not represent a reasonable rate of interest. In addition, this index does not represent an actual investment. Therefore, any additional compensation payable based on the rate of return of this index will result in an impermissible increase in the amount payable under the formula. If, in contrast, the increase were based on the rate of return of an existing mutual fund that is invested in a manner that seeks to approximate the Standard & Poor's 500 Index, the increase would be based on a predetermined actual investment within the meaning of paragraph (e)(2)(iii)(B) of this section and thus would not result in an impermissible increase in the amount payable under the formula.

(3) *Outside directors*—(i) *General rule.* The performance goal under which compensation is paid must be established by a compensation committee comprised solely of two or more outside directors. A director is an outside director if the director—

(A) Is not a current employee of the publicly held corporation;

(B) Is not a former employee of the publicly held corporation who receives compensation for prior services (other than benefits under a tax-qualified retirement plan) during the taxable year;

(C) Has not been an officer of the publicly held corporation; and

(D) Does not receive remuneration from the publicly held corporation, either directly or indirectly, in any capacity other than as a director. For this purpose, remuneration includes any payment in exchange for goods or services.

(ii) *Remuneration received.* For purposes of this paragraph (e)(3), remuneration is received, directly or indirectly, by a director in each of the following circumstances:

(A) If remuneration is paid, directly or indirectly, to the director personally or to an entity in which the director has a beneficial ownership interest of greater than 50 percent. For this purpose, remuneration is considered paid when actually paid (and throughout the remainder of that taxable year of the corporation) and, if earlier, throughout the period when a contract or agreement to pay remuneration is outstanding.

(B) If remuneration, other than de minimis remuneration, was paid by the publicly held corporation in its preceding taxable year to an entity in which the director has a beneficial ownership interest of at least 5 percent but not more than 50 percent. For this purpose, remuneration is considered paid when actually paid or, if earlier, when the publicly held corporation becomes liable to pay it.

(C) If remuneration, other than de minimis remuneration, was paid by the publicly held corporation in its preceding taxable year to an entity by which the director is employed or self-employed other than as a director. For this purpose, remuneration is considered paid when actually paid or, if earlier, when the publicly held corporation becomes liable to pay it.

(iii) *De minimis remuneration*—(A) *In general.* For purposes of paragraphs (e)(3)(ii)(B) and (C) of this section, remuneration that was paid by the publicly held corporation in its preceding taxable year to an entity is de minimis if payments to the entity did not exceed 5 percent of the gross revenue of the entity for its taxable year ending with or within that preceding taxable year of the publicly held corporation.

(B) *Remuneration for personal services and substantial owners.* Notwithstanding paragraph (e)(3)(iii)(A) of this section, remuneration in excess of $60,000 is not de minimis if the remuneration is paid to an entity described in paragraph (e)(3)(ii)(B) of this section, or is paid for personal services to an entity described in paragraph (e)(3)(ii)(C) of this section.

(iv) *Remuneration for personal services.* For purposes of paragraph (e)(3)(iii)(B) of this section, remuneration from a publicly held corporation is for personal services if—

(A) The remuneration is paid to an entity for personal or professional services, consisting of legal, accounting, investment banking, and management consulting services (and other similar services that may be specified by the Commissioner in revenue rulings, notices, or other guidance published in the Internal Revenue Bulletin), performed for the publicly held corporation, and the remuneration is not for services that are incidental to the purchase of goods or to the purchase of services that are not personal services; and

(B) The director performs significant services (whether or not as an employee) for the corporation, division, or similar organization (within the entity) that actually provides the services described in paragraph (e)(3)(iv)(A) of this section to the publicly held corporation, or more than 50 percent of the entity's gross revenues (for the entity's preceding taxable year) are derived from that corporation, subsidiary, or similar organization.

(v) *Entity defined.* For purposes of this paragraph (e)(3), entity means an organization that is a sole proprietorship, trust, estate, partnership, or corporation. The term also includes an affiliated group of corporations as defined in section 1504 (determined without regard to section 1504(b)) and a group of organizations that would be an affiliated group but for the fact that one or more of the organizations are not incorporated. However, the aggregation rules referred to in the preceding sentence do not apply for purposes of determining whether a director has a beneficial ownership interest of at least 5 percent or greater than 50 percent.

(vi) *Employees and former officers.* Whether a director is an employee or a former officer is determined on the basis of the facts at the time that the individual is serving as a director on the compensation committee. Thus, a director is not precluded from being an outside director solely because the director is a former officer of a corporation that previously was an affiliated corporation of the publicly held corporation. For example, a director of a parent corporation of an affiliated group is not precluded from being an outside director solely because that director is a former officer of an affiliated subsidiary that was spun off or liquidated. However, an outside director would no longer be an outside director if a corporation in which the director was previously an officer became an affiliated corporation of the publicly held corporation.

(vii) *Officer.* Solely for purposes of this paragraph (e)(3), *officer* means an administrative executive who is or was in regular and continued service. The term implies continuity of service and excludes those employed for a special and single transaction. An individual who merely has (or had) the title of officer but not the authority of an officer is not considered an officer. The determination of whether an individual is or was an officer is based on all of the facts and circumstances in the particular case, including without limitation the source of the individual's authority, the term for which the individual is elected or appointed, and the nature and extent of the individual's duties.

(viii) *Members of affiliated groups.* For purposes of this paragraph (e)(3), the outside directors of the publicly held member of an affiliated group are treated as the outside directors of all members of the affiliated group.

(ix) *Examples.* This paragraph (e)(3) may be illustrated by the following examples:

Example 1. Corporations X and Y are members of an affiliated group of corporations as defined in section 1504, until July 1, 1994, when Y is sold to another group. Prior to the sale, A served as an officer of Corporation Y. After July 1, 1994, A is not treated as a former officer of Corporation X by reason of having been an officer of Y.

Example 2. Corporation Z, a calendar-year taxpayer, uses the services of a law firm by which B is employed, but in which B has a less-than-5-percent ownership interest. The law firm reports income on a July 1 to June 30 basis. Corporation Z appoints B to serve on its compensation committee for calendar year 1998 after determining that, in calendar year 1997, it did not become liable to the law firm for remuneration exceeding the lesser of $60,000 or five percent of the law firm's gross revenue (calculated for the year ending June 30, 1997). On October 1, 1998, Corporation Z becomes liable to pay remuneration of $50,000 to the law firm on June 30, 1999. For the year ending June 30, 1998, the law firm's gross revenue was less than $1 million. Thus, in calendar year 1999, B is not an outside director. However, B may satisfy the requirements for an outside director in calendar year 2000, if, in calendar year 1999, Corporation Z does not become liable to the law firm for additional remuneration. This is because the remuneration actually paid on June 30, 1999 was considered paid on October 1, 1998 under paragraph (e)(3)(ii)(C) of this section.

Example 3. Corporation Z, a publicly held corporation, purchases goods from Corporation A. D, an executive and less- than-5-percent owner of Corporation A, sits on the board of directors of Corporation Z and on its compensation committee. For 1997, Corporation Z obtains representations to the effect that D is not eligible for any commission for D's sales to Corporation Z and that, for purposes of determining D's compensation for 1997, Corporation A's sales to Corporation Z are not otherwise treated differently than sales to other customers of Corporation A (including its affiliates, if any) or are irrelevant. In addition, Corporation Z has no reason to believe that these representations are inaccurate or that it is otherwise paying remuneration indirectly to D personally. Thus, in 1997, no remuneration is considered paid by Corporation Z indirectly to D personally under paragraph (e)(3)(ii)(A) of this section.

Example 4. (i) Corporation W, a publicly held corporation, purchases goods from Corporation T. C, an executive and less- than-5-percent owner of Corporation T, sits on the board of directors of Corporation W and on its compensation committee. Corporation T develops a new product and agrees on January 1, 1998 to pay C a bonus of $500,000 if Corporation W contracts to purchase the product. Even if Corporation W purchases the new product, sales to Corporation W will represent less than 5 percent of Corporation T's gross revenues. In 1999, Corporation W contracts to purchase the new product and, in 2000, C receives the $500,000 bonus from Corporation T. In 1998, 1999, and 2000, Corporation W does not obtain any representations relating to indirect remuneration to C personally (such as the representations described in *Example 3*).

(ii) Thus, in 1998, 1999, and 2000, remuneration is considered paid by Corporation W indirectly to C personally under paragraph (e)(3)(ii)(A) of this section. Accordingly, in 1998, 1999, and 2000, C is not an outside director of Corporation W. The result would have been the same if Corporation W had obtained appropriate representations but nevertheless had reason to believe that it was paying remuneration indirectly to C personally.

Example 5. Corporation R, a publicly held corporation, purchases utility service from Corporation Q, a public utility. The chief executive officer, and less-than-5-percent owner, of Corporation Q is a director of Corporation R. Corporation R pays Corporation Q more than $60,000 per year for the utility service, but less than 5 percent of Corporation Q's gross revenues. Because utility services are not personal services, the fees paid are not subject to the $60,000 de minimis rule for remuneration for personal services within the meaning of paragraph (e)(3)(iii)(B) of this section. Thus, the chief executive officer qualifies as an outside director of Corporation R, unless disqualified on some other basis.

Example 6. Corporation A, a publicly held corporation, purchases management consulting services from Division S of Conglomerate P. The chief financial officer of Division S is a director of Corporation A. Corporation A pays more than $60,000 per year for the management consulting services, but less than 5 percent of Conglomerate P's gross revenues. Because management consulting services are personal services within the meaning of paragraph (e)(3)(iv)(A) of this section, and the chief financial officer performs significant services for Division S, the fees paid are subject to the $60,000 de minimis rule as remuneration for personal services. Thus, the chief financial officer does not qualify as an outside director of Corporation A.

Example 7. The facts are the same as in *Example 6*, except that the chief executive officer, and less-than-5-percent owner, of the parent company of Conglomerate P is a director of Corporation A and does not perform significant services for Division S. If the gross revenues of Division S do not constitute more than 50 percent of the gross revenues of Conglomerate P for P's preceding taxable year, the chief executive officer will qualify as an outside director of Corporation A, unless disqualified on some other basis.

(4) *Shareholder approval requirement*—(i) *General rule.* The material terms of the performance goal under which the compensation is to be paid must be disclosed to and subsequently approved by the shareholders of the publicly held corporation before the compensation is paid. The requirements of this paragraph (e)(4) are not satisfied if the compensation would be paid regardless of whether the material terms are approved by shareholders. The material terms include the employees eligible to receive compensation; a description of the business criteria on which the performance goal is based; and either the maximum amount of compensation

that could be paid to any employee or the formula used to calculate the amount of compensation to be paid to the employee if the performance goal is attained (except that, in the case of a formula based, in whole or in part, on a percentage of salary or base pay, the maximum dollar amount of compensation that could be paid to the employee must be disclosed).

(ii) *Eligible employees.* Disclosure of the employees eligible to receive compensation need not be so specific as to identify the particular individuals by name. A general description of the class of eligible employees by title or class is sufficient, such as the chief executive officer and vice presidents, or all salaried employees, all executive officers, or all key employees.

(iii) *Description of business criteria*—(A) *In general.* Disclosure of the business criteria on which the performance goal is based need not include the specific targets that must be satisfied under the performance goal. For example, if a bonus plan provides that a bonus will be paid if earnings per share increase by 10 percent, the 10-percent figure is a target that need not be disclosed to shareholders. However, in that case, disclosure must be made that the bonus plan is based on an earnings-per-share business criterion. In the case of a plan under which employees may be granted stock options or stock appreciation rights, no specific description of the business criteria is required if the grants or awards are based on a stock price that is no less than current fair market value.

(B) *Disclosure of confidential information.* The requirements of this paragraph (e)(4) may be satisfied even though information that otherwise would be a material term of a performance goal is not disclosed to shareholders, provided that the compensation committee determines that the information is confidential commercial or business information, the disclosure of which would have an adverse effect on the publicly held corporation. Whether disclosure would adversely affect the corporation is determined on the basis of the facts and circumstances. If the compensation committee makes such a determination, the disclosure to shareholders must state the compensation committee's belief that the information is confidential commercial or business information, the disclosure of which would adversely affect the company. In addition, the ability not to disclose confidential information does not eliminate the requirement that disclosure be made of the maximum amount of compensation that is payable to an individual under a performance goal. Confidential information does not include the identity of an executive or the class of executives to which a performance goal applies or the amount of compensation that is payable if the goal is satisfied.

(iv) *Description of compensation.* Disclosure as to the compensation payable under a performance goal must be specific enough so that shareholders can determine the maximum amount of compensation that could be paid to any employee during a specified period. If the terms of the performance goal do not provide for a maximum dollar amount, the disclosure must include the formula under which the compensation would be calculated. Thus, for example, if compensation attributable to the exercise of stock options is equal to the difference in the exercise price and the current value of the stock, disclosure would be required of the maximum number of shares for which grants may be made to any employee and the exercise price of those options (e.g., fair market value on date of grant). In that case, shareholders could calculate the maximum amount of compensation that would be attributable to the exercise of options on the basis of their assumptions as to the future stock price.

(v) *Disclosure requirements of the Securities and Exchange Commission.* To the extent not otherwise specifically provided in this paragraph (e)(4), whether the material terms of a performance goal are adequately disclosed to shareholders is determined under the same standards as apply under the Exchange Act.

(vi) *Frequency of disclosure.* Once the material terms of a performance goal are disclosed to and approved by shareholders, no additional disclosure or approval is required unless the compensation committee changes the material terms of the performance goal. If, however, the compensation committee has authority to change the targets under a performance goal after shareholder approval of the goal, material terms of the performance goal must be disclosed to and reapproved by shareholders no later than the first shareholder meeting that occurs in the fifth year following the year in which shareholders previously approved the performance goal.

(vii) *Shareholder vote.* For purposes of this paragraph (e)(4), the material terms of a performance goal are approved by shareholders if, in a separate vote, a majority of the votes cast on the issue (including abstentions to the extent abstentions are counted as voting under applicable state law) are cast in favor of approval.

(viii) *Members of affiliated group.* For purposes of this paragraph (e)(4), the shareholders of the publicly held member of the affiliated group are treated as the shareholders of all members of the affiliated group.

(ix) *Examples.* This paragraph (e)(4) may be illustrated by the following examples:

Example 1. Corporation X adopts a plan that will pay a specified class of its executives an annual cash bonus based on the overall increase in corporate sales during the year. Under the terms of the plan, the cash bonus of each executive equals $100,000 multiplied by the number of percentage points by which sales increase in the current year when compared to the prior year. Corporation X discloses to its shareholders prior to the vote both the class of executives eligible to receive awards and the annual formula of $100,000 multiplied by the percentage increase in sales. This disclosure meets the requirements of this paragraph (e)(4). Because the compensation committee does not have the authority to establish a different target under the plan, Corporation X need not redisclose to its shareholders and obtain their reapproval of the material terms of the plan until those material terms are changed.

Example 2. The facts are the same as in *Example 1* except that Corporation X discloses only that bonuses will be paid on the basis of the annual increase in sales. This disclosure does not meet the requirements of this paragraph (e)(4) because it does not include the formula for calculating the compensation or a maximum amount of compensation to be paid if the performance goal is satisfied.

Example 3. Corporation Y adopts an incentive compensation plan in 1995 that will pay a specified class of its executives a bonus every 3 years based on the following 3 factors: increases in earnings per share, reduction in costs for specified divisions, and increases in sales by specified divisions. The bonus is payable in cash or in Corporation Y stock, at the option of the executive. Under the terms of the plan, prior to the beginning of each 3-year period, the compensation committee determines the specific targets under each of the three factors (*i.e.*, the amount of the increase in earnings per share, the reduction in costs, and the amount of sales) that must be met in order for the executives to receive a bonus. Under the terms of the plan, the compensation committee retains the discretion to determine whether a bonus will be paid under any one of the goals. The terms of the plan also specify that no executive may receive a bonus in excess of $1,500,000 for any 3-year period. To satisfy the requirements of this paragraph (e)(4), Corporation Y obtains shareholder approval of the plan at its 1995 annual shareholder meeting. In the proxy statement issued to shareholders, Corporation Y need not disclose to shareholders the specific targets that are set by the compensation committee. However, Corporation Y must disclose that bonuses are paid on the basis of earnings per share, reductions in costs, and increases in sales of specified divisions. Corporation Y also must disclose the maximum amount of compensation that any executive may receive under the plan is $1,500,000 per 3-year period. Unless changes in the material terms of the plan are made earlier, Corporation Y need not disclose the material terms of the plan to the shareholders and obtain their reapproval until the first shareholders' meeting held in 2000.

Example 4. The same facts as in *Example 3*, except that prior to the beginning of the second 3-year period, the compensation committee determines that different targets will be set under the plan for that period with regard to all three of the performance criteria (*i.e.*, earnings per share, reductions in costs, and increases in sales). In addition, the compensation committee raises the maximum dollar amount that can be paid under the plan for a 3-year period to $2,000,000. The increase in the maximum dollar amount of compensation under the plan is a changed material term. Thus, to satisfy the requirements of this paragraph (e)(4), Corporation Y must disclose to and obtain approval by the shareholders of the plan as amended.

Example 5. In 1998, Corporation Z establishes a plan under which a specified group of executives will receive a cash bonus not to exceed $750,000 each if a new product that has been in development is completed and ready for sale to customers by January 1, 2000. Although the completion of the new product is a material term of the performance goal under this paragraph (e)(4), the compensation committee determines that the disclosure to shareholders of the performance goal would adversely affect Corporation Z because its competitors would be made aware of the existence and timing of its new product. In this case, the requirements of this paragraph (e)(4) are satisfied if all other material terms, including the maximum amount of compensation, are disclosed and the disclosure affirmatively states that the terms of the performance goal are not being disclosed because the compensation committee has determined that those terms include confidential information, the disclosure of which would adversely affect Corporation Z.

(5) *Compensation committee certification.* The compensation committee must certify in writing prior to payment of the compensation that the performance goals and any other material terms were in fact satisfied. For this purpose, approved minutes of the compensation committee meeting in which the certification is made are treated as a written certification. Certification by the compensation committee is not required for compensation that is attributable solely to the increase in the value of the stock of the publicly held corporation.

(f) *Companies that become publicly held, spinoffs, and similar transactions*—(1) *In general.* In the case of a corporation that was not a publicly held corporation and then becomes a publicly held corporation, the deduction limit of paragraph (b) of this section does not apply to any remuneration paid pursuant to a compensation plan or agreement that existed during the period in which the corporation was not publicly held. However, in the case of such a corporation that becomes publicly held in connection with an initial public offering, this relief applies only to the extent that the prospectus accompanying the initial public offering disclosed information concerning those plans or agreements that satisfied all applicable securities laws then in effect. In accordance with paragraph (c)(1)(ii) of this section, a corporation that is a member of an affiliated group that includes a publicly held corporation is considered publicly held and, therefore, cannot rely on this paragraph (f)(1).

(2) *Reliance period.* Paragraph (f)(1) of this section may be relied upon until the earliest of—

(i) The expiration of the plan or agreement;

(ii) The material modification of the plan or agreement, within the meaning of paragraph (h)(1)(iii) of this section;

(iii) The issuance of all employer stock and other compensation that has been allocated under the plan; or

(iv) The first meeting of shareholders at which directors are to be elected that occurs after the close of the third calendar year following the calendar year in which the initial public offering occurs or, in the case of a privately held corporation that becomes publicly held without an initial public offering, the first calendar year following the calendar year in which the corporation becomes publicly held.

(3) *Stock-based compensation.* Paragraph (f)(1) of this section will apply to any compensation received pursuant to the exercise of a stock option or stock appreciation right, or the substantial vesting of restricted property, granted under a plan or agreement described in paragraph (f)(1) of this section if the grant occurs on or before the earliest of the events specified in paragraph (f)(2) of this section.

(4) *Subsidiaries that become separate publicly held corporations*—(i) *In general.* If a subsidiary that is a member of the affiliated group described in paragraph (c)(1)(ii) of this section becomes a separate publicly held corporation (whether by spinoff or otherwise), any remuneration paid to covered employees of the new publicly held corporation will satisfy the exception for performance-based compensation described in paragraph (e) of this section if the conditions in either paragraph (f)(4)(ii) or (f)(4)(iii) of this section are satisfied.

(ii) *Prior establishment and approval.* Remuneration satisfies the requirements of this paragraph (f)(4)(ii) if the remuneration satisfies the requirements for performance-based compensation set forth in paragraphs (e)(2), (e)(3), and (e)(4) of this section (by application of paragraphs (e)(3)(viii) and (e)(4)(viii) of this section) before the corporation becomes a separate publicly held corporation, and the certification required by paragraph (e)(5) of this section is made by the compensation committee of the new publicly held corporation (but if the performance goals are attained before the corporation becomes a separate publicly held corporation, the certification may be made by the compensation committee referred to in paragraph (e)(3)(viii) of this section before it becomes a separate publicly held corporation). Thus, this paragraph (f)(4)(ii) requires that the outside directors and shareholders (within the meaning of paragraphs (e)(3)(viii) and (e)(4)(viii) of this section) of the corporation before it becomes a separate publicly held corporation establish and approve, respectively, the performance-based compensation for the covered employees of the new publicly held corporation in accordance with paragraphs (e)(3) and (e)(4) of this section.

(iii) *Transition period.* Remuneration satisfies the requirements of this paragraph (f)(4)(iii) if the remuneration satisfies all of the requirements of paragraphs (e)(2), (e)(3), and (e)(5) of this section. The outside directors (within the meaning of paragraph (e)(3)(viii) of this section) of the corporation before it becomes a separate publicly held corporation, or the outside directors of the new publicly held corporation, may establish and administer the performance goals for the covered employees of the new publicly held corporation for purposes of satisfying the requirements of paragraphs (e)(2) and (e)(3) of this section. The certification required by paragraph (e)(5) of this section must be made by the compensation committee of the new publicly held corporation. However, a taxpayer may rely on this paragraph (f)(4)(iii) to satisfy the requirements of paragraph (e) of this section only for compensation paid, or stock options, stock appreciation rights, or restricted property granted, prior to the first regularly scheduled meeting of the shareholders of the new publicly held corporation that occurs more than 12 months after the date the corporation becomes a separate publicly held corporation. Compensation paid, or stock options, stock appreciation rights, or restricted property granted, on or after the date of that meeting of shareholders must satisfy all requirements of paragraph (e) of this section, including the shareholder approval requirement of paragraph (e)(4) of this section, in order to satisfy the requirements for performance-based compensation.

(5) *Example.* The following example illustrates the application of paragraph (f)(4)(ii) of this section:

Example. Corporation P, which is publicly held, decides to spin off Corporation S, a wholly owned subsidiary of Corporation P. After the spinoff, Corporation S will be a separate publicly held corporation. Before the spinoff, the compensation committee of Corporation P, pursuant to paragraph (e)(3)(viii) of this section, establishes a bonus plan for the executives of Corporation S that provides for bonuses payable after the spinoff and that satisfies the requirements of paragraph (e)(2) of this section. If, pursuant to paragraph (e)(4)(viii) of this section, the shareholders of Corporation P approve the plan prior to the spinoff, that approval will satisfy the requirements of paragraph (e)(4) of this section with respect to compensation paid pursuant to the bonus plan after the spinoff. However, the compensation committee of Corporation S will be required to certify that the goals are satisfied prior to the payment of the bonuses in order for the bonuses to be considered performance-based compensation.

(g) *Coordination with disallowed excess parachute payments.* The $1,000,000 limitation in paragraph (b) of this section is reduced (but not below zero) by the amount (if any) that would have been included in the compensation of the covered employee for the taxable year but for being disallowed by reason of section 280G. For example, assume that during a taxable year a corporation pays $1,500,000 to a covered employee and no portion satisfies the exception in paragraph (d) of this section for commissions or paragraph (e) of this section for qualified performance-based compensation. Of the $1,500,000, $600,000 is an excess parachute payment, as defined in section 280G(b)(1) and is disallowed by reason of that section. Because the excess parachute payment reduces the limitation of paragraph (b) of this section, the corporation can deduct $400,000, and $500,000 of the otherwise deductible amount is nondeductible by reason of section 162(m).

(h) *Transition rules*—(1) *Compensation payable under a written binding contract which was in effect on February 17, 1993*—(i) *General rule.* The deduction limit of paragraph (b) of this section does not apply to any compensation payable under a written binding contract that was in effect on February 17, 1993. The preceding sentence does not apply unless, under applicable state law, the corporation is obligated to pay the compensation if the employee performs services. However, the deduction limit of paragraph (b) of this section does apply to a contract that is renewed after February 17, 1993. A written binding contract that is terminable or cancelable by the corporation after February 17, 1993, without the employee's consent is treated as a new contract as of the date that any such termination or cancellation, if made, would be effective. Thus, for example, if the terms of a contract provide that it will be automatically renewed as of a certain date unless either the corporation or the employee gives notice of termination of the contract at least 30 days before that date, the contract is treated as a new contract as of the date that termination would be effective if that notice were given. Similarly, for example, if the terms of a contract provide that the contract will be terminated or canceled as of a certain date unless either the corporation or the employee elects to renew within 30 days of that date, the contract is treated as renewed by the corporation as of that date. Alternatively, if the corporation will remain legally obligated by the terms of a contract beyond a certain date at the sole discretion of the employee, the contract will not be treated as a new contract as of that date if the employee exercises the discretion to keep the corporation bound to the contract. A contract is not treated as terminable or cancelable if it can be terminated or canceled only by terminating the employment relationship of the employee.

(ii) *Compensation payable under a plan or arrangement.* If a compensation plan or arrangement meets the requirements of paragraph (h)(1)(i) of this section, the compensation paid to an employee pursuant to the plan or arrangement will not be subject to the deduction limit of paragraph (b) of this section even though the employee was not eligible to participate in the plan as of February 17, 1993. However, the preceding sentence does not apply unless the employee was employed on February 17, 1993, by the corporation that maintained the plan or arrangement, or the employee had the right to participate in the plan or arrangement under a written binding contract as of that date.

(iii) *Material modifications.* (A) Paragraph (h)(1)(i) of this section will not apply to any written binding contract that is materially modified. A material modification occurs when the contract is amended to increase the amount of compensation payable to the employee. If a binding written contract is materially modified, it is treated as a new contract entered into as of the date of the material modification. Thus, amounts received by an employee under the contract prior to a material modification are not affected, but amounts received subsequent to the material modification are not treated as paid under a binding, written contract described in paragraph (h)(1)(i) of this section.

(B) A modification of the contract that accelerates the payment of compensation will be treated as a material modification unless the amount of compensation paid is discounted to reasonably reflect the time value of money. If the contract is modified to defer the payment of compensation, any compensation paid in excess of the amount that was originally payable to the employee under the contract will not be treated as a material modification if the additional amount is based on either a reasonable rate of interest or one or more predetermined actual investments (whether or not assets associated with the amount originally owed are actually invested therein) such that the amount payable by the employer at the later date will be based on the actual rate of return of the specific investment (including any decrease as well as any increase in the value of the investment).

(C) The adoption of a supplemental contract or agreement that provides for increased compensation, or the payment of additional compensation, is a material modification of a binding, written contract where the facts and circumstances show that the additional compensation is paid on the basis of substantially the same elements or conditions as the compensation that is otherwise paid under the written binding contract. However, a material modification of a written binding contract does not include a supplemental payment that is equal to or less than a reasonable cost-of-living increase over the payment made in the preceding year under that written binding contract. In addition, a supplemental payment of compensation that satisfies the requirements of qualified performance-based compensation in paragraph (e) of this section will not be treated as a material modification.

(iv) Examples. The following examples illustrate the exception of this paragraph (h)(1):

Example 1. Corporation X executed a 3-year compensation arrangement with C on February 15, 1993, that constitutes a written binding contract under applicable state law. The terms of the arrangement provide for automatic extension after the 3-year term for additional 1-year periods, unless the corporation exercises its option to terminate the arrangement within 30 days of the end of the 3-year term or, thereafter, within 30 days before each anniversary date. Termination of the compensation arrangement does not require the termination of C's employment relationship with Corporation X. Unless terminated, the arrangement is treated as renewed on February 15, 1996, and the deduction limit of paragraph (b) of this section applies to payments under the arrangement after that date.

Example 2. Corporation Y executed a 5-year employment agreement with B on January 1, 1992, providing for a salary of $900,000 per year. Assume that this agreement constitutes a written binding contract under applicable state law. In 1992 and 1993, B receives the salary of $900,000 per year. In 1994, Corporation Y increases B's salary with a payment of $20,000. The $20,000 supplemental payment does not constitute a material modification of the written binding contract because the $20,000 payment is less than or equal to a reasonable cost-of-living increase from 1993. However, the $20,000 supplemental payment is subject to the limitation in paragraph (b) of this section. On January 1, 1995, Corporation Y increases B's salary to $1,200,000. The $280,000 supplemental payment is a material modification of the written binding contract because the additional compensation is paid on the basis of substantially the same elements or conditions as the compensation that is otherwise paid under the written binding contract and it is greater than a reasonable, annual cost-of-living increase. Because the written binding contract is materially modified as of January 1, 1995, all compensation paid to B in 1995 and thereafter is subject to the deduction limitation of section 162(m).

Example 3. Assume the same facts as in *Example 2*, except that instead of an increase in salary, B receives a restricted stock grant subject to B's continued employment for the balance of the contract. The restricted stock grant is not a material modification of the binding written contract because any additional compensation paid to B under the grant is not paid on the basis of substantially the same elements and conditions as B's salary because it is based both on the stock price and B's continued service. However, compensation attributable to the restricted stock grant is subject to the deduction limitation of section 162(m).

(2) *Special transition rule for outside directors.* A director who is a disinterested director is treated as satisfying the requirements of an outside director under paragraph (e)(3) of this section until the first meeting of shareholders at which directors are to be elected that occurs on or after January 1, 1996. For purposes of this paragraph (h)(2) and paragraph (h)(3) of this section, a director is a disinterested director if the director is disinterested within the meaning of Rule 16b–3(c)(2)(i), 17 CFR 240.16b–3(c)(2)(i), under the Exchange Act (including the provisions of Rule 16b–3(d)(3), as in effect on April 30, 1991).

(3) *Special transition rule for previously-approved plans—(i) In general.* Any compensation paid under a plan or agreement approved by shareholders before December 20, 1993, is treated as satisfying the requirements of paragraphs (e)(3) and (e)(4) of this section, provided that the directors administering the plan or agreement are disinterested directors and the plan was approved by shareholders in a manner consistent with Rule 16b–3(b), 17 CFR 240.16b–3(b), under the Exchange Act or Rule 16b–3(a), 17 CFR 240.16b–3(a) (as contained in 17 CFR part 240 revised April 1, 1990). In addition, for purposes of satisfying the requirements of paragraph (e)(2)(vi) of this section, a plan or agreement is treated as stating a maximum number of shares with respect to which an option or right may be granted to any employee if the plan or agreement that was approved by the shareholders provided for an aggregate limit, consistent with Rule 16b–3(b), 17

CFR 250.16b–3(b), on the shares of employer stock with respect to which awards may be made under the plan or agreement.

(ii) *Reliance period.* The transition rule provided in this paragraph (h)(3) shall continue and may be relied upon until the earliest of—

(A) The expiration or material modification of the plan or agreement;

(B) The issuance of all employer stock and other compensation that has been allocated under the plan; or

(C) The first meeting of shareholders at which directors are to be elected that occurs after December 31, 1996.

(iii) *Stock-based compensation.* This paragraph (h)(3) will apply to any compensation received pursuant to the exercise of a stock option or stock appreciation right, or the substantial vesting of restricted property, granted under a plan or agreement described in paragraph (h)(3)(i) of this section if the grant occurs on or before the earliest of the events specified in paragraph (h)(3)(ii) of this section.

(iv) *Example.* The following example illustrates the application of this paragraph (h)(3):

Example. Corporation Z adopted a stock option plan in 1991. Pursuant to Rule 16b–3 under the Exchange Act, the stock option plan has been administered by disinterested directors and was approved by Corporation Z shareholders. Under the terms of the plan, shareholder approval is not required again until 2001. In addition, the terms of the stock option plan include an aggregate limit on the number of shares available under the plan. Option grants under the Corporation Z plan are made with an exercise price equal to or greater than the fair market value of Corporation Z stock. Compensation attributable to the exercise of options that are granted under the plan before the earliest of the dates specified in paragraph (h)(3)(ii) of this section will be treated as satisfying the requirements of paragraph (e) of this section for qualified performance-based compensation, regardless of when the options are exercised.

(i) [Reserved]

(j) *Effective date*—(1) *In general.* Section 162(m) and this section apply to compensation that is otherwise deductible by the corporation in a taxable year beginning on or after January 1, 1994.

(2) *Delayed effective date for certain provisions*—(i) *Date on which remuneration is considered paid.* Notwithstanding paragraph (j)(1) of this section, the rules in the second sentence of each of paragraphs (e)(3)(ii)(A), (e)(3)(ii)(B), and (e)(3)(ii)(C) of this section for determining the date or dates on which remuneration is considered paid to a director are effective for taxable years beginning on or after January 1, 1995. Prior to those taxable years, taxpayers must follow the rules in paragraphs (e)(3)(ii)(A), (e)(3)(ii)(B), and (e)(3)(ii)(C) of this section or another reasonable, good faith interpretation of section 162(m) with respect to the date or dates on which remuneration is considered paid to a director.

(ii) *Separate treatment of publicly held subsidiaries.* Notwithstanding paragraph (j)(1) of this section, the rule in paragraph (c)(1)(ii) of this section that treats publicly held subsidiaries as separately subject to section 162(m) is effective as of the first regularly scheduled meeting of the shareholders of the publicly held subsidiary that occurs more than 12 months after December 2, 1994. The rule for stock-based compensation set forth in paragraph (f)(3) of this section will apply for this purpose, except that the grant must occur before the shareholder meeting specified in this paragraph (j)(2)(ii). Taxpayers may choose to rely on the rule referred to in the first sentence of this paragraph (j)(2)(ii) for the period prior to the effective date of the rule.

(iii) *Subsidiaries that become separate publicly held corporations.* Notwithstanding paragraph (j)(1) of this section, if a subsidiary of a publicly held corporation becomes a separate publicly held corporation as described in paragraph (f)(4)(i) of this section, then, for the duration of the reliance period described in paragraph (f)(2) of this section, the rules of paragraph (f)(1) of this section are treated as applying (and the rules of paragraph (f)(4) of this section do not apply) to remuneration paid to covered employees of that new publicly held corporation pursuant to a plan or agreement that existed prior to December 2, 1994, provided that the treatment of that remuneration as performance-based is in accordance with a reasonable, good faith interpretation of section 162(m). However, if remuneration is paid to covered employees of that new publicly held corporation pursuant to a plan or agreement that existed prior to December 2, 1994, but that remuneration is not performance-based under a reasonable, good faith interpretation of section 162(m), the rules of paragraph (f)(1) of this section will be treated as applying only until the first regularly scheduled meeting of shareholders that occurs more than 12 months after December 2, 1994. The rules of paragraph (f)(4) of this section will apply as of that first regularly scheduled meeting. The rule for stock-based compensation set forth in paragraph (f)(3) of this section will apply for purposes of this paragraph (j)(2)(iii), except that the grant must occur before the shareholder meeting specified in the preceding sentence if the remuneration is not performance-based under a reasonable, good faith interpretation of section 162(m). Taxpayers may choose to rely on the rules of paragraph (f)(4) of this section for the period prior to the applicable effective date referred to in the first or second sentence of this paragraph (j)(2)(iii).

(iv) *Bonus pools.* Notwithstanding paragraph (j)(1) of this section, the rules in paragraph (e)(2)(iii)(A) that limit the sum of individual percentages of a bonus pool to 100 percent will not apply to remuneration paid before January 1, 2001, based on performance in any performance period that began prior to December 20, 1995.

(v) *Compensation based on a percentage of salary or base pay.* Notwithstanding paragraph (j)(1) of this section, the requirement in paragraph (e)(4)(i) of this section that, in the case of certain formulas based on a percentage of salary or base pay, a corporation disclose to shareholders the maximum dollar amount of compensation that could be paid to the employee, will apply only to plans approved by shareholders after April 30, 1995.

[T.D. 8650, 60 FR 65537, Dec. 20, 1995, as amended at 61 FR 4350, Feb. 6, 1996]

§ 1.162–28 Allocation of costs to lobbying activities.

(a) *Introduction*—(1) *In general.* Section 162(e)(1) denies a deduction for certain amounts paid or incurred in connection with activities described in section 162(e)(1) (A) and (D) (*lobbying activities*). To determine the nondeductible amount, a taxpayer must allocate costs to lobbying activities. This section describes costs that must be allocated to lobbying activities and prescribes rules permitting a taxpayer to use a reasonable method to allocate those costs. This section does not apply to taxpayers subject to section 162(e)(5)(A). In addition, this section does not apply for purposes of sections 4911 and 4945 and the regulations thereunder.

(2) *Recordkeeping.* For recordkeeping requirements, see section 6001 and the regulations thereunder.

(b) *Reasonable method of allocating costs*—(1) *In general.* A taxpayer must use a reasonable method to allocate the costs described in paragraph (c) of this section to lobbying activities. A method is not reasonable unless it is applied consistently and is consistent with the special rules in paragraph (g) of this section. Except as provided in paragraph (b)(2) of this section, reasonable methods of allocating costs to lobbying activities include (but are not limited to)—

(i) The ratio method described in paragraph (d) of this section;

(ii) The gross-up method described in paragraph (e) of this section; and

(iii) A method that applies the principles of section 263A and the regulations thereunder (see paragraph (f) of this section).

(2) *Taxpayers not permitted to use certain methods.* A taxpayer (other than one subject to section 6033(e)) that does not pay or incur reasonable labor costs for persons engaged in lobbying activities may not use the gross-up method. For example, a partnership or sole proprietorship in which the lobbying activities are performed by the owners who do not receive a salary or guaranteed payment for services does not pay or incur reasonable labor costs for persons engaged in those activities and may not use the gross-up method.

(c) *Costs allocable to lobbying activities*—(1) *In general.* Costs properly allocable to lobbying activities include labor costs and general and administrative costs.

(2) *Labor costs.* For each taxable year, labor costs include costs attributable to full-time, part-time, and contract

employees. Labor costs include all elements of compensation, such as basic compensation, overtime pay, vacation pay, holiday pay, sick leave pay, payroll taxes, pension costs, employee benefits, and payments to a supplemental unemployment benefit plan.

(3) *General and administrative costs.* For each taxable year, general and administrative costs include depreciation, rent, utilities, insurance, maintenance costs, security costs, and other administrative department costs (for example, payroll, personnel, and accounting).

(d) *Ratio method*—(1) *In general.* Under the ratio method described in this paragraph (d), a taxpayer allocates to lobbying activities the sum of its third-party costs (as defined in paragraph (d)(5) of this section) allocable to lobbying activities and the costs determined by using the following formula:

$$\frac{\text{Lobbying labor hours}}{\text{Total labor hours}} \times \begin{array}{l}\text{Total costs}\\ \text{of operations.}\end{array}$$

(2) *Lobbying labor hours.* Lobbying labor hours are the hours that a taxpayer's personnel spend on lobbying activities during the taxable year. A taxpayer may use any reasonable method to determine the number of labor hours spent on lobbying activities and may use the de minimis rule of paragraph (g)(1) of this section. A taxpayer may treat as zero the lobbying labor hours of personnel engaged in secretarial, clerical, support, and other administrative activities (as opposed to activities involving significant judgment with respect to lobbying activities). Thus, for example, the hours spent on lobbying activities by para-professionals and analysts may not be treated as zero.

(3) *Total labor hours.* Total labor hours means the total number of hours that a taxpayer's personnel spend on a taxpayer's trade or business during the taxable year. A taxpayer may make reasonable assumptions concerning total hours spent by personnel on the taxpayer's trade or business. For example, it may be reasonable, based on all the facts and circumstances, to assume that all full-time personnel spend 1,800 hours per year on a taxpayer's trade or business. If, under paragraph (d)(2) of this section, a taxpayer treats as zero the lobbying labor hours of personnel engaged in secretarial, clerical, support, and other administrative activities, the taxpayer must also treat as zero the total labor hours of all personnel engaged in those activities.

(4) *Total costs of operations.* A taxpayer's total costs of operations means the total costs of the taxpayer's trade or business for a taxable year, excluding third-party costs (as defined in paragraph (d)(5) of this section).

(5) *Third-party costs.* Third-party costs are amounts paid or incurred in whole or in part for lobbying activities conducted by third parties (such as amounts paid to taxpayers subject to section 162(e)(5)(A) or dues or other similar amounts that are not deductible in whole or in part under section 162(e)(3)) and amounts paid or incurred for travel (including meals and lodging while away from home) and entertainment relating in whole or in part to lobbying activities.

(6) *Example.* The provisions of this paragraph (d) are illustrated by the following example.

Example. (i) In 1996, three full-time employees, A, B, and C, of Taxpayer W engage in both lobbying activities and nonlobbying activities. A spends 300 hours, B spends 1,700 hours, and C spends 1,000 hours on lobbying activities, for a total of 3,000 hours spent on lobbying activities for W. W reasonably assumes that each of its three employees spends 2,000 hours a year on W's business.

(ii) W's total costs of operations are $300,000. W has no third-party costs.

(iii) Under the ratio method, X allocates $150,000 to its lobbying activities for 1996, as follows:

$$\frac{\text{Lobbying labor hours}}{\text{Total labor hours}} \times \begin{array}{l}\text{Total costs}\\ \text{of operations}\end{array} + \begin{array}{l}\text{Allocable third-}\\ \text{party costs}\end{array} = \begin{array}{l}\text{Costs allocable to}\\ \text{lobbying activities}\end{array}$$

$$\left[\frac{300+1{,}700+1{,}000}{6{,}000} \times \$300{,}000\right] + [0] = \$150{,}000.$$

(e) *Gross-up method*—(1) *In general.* Under the gross-up method described in this paragraph (e)(1), the taxpayer allocates to lobbying activities the sum of its third-party costs (as defined in paragraph (d)(5) of this section) allocable to lobbying activities and 175 percent of its basic lobbying labor costs (as defined in paragraph (e)(3) of this section) of all personnel.

(2) *Alternative gross-up method.* Under the alternative gross-up method described in this paragraph (e)(2), the taxpayer allocates to lobbying activities the sum of its third-party costs (as defined in paragraph (d)(5) of this section) allocable to lobbying activities and 225 percent of its basic lobbying labor costs (as defined in paragraph (e)(3)), excluding the costs of personnel who engage in secretarial, clerical, support, and other administrative activities (as opposed to activities involving significant judgment with respect to lobbying activities).

(3) *Basic lobbying labor costs.* For purposes of this paragraph (e), basic lobbying labor costs are the basic costs of lobbying labor hours (as defined in paragraph (d)(2) of this section) determined for the appropriate personnel. For purposes of this paragraph (e), basic costs of lobbying labor hours are wages or other similar costs of labor, including, for example, guaranteed payments for services. Basic costs do not include pension, profit-sharing, employee benefits, and supplemental unemployment benefit plan costs, or other similar costs.

(4) *Example.* The provisions of this paragraph (e) are illustrated by the following example.

Example. (i) In 1996, three employees, A, B, and C, of Taxpayer X engage in both lobbying activities and nonlobbying activities. A spends 300 hours, B spends 1,700 hours, and C spends 1,000 hours on lobbying activities.

(ii) X has no third-party costs.

(iii) For purposes of the gross-up method, X determines that its basic labor costs are \$20 per hour for A, \$30 per hour for B, and \$25 per hour for C. Thus, its basic lobbying labor costs are (\$20×300)+(\$30×1,700)+(\$25×1,000), or (\$6,000+\$51,000+\$25,000), for total basic lobbying labor costs for 1996 of \$82,000.

(iv) Under the gross-up method, X allocates \$143,500 to its lobbying activities for 1996, as follows:

$$175\% \times \begin{array}{l}\text{Basic lobbying labor}\\ \text{costs of all personnel}\end{array} + \begin{array}{l}\text{Allocable third-}\\ \text{party costs}\end{array} = \begin{array}{l}\text{Costs allocable to}\\ \text{lobbying activities}\end{array}$$

$$[175\% \times \$82{,}000] + [0] = \$143{,}500.$$

(f) *Section 263A cost allocation methods*—(1) *In general.* A taxpayer may allocate its costs to lobbying activities under the principles set forth in section 263A and the regulations thereunder, except to the extent inconsistent with paragraph (g) of this section. For this purpose, lobbying activities are considered a service department or function. Therefore, a taxpayer may allocate costs to lobbying activities by applying the methods provided in §§ 1.263A–1 through 1.263A–3. See § 1.263A–1(e)(4), which describes service costs generally; § 1.263A–1(f), which sets forth cost allocation methods available under section 263A; and § 1.263A–1(g)(4), which provides methods of allocating service costs.

(2) *Example.* The provisions of this paragraph (f) are illustrated by the following example.

Example. (i) Three full-time employees, A, B, and C, work in the Washington office of Taxpayer Y, a manufacturing concern. They each engage in lobbying activities and non-lobbying activities. In 1996, A spends 75 hours, B spends 1,750 hours, and C spends 2,000 hours on lobbying activities. A's hours are not spent on direct contact lobbying as defined in paragraph (g)(2) of this section. All three work 2,000 hours during 1996. The Washington office also employs one secretary, D, who works exclusively for A, B, and C.

(ii) In addition, three departments in the corporate headquarters in Chicago benefit the Washington office: Public affairs, human resources, and insurance.

(iii) Y is subject to section 263A and uses the step-allocation method to allocate its service costs. Prior to the amendments to section 162(e), the Washington office was treated as an overall management function for purposes of section 263A. As such, its costs were fully deductible and no further allocations were made under Y's step allocation. Following the amendments to section 162(e), Y adopts its 263A step-allocation methodology to allocate costs to lobbying activities. Y adds a lobbying department to its step-allocation program, which results in an allocation of costs to the lobbying department from both the Washington office and the Chicago office.

(iv) Y develops a labor ratio to allocate its Washington office costs between the newly defined lobbying department and the overall management department. To determine the hours allocable to lobbying activities, Y uses the de minimis rule of paragraph (g)(1) of this section. Under this rule, A's hours spent on lobbying activities are treated as zero because less than 5 percent of A's time is spent on lobbying (75/2,000 = 3.75%). In addition, because D works exclusively for personnel engaged in lobbying activities, D's hours are not used to develop the allocation ratio. Y assumes that D's allocation of time follows the average time of all the personnel engaged in lobbying activities. Thus, Y's labor ratio is determined as follows:

Employee	Departments		
	Lobbying hours	Overall management hours	Total hours
A	0	2,000	2,000
B	1,750	250	2,000
C	2,000	0	2,000
Totals	3,750	2,250	6,000

$$\text{Lobbying Department Ratio} = \frac{3{,}750}{6{,}000} = 62.5\%$$

$$\text{Overall Management Department Ratio} = \frac{2{,}250}{6{,}000} = 37.5\%$$

(v) In 1996, the Washington office has the following costs:

Account	Amount
Professional Salaries and Benefits	$660,000
Clerical Salaries and Benefits	50,000
Rent Expense	100,000
Depreciation on Furniture and Equip	40,000
Utilities	15,000
Outside Payroll Service	5,000
Miscellaneous	10,000
Third-Party Lobbying (Law Firm)	90,000
Total Washington Costs	$970,000

(vi) In addition, $233,800 of costs from the public affairs department, $30,000 of costs from the insurance department, and $5,000 of costs from the human resources department are allocable to the Washington office from departments in Chicago. Therefore, the Washington office costs are allocated to the Lobbying and Overall Management departments as follows:

Total Washington department costs from above	$970,000
Plus Costs Allocated From Other Departments	268,800
Less third-party costs directly allocable to lobbying	(90,000)
Total Washington office costs	1,148,800

	Lobbying department	Overall management department
Department Allocation Ratios	62.5%	37.5%
× Washington Office Costs	$1,148,800	$1,148,800
= Costs Allocated to Departments	$718,000	$430,800

(vii) Y's step-allocation for its Lobbying Department is determined as follows:

Y's step-allocation	Lobbying department
Washington costs allocated to lobbying department	$718,000
Plus third-party costs	90,000

Y's step-allocation	Lobbying department
Total costs of lobbying activities	808,000

(g) *Special rules.* The following rules apply to any reasonable method of allocating costs to lobbying activities.

(1) *De minimis rule for labor hours.* Subject to the exception provided in paragraph (g)(2) of this section, a taxpayer may treat time spent by an individual on lobbying activities as zero if less than five percent of the person's time is spent on lobbying activities. Reasonable methods must be used to determine if less than five percent of a person's time is spent on lobbying activities.

(2) *Direct contact lobbying labor hours.* Notwithstanding paragraph (g)(1) of this section, a taxpayer must treat all hours spent by a person on direct contact lobbying (as well as the hours that person spends in connection with direct contact lobbying, including time spent traveling that is allocable to the direct contact lobbying) as labor hours allocable to lobbying activities. An activity is direct contact lobbying if it is a meeting, telephone conversation, letter, or other similar means of communication with a legislator (other than a local legislator) or covered executive branch official (as defined in section 162(e)(6)) and otherwise qualifies as a lobbying activity. A person who engages in research, preparation, and other background activities related to direct contact lobbying but who does not make direct contact with a legislator or covered executive branch official is not engaged in direct contact lobbying.

(3) *Taxpayer defined.* For purposes of this section, a taxpayer includes a tax-exempt organization subject to section 6033(e).

(h) *Effective date.* This section is effective for amounts paid or incurred on or after July 21, 1995. Taxpayers must adopt a reasonable interpretation of sections 162(e)(1)(A) and (D) for amounts paid or incurred before this date.

[T.D. 8602, 60 FR 37573, July 21, 1995]

§ 1.162–29 Influencing legislation.

(a) *Scope.* This section provides rules for determining whether an activity is influencing legislation for purposes of section 162(e)(1)(A). This section does not apply for purposes of sections 4911 and 4945 and the regulations thereunder.

(b) *Definitions.* For purposes of this section—

(1) *Influencing legislation.* Influencing legislation means—

(i) Any attempt to influence any legislation through a lobbying communication; and

(ii) All activities, such as research, preparation, planning, and coordination, including deciding whether to make a lobbying communication, engaged in for a purpose of making or supporting a lobbying communication, even if not yet made. See paragraph (c) of this section for rules for determining the purposes for engaging in an activity.

(2) *Attempt to influence legislation.* An attempt to influence any legislation through a lobbying communication is making the lobbying communication.

(3) *Lobbying communication.* A lobbying communication is any communication (other than any communication compelled by subpoena, or otherwise compelled by Federal or State law) with any member or employee of a legislative body or any other government official or employee who may participate in the formulation of the legislation that—

(i) Refers to specific legislation and reflects a view on that legislation; or

(ii) Clarifies, amplifies, modifies, or provides support for views reflected in a prior lobbying communication.

(4) *Legislation.* Legislation includes any action with respect to Acts, bills, resolutions, or other similar items by a legislative body. Legislation includes a proposed treaty required to be submitted by the President to the Senate for its advice and consent from the time the President's representative begins to negotiate its position with the prospective parties to the proposed treaty.

(5) *Specific legislation.* Specific legislation includes a specific legislative proposal that has not been introduced in a legislative body.

(6) *Legislative bodies.* Legislative bodies are Congress, state legislatures, and

other similar governing bodies, excluding local councils (and similar governing bodies), and executive, judicial, or administrative bodies. For this purpose, administrative bodies include school boards, housing authorities, sewer and water districts, zoning boards, and other similar Federal, State, or local special purpose bodies, whether elective or appointive.

(7) *Examples.* The provisions of this paragraph (b) are illustrated by the following examples.

Example 1. Taxpayer P's employee, A, is assigned to approach members of Congress to gain their support for a pending bill. A drafts and P prints a position letter on the bill. P distributes the letter to members of Congress. Additionally, A personally contacts several members of Congress or their staffs to seek support for P's position on the bill. The letter and the personal contacts are lobbying communications. Therefore, P is influencing legislation.

Example 2. Taxpayer R is invited to provide testimony at a congressional oversight hearing concerning the implementation of The Financial Institutions Reform, Recovery, and Enforcement Act of 1989. Specifically, the hearing concerns a proposed regulation increasing the threshold value of commercial and residential real estate transactions for which an appraisal by a state licensed or certified appraiser is required. In its testimony, R states that it is in favor of the proposed regulation. Because R does not refer to any specific legislation or reflect a view on any such legislation, R has not made a lobbying communication. Therefore, R is not influencing legislation.

Example 3. State X enacts a statute that requires the licensing of all day-care providers. Agency B in State X is charged with writing rules to implement the statute. After the enactment of the statute, Taxpayer S sends a letter to Agency B providing detailed proposed rules that S recommends Agency B adopt to implement the statute on licensing of day-care providers. Because the letter to Agency B neither refers to nor reflects a view on any specific legislation, it is not a lobbying communication. Therefore, S is not influencing legislation.

Example 4. Taxpayer T proposes to a State Park Authority that it purchase a particular tract of land for a new park. Even if T's proposal would necessarily require the State Park Authority eventually to seek appropriations to acquire the land and develop the new park, T has not made a lobbying communication because there has been no reference to, nor any view reflected on, any specific legislation. Therefore, T's proposal is not influencing legislation.

Example 5. (i) Taxpayer U prepares a paper that asserts that lack of new capital is hurting State X's economy. The paper indicates that State X residents either should invest more in local businesses or increase their savings so that funds will be available to others interested in making investments. U forwards a summary of the unpublished paper to legislators in State X with a cover letter that states in part:

You must take action to improve the availability of new capital in the state.

(ii) Because neither the summary nor the cover letter refers to any specific legislative proposal and no other facts or circumstances indicate that they refer to an existing legislative proposal, forwarding the summary to legislators in State X is not a lobbying communication. Therefore, U is not influencing legislation.

(iii) Q, a member of the legislature of State X, calls U to request a copy of the unpublished paper from which the summary was prepared. U forwards the paper with a cover letter that simply refers to the enclosed materials. Because U's letter to Q and the unpublished paper do not refer to any specific legislation or reflect a view on any such legislation, the letter is not a lobbying communication. Therefore, U is not influencing legislation.

Example 6. (i) Taxpayer V prepares a paper that asserts that lack of new capital is hurting the national economy. The paper indicates that lowering the capital gains rate would increase the availability of capital and increase tax receipts from the capital gains tax. V forwards the paper to its representatives in Congress with a cover letter that says, in part:

I urge you to support a reduction in the capital gains tax rate.

(ii) V's communication is a lobbying communication because it refers to and reflects a view on a specific legislative proposal (*i.e.*, lowering the capital gains rate). Therefore, V is influencing legislation.

Example 7. Taxpayer W, based in State A, notes in a letter to a legislator of State A that State X has passed a bill that accomplishes a stated purpose and then says that State A should pass such a bill. No such bill has been introduced into the State A legislature. The communication is a lobbying communication because it refers to and reflects a view on a specific legislative proposal. Therefore, W is influencing legislation.

Example 8. (i) Taxpayer Y represents citrus fruit growers. Y writes a letter to a United States senator discussing how pesticide O has benefited citrus fruit growers and disputing problems linked to its use. The letter discusses a bill pending in Congress and states in part:

This bill would prohibit the use of pesticide O. If citrus growers are unable to use this pesticide, their crop yields will be severely reduced, leading to higher prices for consumers and lower profits, even bankruptcy, for growers.

(ii) Y's views on the bill are reflected in this statement. Thus, the communication is a lobbying communication, and Y is influencing legislation.

Example 9. (i) B, the president of Taxpayer Z, an insurance company, meets with Q, who chairs the X state legislature's committee with jurisdiction over laws regulating insurance companies, to discuss the possibility of legislation to address current problems with surplus-line companies. B recommends that legislation be introduced that would create minimum capital and surplus requirements for surplus-line companies and create clearer guidelines concerning the risks that surplus-line companies can insure. B's discussion with Q is a lobbying communication because B refers to and reflects a view on a specific legislative proposal. Therefore, Z is influencing legislation.

(ii) Q is not convinced that the market for surplus-line companies is substantial enough to warrant such legislation and requests that B provide information on the amount and types of risks covered by surplus-line companies. After the meeting, B has employees of Z prepare estimates of the percentage of property and casualty insurance risks handled by surplus-line companies. B sends the estimates with a cover letter that simply refers to the enclosed materials. Although B's follow-up letter to Q does not refer to specific legislation or reflect a view on such legislation, B's letter supports the views reflected in the earlier communication. Therefore, the letter is a lobbying communication and Z is influencing legislation.

(c) *Purpose for engaging in an activity*—(1) *In general.* The purposes for engaging in an activity are determined based on all the facts and circumstances. Facts and circumstances include, but are not limited to—

(i) Whether the activity and the lobbying communication are proximate in time;

(ii) Whether the activity and the lobbying communication relate to similar subject matter;

(iii) Whether the activity is performed at the request of, under the direction of, or on behalf of a person making the lobbying communication;

(iv) Whether the results of the activity are also used for a nonlobbying purpose; and

(v) Whether, at the time the taxpayer engages in the activity, there is specific legislation to which the activity relates.

(2) *Multiple purposes.* If a taxpayer engages in an activity both for the purpose of making or supporting a lobbying communication and for some nonlobbying purpose, the taxpayer must treat the activity as engaged in partially for a lobbying purpose and partially for a nonlobbying purpose. This division of the activity must result in a reasonable allocation of costs to influencing legislation. See §1.162–28 (allocation rules for certain expenditures to which section 162(e)(1) applies). A taxpayer's treatment of these multiple-purpose activities will, in general, not result in a reasonable allocation if it allocates to influencing legislation—

(i) Only the incremental amount of costs that would not have been incurred but for the lobbying purpose; or

(ii) An amount based solely on the number of purposes for engaging in that activity without regard to the relative importance of those purposes.

(3) *Activities treated as having no purpose to influence legislation.* A taxpayer that engages in any of the following activities is treated as having done so without a purpose of making or supporting a lobbying communication—

(i) Before evidencing a purpose to influence any specific legislation referred to in paragraph (c)(3)(i)(A) or (B) of this section (or similar legislation)—

(A) Determining the existence or procedural status of specific legislation, or the time, place, and subject of any hearing to be held by a legislative body with respect to specific legislation; or

(B) Preparing routine, brief summaries of the provisions of specific legislation;

(ii) Performing an activity for purposes of complying with the requirements of any law (for example, satisfying state or federal securities law filing requirements);

(iii) Reading any publications available to the general public or viewing or listening to other mass media communications; and

(iv) Merely attending a widely attended speech.

(4) *Examples.* The provisions of this paragraph (c) are illustrated by the following examples.

Example 1. (i) *Facts.* In 1997, Agency F issues proposed regulations relating to the business of Taxpayer W. There is no specific legislation during 1997 that is similar to the regulatory proposal. W undertakes a study of the impact of the proposed regulations on its business. W incorporates the results of that study in comments sent to Agency F in 1997. In 1998, legislation is introduced in Congress that is similar to the regulatory proposal. Also in 1998, W writes a letter to Senator P stating that it opposes the proposed legislation. W encloses with the letter a copy of the comments it sent to Agency F.

(ii) *Analysis.* W's letter to Senator P refers to and reflects a view on specific legislation and therefore is a lobbying communication. Although W's study of the impact of the proposed regulations is proximate in time and similar in subject matter to its lobbying communication, W performed the study and incorporated the results in comments sent to Agency F when no legislation with a similar subject matter was pending (a nonlobbying use). On these facts, W engaged in the study solely for a nonlobbying purpose.

Example 2. (i) *Facts.* The governor of State Q proposes a budget that includes a proposed sales tax on electricity. Using its records of electricity consumption, Taxpayer Y estimates the additional costs that the budget proposal would impose upon its business. In the same year, Y writes to members of the state legislature and explains that it opposes the proposed sales tax. In its letter, Y includes its estimate of the costs that the sales tax would impose on its business. Y does not demonstrate any other use of its estimates.

(ii) *Analysis.* The letter is a lobbying communication (because it refers to and reflects a view on specific legislation, the governor's proposed budget). Y's estimate of additional costs under the proposal supports the lobbying communication, is proximate in time and similar in subject matter to a specific legislative proposal then in existence, and is not used for a nonlobbying purpose. Based on these facts, Y estimated its additional costs under the budget proposal solely to support the lobbying communication.

Example 3. (i) *Facts.* A senator in the State Q legislature announces her intention to introduce legislation to require health insurers to cover a particular medical procedure in all policies sold in the state. Taxpayer Y has different policies for two groups of employees, one of which covers the procedure and one of which does not. After the bill is introduced, Y's legislative affairs staff asks Y's human resources staff to estimate the additional cost to cover the procedure for both groups of employees. Y's human resources staff prepares a study estimating Y's increased costs and forwards it to the legislative affairs staff. Y's legislative staff then writes to members of the state legislature and explains that it opposes the proposed change in insurance coverage based on the study. Y's legislative affairs staff thereafter forwards the study, prepared for its use in opposing the statutory proposal, to its labor relations staff for use in negotiations with employees scheduled to begin later in the year.

(ii) *Analysis.* The letter to legislators is a lobbying communication (because it refers to and reflects a view on specific legislation). The activity of estimating Y's additional costs under the proposed legislation relates to the same subject as the lobbying communication, occurs close in time to the lobbying communication, is conducted at the request of a person making a lobbying communication, and relates to specific legislation then in existence. Although Y used the study in its labor negotiations, mere use for that purpose does not establish that Y estimated its additional costs under the proposed legislation in part for a nonlobbying purpose. Thus, based on all the facts and circumstances, Y estimated the additional costs it would incur under the proposal solely to make or support the lobbying communication.

Example 4. (i) *Facts.* After several years of developmental work under various contracts, in 1996, Taxpayer A contracts with the Department of Defense (DOD) to produce a prototype of a new generation military aircraft. A is aware that DOD will be able to fund the contract only if Congress appropriates an amount for that purpose in the upcoming appropriations process. In 1997, A conducts simulation tests of the aircraft and revises the specifications of the aircraft's expected performance capabilities, as required under the contract. A submits the results of the tests and the revised specifications to DOD. In 1998, Congress considers legislation to appropriate funds for the contract. In that connection, A summarizes the results of the simulation tests and of the aircraft's expected performance capabilities, and submits the summary to interested members of Congress with a cover letter that encourages them to support appropriations of funds for the contract.

(ii) *Analysis.* The letter is a lobbying communication (because it refers to specific legislation (*i.e.*, appropriations) and requests passage). The described activities in 1996, 1997, and 1998 relate to the same subject as the lobbying communication. The summary was prepared specifically for, and close in time to, that communication. Based on these facts, the summary was prepared solely for a lobbying purpose. In contrast, A conducted the tests and revised the specifications to comply with its production contract with DOD. A conducted the tests and revised the specifications solely for a nonlobbying purpose.

Example 5. (i) *Facts.* C, president of Taxpayer W, travels to the state capital to attend a two-day conference on new manufacturing processes. C plans to spend a third day in the capital meeting with state legislators to explain why W opposes a pending bill unrelated to the subject of the conference. At the meetings with the legislators, C makes lobbying communications by referring to and reflecting a view on the pending bill.

(ii) *Analysis.* C's traveling expenses (transportation and meals and lodging) are partially for the purpose of making or supporting the lobbying communications and partially for a nonlobbying purpose. As a result, under paragraph (c)(2) of this section, W must reasonably allocate C's traveling expenses between these two purposes. Allocating to influencing legislation only C's incremental transportation expenses (*i.e.*, the taxi fare to meet with the state legislators) does not result in a reasonable allocation of traveling expenses.

Example 6. (i) *Facts.* On February 1, 1997, a bill is introduced in Congress that would affect Company E. Employees in E's legislative affairs department, as is customary, prepare a brief summary of the bill and periodically confirm the procedural status of the bill through conversations with employees and members of Congress. On March 31, 1997, the head of E's legislative affairs department meets with E's President to request that B, a chemist, temporarily help the legislative affairs department analyze the bill. The President agrees, and suggests that B also be assigned to draft a position letter in opposition to the bill. Employees of the legislative affairs department continue to confirm periodically the procedural status of the bill. On October 31, 1997, B's position letter in opposition to the bill is delivered to members of Congress.

(ii) *Analysis.* B's letter is a lobbying communication because it refers to and reflects a view on specific legislation. Under paragraph (c)(3)(i) of this section, the assignment of B to assist the legislative affairs department in analyzing the bill and in drafting a position letter in opposition to the bill evidences a purpose to influence legislation. Neither the activity of periodically confirming the procedural status of the bill nor the activity of preparing the routine, brief summary of the bill before March 31 constitutes influencing legislation. In contrast, periodically confirming the procedural status of the bill on or after March 31 relates to the same subject as, and is close in time to, the lobbying communication and is used for no nonlobbying purpose. Consequently, after March 31, E determined the procedural status of the bill for the purpose of supporting the lobbying communication by B.

(d) *Lobbying communication made by another.* If a taxpayer engages in activities for a purpose of supporting a lobbying communication to be made by another person (or by a group of persons), the taxpayer's activities are treated under paragraph (b) of this section as influencing legislation. For example, if a taxpayer or an employee of the taxpayer (as a volunteer or otherwise) engages in an activity to assist a trade association in preparing its lobbying communication, the taxpayer's activities are influencing legislation even if the lobbying communication is made by the trade association and not the taxpayer. If, however, the taxpayer's employee, acting outside the employee's scope of employment, volunteers to engage in those activities, then the taxpayer is not influencing legislation.

(e) *No lobbying communication.* Paragraph (e) of this section applies if a taxpayer engages in an activity for a purpose of making or supporting a lobbying communication, but no lobbying communication that the activity supports has yet been made.

(1) *Before the filing date.* Under this paragraph (e)(1), if on the filing date of the return for any taxable year the taxpayer no longer expects, under any reasonably foreseeable circumstances, that a lobbying communication will be made that is supported by the activity, then the taxpayer will be treated as if it did not engage in the activity for a purpose of making or supporting a lobbying communication. Thus, the taxpayer need not treat any amount allocated to that activity for that year under §1.162–28 as an amount to which section 162(e)(1)(A) applies. The filing date for purposes of paragraph (e) of this section is the earlier of the time the taxpayer files its timely return for the year or the due date of the timely return.

(2) *After the filing date*—(i) *In general.* If, at any time after the filing date, the taxpayer no longer expects, under any reasonably foreseeable circumstances, that a lobbying communication will be made that is supported by the activity, then any amount previously allocated under §1.162–28 to the activity and disallowed under section 162(e)(1)(A) is

treated as an amount that is not subject to section 162(e)(1)(A) and that is paid or incurred only at the time the taxpayer no longer expects that a lobbying communication will be made.

(ii) *Special rule for certain tax-exempt organizations.* For a tax-exempt organization subject to section 6033(e), the amounts described in paragraph (e)(2)(i) of this section are treated as reducing (but not below zero) its expenditures to which section 162(e)(1) applies beginning with that year and continuing for subsequent years to the extent not treated in prior years as reducing those expenditures.

(f) *Anti-avoidance rule.* If a taxpayer, alone or with others, structures its activities with a principal purpose of achieving results that are unreasonable in light of the purposes of section 162(e)(1)(A) and section 6033(e), the Commissioner can recast the taxpayer's activities for federal tax purposes as appropriate to achieve tax results that are consistent with the intent of section 162(e)(1)(A), section 6033(e) (if applicable), and this section, and the pertinent facts and circumstances.

(g) *Taxpayer defined.* For purposes of this section, a taxpayer includes a tax-exempt organization subject to section 6033(e).

(h) *Effective date.* This section is effective for amounts paid or incurred on or after July 21, 1995. Taxpayers must adopt a reasonable interpretation of section 162(e)(1)(A) for amounts paid or incurred before this date.

[T.D. 8602, 60 FR 37575, July 21, 1995]

§ 1.162(k)–1 Disallowance of deduction for reacquisition payments.

(a) *In general.* Except as provided in paragraph (b) of this section, no deduction otherwise allowable is allowed under Chapter 1 of the Internal Revenue Code for any amount paid or incurred by a corporation in connection with the reacquisition of its stock or the stock of any related person (as defined in section 465(b)(3)(C)). Amounts paid or incurred in connection with the reacquisition of stock include amounts paid by a corporation to reacquire its stock from an ESOP that are used in a manner described in section 404(k)(2)(A). See § 1.404(k)–3.

(b) *Exceptions.* Paragraph (a) of this section does not apply to any—

(1) Deduction allowable under section 163 (relating to interest);

(2) Deduction for amounts that are properly allocable to indebtedness and amortized over the term of such indebtedness;

(3) Deduction for dividends paid (within the meaning of section 561); or

(4) Amount paid or incurred in connection with the redemption of any stock in a regulated investment company that issues only stock which is redeemable upon the demand of the shareholder.

(c) *Effective date.* This section applies with respect to amounts paid or incurred on or after August 30, 2006.

[T.D. 9282, 71 FR 51473, Aug. 30, 2006]

§ 1.163–1 Interest deduction in general.

(a) Except as otherwise provided in sections 264 to 267, inclusive, interest paid or accrued within the taxable year on indebtedness shall be allowed as a deduction in computing taxable income. For rules relating to interest on certain deferred payments, see section 483 and the regulations thereunder.

(b) Interest paid by the taxpayer on a mortgage upon real estate of which he is the legal or equitable owner, even though the taxpayer is not directly liable upon the bond or note secured by such mortgage, may be deducted as interest on his indebtedness. Pursuant to the provisions of section 163(c), any annual or periodic rental payment made by a taxpayer on or after January 1, 1962, under a redeemable ground rent, as defined in section 1055(c) and paragraph (b) of § 1.1055–1, is required to be treated as interest on an indebtedness secured by a mortgage and, accordingly, may be deducted by the taxpayer as interest on his indebtedness. Section 163(c) has no application in respect of any annual or periodic rental payment made prior to January 1, 1962, or pursuant to an arrangement which does not constitute a "redeemable ground rent" as defined in section 1055(c) and paragraph (b) of § 1.1055–1. Accordingly, annual or periodic payments of Pennsylvania ground rents made before, on, or after January 1, 1962, are deductible as interest if the ground rent is redeemable. An annual or periodic rental payment under a Maryland redeemable ground rent made prior to January 1, 1962, is deductible in accordance with the rules and regulations applicable at the time such payment was made. Any annual or periodic rental payment under a Maryland redeemable ground rent made by the taxpayer on or after January 1, 1962, is, pursuant to the provisions of section 163(c), treated as interest on an indebtedness secured by a mortgage and, accordingly, is deductible by the taxpayer as interest on his indebtedness. In any case where the ground rent is irredeemable, any annual or periodic ground rent payment shall be treated as rent and shall be deductible only to the extent that the payment constitutes a proper business expense. Amounts paid in redemption of a ground rent shall not be treated as interest. For treatment of redeemable ground rents and real property held subject to liabilities under redeemable ground rents, see section 1055 and the regulations thereunder.

(c) Interest calculated for costkeeping or other purposes on account of capital or surplus invested in the business which does not represent a charge arising under an interest-bearing obligation, is not an allowable deduction from gross income. Interest paid by a corporation on scrip dividends is an allowable deduction. So-called interest on preferred stock, which is in reality a dividend thereon, cannot be deducted in computing taxable income. (See, however, section 583.) In the case of banks and loan or trust companies, interest paid within the year on deposits, such as interest paid on moneys received for investment and secured by interest-bearing certificates of indebtedness issued by such bank or loan or trust company, may be deducted from gross income.

(d) To the extent of assistance payments made in respect of an indebtedness of the taxpayer during the taxable year by the Department of Housing and Urban Development under section 235 of the National Housing Act (12 U.S.C. 1715z), as amended, no deduction shall be allowed under section 163 and this section for interest paid or accrued with respect to such indebtedness. However, such payments shall not affect the amount of any deduction under any section of the Code other than section 163. The provisions of this paragraph shall apply to taxable years beginning after December 31, 1974.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6821, 30 FR 6216, May 4, 1965; T.D. 6873, 31 FR 941, Jan. 25, 1966; T.D. 7408, 41 FR 9547, Mar. 5, 1976]

§ 1.163–2 Installment purchases where interest charge is not separately stated.

(a) *In general.* (1) Whenever there is a contract with a seller for the purchase of personal property providing for payment of part or all of the purchase price in installments and there is a separately stated carrying charge (including a finance charge, service charge, and the like) but the actual interest charge cannot be ascertained, a portion of the payments made during the taxable year under the contract shall be treated as interest and is deductible under section 163 and this section. Section 163(b) contains a formula, described in paragraph (b) of this section, in accordance with which the amount of interest deductible in the taxable year must be computed. This formula is designed to operate automatically in the case of any installment purchase, without regard to whether payments under the contract are made when due or are in default. For applicable limitations when an obligation to pay is terminated, see paragraph (c) of this section.

(2) Whenever there is a contract with an educational institution for the purchase of educational services providing for payment of part or all of the purchase price in installments and there is a separately stated carrying charge (including a finance charge, service charge, and the like) but the actual interest charge cannot be ascertained, a portion of the payments made during the taxable year under the contract shall be treated as interest and is deductible under section 163 and this section. See paragraphs (b) and (c) of this section for the applicable computation and limitations rules. For purposes of section 163(b) and this section, the term ''educational services'' means any service (including lodging) which is

purchased from an educational institution (as defined in section 151(e)(4) and paragraph (c) of § 1.151–3) and which is provided for a student of such institution.

(3) Section 163(b) and this section do not apply to a contract for the loan of money, even if the loan is to be repaid in installments and even if the borrowed amount is used to purchase personal property or educational services. In cases to which the preceding sentence applies, the portion of the installment payment which constitutes interest (as distinguished from payments of principal and charges such as payments for credit life insurance) is deductible under section 163(a) and § 1.163–1.

(b) *Computation.* The portion of any such payments to be treated as interest shall be equal to 6 percent of the average unpaid balance under the contract during the taxable year. For purposes of this computation, the average unpaid balance under the contract is the sum of the unpaid balance outstanding on the first day of each month beginning during the taxable year, divided by 12.

(c) *Limitations.* The amount treated as interest under section 163(b) and this section for any taxable year shall not exceed the amount of the payments made under the contract during the taxable year nor the aggregate carrying charges properly attributable to each contract for such taxable year. In computing the amount to be treated as interest if the obligation to pay is terminated as, for example, in the case of a repossession of the property, the unpaid balance on the first day of the month during which the obligation is terminated shall be zero.

(d) *Illustrations.* The provisions of this section may be illustrated by the following examples:

Example 1. On January 20, 1955, A purchased a television set for $400, including a stated carrying charge of $25. The down payment was $50, and the balance was paid in 14 monthly installments of $25 each, on the 20th day of each month commencing with February. Assuming that A is a cash method, calendar year taxpayer and that no other installment purchases were made, the amount to be treated as interest in 1955 is $12.38, computed as follows:

YEAR 1955

First day of	Unpaid balance outstanding
January	0
February	$350
March	325
April	300
May	275
June	250
July	225
August	200
September	175
October	150
November	125
December	100
	2,475

Sum of unpaid balances $2,475÷12 = $206.25; 6 percent thereof = $12.38.

Example 2. On November 20, 1955, B purchased a furniture set for $1,250, including a stated carrying charge of $48. The down payment was $50 and the balance was payable in 12 monthly installments of $100 each, on the first day of each month commencing with December 1955. Assume that B is a cash method, calendar year taxpayer and that no other installment purchases were made. Assume further that B made the first payment when due, but made only one other payment on June 1, 1956. The amount to be treated as interest in 1955 is $4, and the amount to be treated as interest in 1956 is $33, computed as follows:

YEAR 1955

First day of	Unpaid balance outstanding
December	$1,200

Sum of unpaid balances $1,200÷12 = $100; 6 percent thereof = $6.

Carrying charges attributable to 1955 = $4.

YEAR 1956

First day of	Unpaid balance outstanding
January	$1,100
February	1,000
March	900
April	800
May	700
June	600
July	500
August	400
September	300
October	200
November	100
	6,600

Sum of unpaid balances $6,600÷12 = $550; 6 percent thereof = $33.

Carrying charges attributable to 1956 = $44 ($4×11).

Example 3. Assume the same facts as in example (2), except that the furniture was repossessed and B's obligation to pay terminated as of July 15, 1956. The amount to be treated as interest in 1955 is $4, computed as in example (2) above. The amount to be treated as interest in 1956 is $25.50, computed as follows:

YEAR 1956

First day of	Unpaid balance outstanding
January	$1,100
February	1,000
March	900
April	800
May	700
June	600
July-November	0
	5,100

Sum of unpaid balances $5,100÷12 = $425. 6 percent thereof = $25.50.

Carrying charges attributable to 1956 = $44 ($4×11).

Example 4. (i) On September 15, 1968, C registered at X University for the 1968–69 academic year. C entered into an agreement with the X University for the purchase during such academic year of educational services (including lodging and tuition) for a total fee of $1,000, including a separately stated carrying charge of $50. Under the terms of the agreement, an initial payment of $200 was to be made by C on September 15, 1968, and the balance was to be paid in 8 monthly installments of $100 each, on the 15th day of each month commencing with October 1968. C made all of the required 1968 payments. Assuming that C is a cash method, calendar year taxpayer and that no other installment purchases of services or property were made, the amount to be treated as interest in 1968 is $10.50, computed as follows:

YEAR 1968

First day of	Unpaid balance outstanding
January-September	0
October	$800
November	700
December	600
Total	2,100

The sum of unpaid balances ($2,100) divided by 12 is $175; 6 percent thereof is $10.50. The carrying charges attributable to 1968 are $18.75 (*i.e.*, the total carrying charges ($50), divided by the total number of payments (8), multiplied by the number of payments made in 1968 (3)). Since the amount to be treated as interest in 1968 ($10.50) does not exceed the carrying charges attributable to 1968 ($18.75), the limitation set forth in paragraph (c) of this section is not applicable.

(ii) The result in this example would be the same even if the X University assigned the agreement to a bank or other financial institution and C made his payments directly to the bank or other financial institution.

Example 5. On September 15, 1968, D registered at Y University for the 1968–69 academic year. The tuition for such year was $1,500. In order to pay his tuition, D borrowed $1,500 from the M Corporation, a lending institution, and remitted that sum to the Y University. The loan agreement between M Corporation and D provided that D was to repay the loan, plus a service charge, in 10 equal monthly installments, on the first day of each month commencing with October 1968. The service charge consisted of interest and the cost of credit life insurance on D's life. Since section 163(b) and this section do not apply to a contract for the loan of money, D is not entitled to compute his interest deduction with respect to his loan from M Corporation under such sections. D may deduct that portion of each installment payment which constitutes interest (as distinguished from payments of principal and the charge for credit life insurance) under section 163(a) and §1.163–1, provided that the amount of such interest can be ascertained.

(e) *Effective date.* Except in the case of payments made under a contract for educational services, the rule provided in section 163(b) and this section applies to payments made during taxable years beginning after December 31, 1953, and ending after August 16, 1954, regardless of when the contract of sale was made. In the case of payments made under a contract for educational services, the rule provided in section 163(b) and this section applies to payments made during taxable years beginning after December 31, 1963, regardless of when the contract for educational services was made.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6991, 34 FR 742, Jan. 17, 1969]

§ 1.163–3 Deduction for discount on bond issued on or before May 27, 1969.

(a) *Discount upon issuance.* (1) If bonds are issued by a corporation at a discount, the net amount of such discount is deductible and should be prorated or amortized over the life of the bonds. For purposes of this section, the amortizable bond discount equals the excess of the amount payable at maturity (or, in the case of a callable bond, at the earlier call date) over the issue price of the bond (as defined in paragraph (b)(2) of § 1.1232–3).

(2) In the case of a bond issued by a corporation after December 31, 1954, as part of an investment unit consisting of an obligation and an option, the issue price of the bond is determined by allocating the amount received for the investment unit to the individual elements of the unit in the manner set forth in subdivision (ii)(*a*) of § 1.1232–3(b)(2). Discount with respect to bonds issued by a corporation as part of investment units consisting of obligations and options after December 31, 1954, and before Dec. 24, 1968—

(i) Increased by any amount treated as bond premium which has been included in gross income with respect to such bonds prior to Dec. 24, 1968, or

(ii) Decreased by any amount which has been deducted by the issuer as discount attributable to such bonds prior to Dec. 24, 1968, and

(iii) Decreased by any amount which has been deducted by the issuer prior to Dec. 24, 1968 upon the exercise or sale by investors of options issued in investment units with such bonds,

should be amortized, starting with the first taxable year ending on or after Dec. 24, 1968 over the remaining life of such bonds.

(b) *Examples.* The rules in paragraph (a) of this section are illustrated by the following examples:

Example 1. M Corporation, on January 1, 1960, the beginning of its taxable year issued for $95,000, 3 percent bonds, maturing 10 years from the date of issue, with a stated redemption price at maturity of $100,000. M Corporation should treat $5,000 ($100,000–$95,000) as the total amount to be amortized over the life of the bonds.

Example 2. Assume the same facts as example (1), except that the bonds are convertible into common stock of M Corporation. Since the issue price of the bonds includes any amount attributable to the conversion privilege, the result is the same as in example (1).

Example 3. Assume the same facts as example (1), except that the bonds are issued as part of an investment unit consisting of an obligation and an option. Assume further that the issue price of the bonds as determined under the rules of allocation set forth in subdivision (ii)(*a*) of § 1.1232–3(b)(2) is $94,000. Accordingly, M Corporation should treat $6,000 ($100,000–$94,000) as the total amount to be amortized over the life of the bonds.

Example 4. Assume in example (3), that prior to Dec. 24, 1968, M Corporation had only treated $5,000 as the bond discount to be amortized and deducted only $4,000 of this amount. Starting with the first taxable year ending on or after Dec. 24, 1968, M Corporation should amortize $2,000 ($6,000 discount, less $4,000 previously deducted) over the remaining life of the bonds.

Example 5. N Corporation, on January 1, 1956, for a consideration of $102,000, issued 20-year bonds in the face amount of $100,000, together with options to purchase stock of N Corporation. The issue price of the bonds as determined under the rules of allocation set forth in subdivision (ii)(*a*) of § 1.1232–3(b)(2) is $99,000. Until Dec. 24, 1968, N Corporation has treated as bond premium, $2,000, representing the excess of the consideration received for the bond-option investment units over the maturity value of the bonds, and has accordingly prorated and included in income $1,200 of such amount. Starting with the first taxable year beginning on or after Dec. 24, 1968, N Corporation may amortize as a deduction over the remaining life of the bonds the amount of $2,200 ($1,000 discount, plus $1,200 previously included in income).

Example 6. O Corporation, on January 1, 1956, for a consideration of $100,000, issued 20-year bonds with a $100,000 face value, together with options to purchase stock of O Corporation, which could be exercised at any time up to 5 years from the date of issue. The issue price of the bonds as determined under the rules of allocation set forth in subdivision (ii)(*a*) of § 1.1232–3(b)(2) is $98,000. O Corporation, upon the exercise of the options prior to Dec. 24, 1968, had deducted from income their fair market value at the time of exercise, which is assumed for purposes of this example to have been $3,000. Even though the bonds are considered to have been issued at a discount under paragraph (a)(1) of this section, O Corporation would have no deduction over the remaining life of the bonds, inasmuch as O Corporation, in computing the amount of such deduction, is required under paragraph (a)(2)(iii) of this section to reduce the amount which would otherwise be treated as bond discount, $2,000 ($100,000–$98,000), by the amount deducted from income upon the exercise of the options, in this case, $3,000.

(c) *Deduction upon repurchase.* (1) Except as provided in subparagraphs (2) and (3) of this paragraph, if bonds are issued by a corporation and are subsequently repurchased by the corporation at a price in excess of the issue price plus any amount of discount deducted prior to repurchase, or (in the case of bonds issued subsequent to Feb. 28, 1913) minus any amount of premium returned as income prior to repurchase, the excess of the purchase price over the issue price adjusted for amortized premium or discount is a deductible expense for the taxable year.

(2) In the case of a convertible bond (except a bond which the corporation, before Sept. 5, 1968, has obligated itself to repurchase at a specified price), the deduction allowable under subparagraph (1) of this paragraph may not exceed an amount equal to 1 year's interest at the rate specified in the bond, except to the extent that the corporation can demonstrate to the satisfaction of the Commissioner or his delegate that an amount in excess of 1 year's interest does not include any amount attributable to the conversion feature.

(3) No deduction shall be allowed under subparagraph (1) of this paragraph to the extent a deduction is disallowed under subparagraph (2) of this paragraph or to the extent a deduction is disallowed by section 249 (relating to limitation on deduction of bond premium on repurchase of convertible obligation) and the regulations thereunder. See paragraph (f) of §1.249–1 for effective date limitation on section 249.

(d) *Definition.* For purposes of this section, a debenture, note, certificate other evidence of indebtedness, issued by a corporation and bearing interest shall be given the same treatment as a bond.

(e) *Effective date.* The provisions of this section shall not apply in respect of a bond issued after May 27, 1969, unless issued pursuant to a written commitment which was binding on that date and at all times thereafter.

[T.D. 6984, 33 FR 19175, Dec. 24, 1968, as amended by T.D. 7154, 36 FR 24996, Dec. 28, 1971; T.D. 7259, 38 FR 4253, Feb. 12, 1973]

§ 1.163–4 Deduction for original issue discount on certain obligations issued after May 27, 1969.

(a) *In general.* (1) If an obligation is issued by a corporation with original issue discount, the amount of such discount is deductible as interest and shall be prorated or amortized over the life of the obligation. For purposes of this section the term ''obligation'' shall have the same meaning as in §1.1232–1 (without regard to whether the obligation is a capital asset in the hands of the holder) and the term ''original issue discount'' shall have the same meaning as in section 1232(b)(1) (without regard to the one-fourth of 1 percent limitation in the second sentence thereof). Thus, in general, the amount of original issue discount equals the excess of the amount payable at maturity over the issue price of the bond (as defined in paragraph (b)(2) of §1.1232–3), regardless of whether that amount is less than one-fourth of 1 percent of the redemption price at maturity multiplied by the number of complete years to maturity. For the rule as to whether there is original issue discount in the case of an obligation issued in an exchange for property other than money, and the amount thereof, see paragraph (b)(2)(iii) of §1.1232–3. In any case in which original issue discount is carried over from one corporation to another corporation under section 381(c)(9) or from an obligation exchanged to an obligation received in any exchange under paragraph (b)(1)(iv) of §1.1232–3, such discount shall be carried over for purposes of this section. The amount of original issue discount carried over in an exchange of obligations under the preceding sentence shall be prorated or amortized over the life of the obligation issued in such exchange. For computation of issue price and the amount of original issue discount in the case of serial obligations, see paragraph (b)(2)(iv) of §1.1232–3.

(2) In the case of an obligation issued by a corporation as part of an investment unit (as defined in paragraph (b)(2)(ii)(*a*) of §1.1232–3) consisting of an obligation and other property, the issue price of the obligation is determined by allocating the amount received for the investment unit to the individual elements of the unit in the manner set forth in paragraph (b)(2)(ii) of §1.1232–3.

(3) *Recovery or retention of amounts previously deducted.* In any taxable year in which an amount of original issue

discount which was deducted as interest under this section is retained or recovered by the taxpayer, such as, for example, by reason of a fine, penalty, forfeiture, or other withdrawal fee, such amount shall be includible in the gross income of such taxpayer for such taxable year.

(b) *Examples.* The rules in paragraph (a) of this section are illustrated by the following examples:

Example 1. N Corporation, which uses the calendar year as its taxable year, on January 1, 1970, issued for $99,000, 9 percent bonds maturing 10 years from the date of issue, with a stated redemption price at maturity of $100,000. The original issue discount on each bond (as determined under section 1232(b)(1) without regard to the one-fourth-of-1-percent limitation in the second sentence thereof) is $1,000, *i.e.*, redemption price, $100,000, minus issue price, $99,000. N shall treat $1,000 as the total amount to be amortized over the life of the bonds.

Example 2. Assume the same facts as example (1), except that the bonds are convertible into common stock of N Corporation. Since the issue price of the bonds includes any amount attributable to the conversion privilege, the result is the same as in example (1).

Example 3. Assume the same facts as example (1), except that the bonds are issued as part of an investment unit consisting of an obligation and an option. Assume further that the issue price of the bonds as determined under the rules of allocation set forth in paragraph (b)(2)(ii) of §1.1232–3 is $94,000. The original issue discount on the bond (as determined under section 1232(b)(1) without regard to the one-fourth-of-1-percent limitation in the second sentence thereof) is $6,000, *i.e.*, redemption price, $100,000, minus issue price, $94,000. N shall treat $6,000 as the total amount to be amortized over the life of the bonds.

Example 4. On January 1, 1971, a commercial bank which uses the calendar year as its taxable year, issued a certificate of deposit for $10,000. The certificate of deposit is not redeemable until December 31, 1975, except in an emergency as defined in, and subject to the qualifications provided by Regulations Q of the Board of Governors of the Federal Reserve. See 12 CFR §217.4(d). The stated redemption price at maturity is $13,382.26. The certificate is an obligation to which section 1232(a)(3)(A) applies (see paragraph (d) of §1.1232–1), and the original issue discount with respect to the certificate (as determined under section 1232(b)(1) without regard to the one-fourth-of-1-percent limitation in the second sentence thereof) is $3,382.26 (*i.e.*, redemption price, $13,382.26, minus issued price, $10,000). Y shall treat $3,382.26 as the total amount to be amortized over the life of the certificate.

(c) *Deduction upon repurchase.* (1) Except as provided in subparagraph (2) of this paragraph, if bonds are issued by a corporation and are subsequently repurchased by the corporation at a price in excess of the issue price plus any amount of original issue discount deducted prior to repurchase, or minus any amount of premium returned as income prior to repurchase, the excess of the repurchase price over the issue price adjusted for amortized premium or deducted discount is deductible as interest for the taxable year.

(2) The provisions of subparagraph (1) of this paragraph shall not apply to the extent a deduction is disallowed by section 249 (relating to limitation on deduction of bond premium or repurchase of convertible obligation) and the regulations thereunder.

(d) *Effective date.* The provisions of this section shall apply in respect of obligations issued after May 27, 1969, other than—

(1) Obligations issued pursuant to a written commitment which was binding on May 27, 1969, and at all times thereafter, and

(2) Deposits made before January 1, 1971, in the case of certificates of deposit, time deposits, bonus plans, and other deposit arrangements with banks, domestic building and loan associations, and similar financial institutions.

[36 FR 24996, Dec. 28, 1971, as amended by T.D. 7213, 37 FR 21991, Oct. 18, 1972; T.D. 7259, 38 FR 4253, Feb. 12, 1973]

§ 1.163–5 Denial of interest deduction on certain obligations issued after December 31, 1982, unless issued in registered form.

(a)–(b) [Reserved]

(c) *Obligations issued to foreign persons after September 21, 1984*—(1) *In general.* A determination of whether an obligation satisfies each of the requirements of this paragraph shall be made on an obligation-by-obligation basis. An obligation issued directly (or through affiliated entities) in bearer form by, or guaranteed by, a United States Government-owned agency or a United States Government-sponsored enterprise, such as the Federal National Mortgage Association, the Federal Home Loan Banks, the Federal Loan Mortgage Corporation, the Farm Credit Administration, and the Student Loan Marketing Association, may not satisfy this paragraph (c). An obligation issued after September 21, 1984 is described in this paragraph if—

(i) There are arrangements reasonably designed to ensure that such obligation will be sold (or resold in connection with its original issuance) only to a person who is not a United States person or who is a United States person that is a financial institution (as defined in §1.165–12(c)(1)(v)) purchasing for its own account or for the account of a customer and that agrees to comply with the requirements of section 165(j)(3) (A), (B), or (C) and the regulations thereunder, and

(ii) In the case of an obligation which is not in registered form—

(A) Interest on such obligation is payable only outside the United States and its possessions, and

(B) Unless the obligation is described in subparagraph (2)(i)(C) of this paragraph or is a temporary global security, the following statement in English either appears on the face of the obligation and on any interest coupons which may be detached therefrom or, if the obligation is evidenced by a book entry, appears in the book or record in which the book entry is made: ''Any United States person who holds this obligation will be subject to limitations under the United States income tax laws, including the limitations provided in sections 165(j) and 1287(a) of the Internal Revenue Code.'' For purposes of this paragraph, the term ''temporary global security'' means a security which is held for the benefit of the purchasers of the obligations of the issuer and interests in which are exchangeable for securities in definitive registered or bearer form prior to its stated maturity.

(2) *Rules for the application of this paragraph*—(i) *Arrangements reasonably designed to ensure sale to non-United States persons*. An obligation will be considered to satisfy paragraph (c)(1)(i) of this section if the conditions of paragraph (c)(2)(i) (A), (B), (C), or (D) of this section are met in connection with the original issuance of the obligation. An exchange of one obligation for another is considered an original issuance if and only if the exchange constitutes a disposition of property for purposes of section 1001 of the Code. However, an exchange of one obligation for another will not be considered a new issuance if the obligation received is identical in all respects to the obligation surrendered in exchange therefor, except that the obligor of the obligation received need not be the same obligor as the obligor of the obligation surrendered. Obligations that meet the conditions of paragraph (c)(2)(i) (A), (B), (C) or (D) of this section may be issued in a single public offering. The preceding sentence does not apply to certificates of deposit issued under the conditions of paragraph (c)(2)(i)(C) of this section by a United States person or by a controlled foreign corporation within the meaning of section 957(a) that is engaged in the active conduct of a banking business within the meaning of section 954(c)(3)(B) as in effect prior to the Tax Reform Act of 1986, and the regulations thereunder. A temporary global security need not satisfy the conditions of paragraph (c)(2)(i) (A), (B) or (C) of this section, but must satisfy the applicable requirements of paragraph (c)(2)(i)(D) of this section.

(A) In connection with the original issuance of an obligation, the obligation is offered for sale or resale only outside of the United States and its possessions, is delivered only outside the United States and its possessions and is not registered under the Securities Act of 1933 because it is intended for distribution to persons who are not United States persons. An obligation will not be considered to be required to be registered under the Securities Act of 1933 if the issuer, in reliance on the written opinion of counsel received prior to the issuance thereof, determines in good faith that the obligation need not be registered under the Securities Act of 1933 for the reason that it is intended for distribution to persons who are not United States persons. Solely for purposes of this subdivision (i)(A), the term ''United States person'' has the same meaning as it has for purposes of determining whether an obligation is intended for distribution to persons under the Securities Act of 1933. Except as provided in paragraph (c)(3) of this section, this paragraph (c)(2)(i)(A) applies only to obligations issued on or before September 7, 1990.

(B) The obligation is registered under the Securities Act of 1933, is exempt from registration by reason of section 3 or section 4 of such Act, or does not qualify as a security under the Securities Act of 1933; all of the conditions set forth in paragraph (c)(2)(i)(B) (*1*), (*2*), (*3*), (*4*), and (*5*) of this section are met with respect to such obligations; and, except as provided in paragraph (c)(3) of this section, the obligation is issued on or before September 7, 1990.

(*1*) In connection with the original issuance of an obligation in bearer form, the obligation is offered for sale or resale only outside the United States and its possessions.

(*2*) The issuer does not, and each underwriter and each member of the selling group, if any, covenants that it will not, in connection with the original issuance of the obligation, offer to sell or resell the obligation in bearer form to any person inside the United States or to a United States person unless such United States person is a financial institution as defined in §1.165–12(c)(v) purchasing for its own account or for the account of a customer, which financial institution, as a condition of the purchase, agrees to provide on delivery of the obligation (or on issuance, if the obligation is not in definitive form) the certificate required under paragraph (c)(2)(i)(B)(4).

(*3*) In connection with its sale or resale during the original issuance of the obligation in bearer form, each underwriter and each member of the selling group, if any, or the issuer, if there is no underwriter or selling group, sends a confirmation to the purchaser of the bearer obligation stating that the purchaser represents that it is not a United States person or, if it is a United States person, it is a financial institution as defined in §1.165–12(c)(v) purchasing for its own account or for the account of a customer and that the financial institution will comply with the requirements of section 165(j)(3) (A), (B), or (C) and the regulations thereunder. The confirmation must also state that, if the purchaser is a dealer, it will send similar confirmations to whomever purchases from it.

(*4*) In connection with the original issuance of the obligation in bearer form it is delivered in definitive form (or issued, if the obligation is not in definitive form) to the person entitled to physical delivery thereof only outside the United States and its possessions and only upon presentation of a certificate signed by such person to the issuer, underwriter, or member of the selling group, which certificate states that the obligation is not being acquired by or on behalf of a United States person, or for offer to resell or for resale to a United States person or any person inside the United States, or, if a beneficial interest in the obligation is being acquired by a United States person, that such person is a financial institution as defined in §1.165.12(c)(1)(v) or is acquiring through a financial institution and that the obligation is held by a financial institution that has agreed to comply with the requirements of section 165(j)(3) (A), (B), or (C) and the regulations thereunder and that is not purchasing for offer to resell or for resale inside the United States. When a certificate is provided by a clearing organization, it must be based on statements provided to it by its member organizations. A clearing organization is an entity which is in the business of holding obligations for member organizations and transferring obligations among such members by credit or debit to the account of a member without the necessity of physical delivery of the obligation. For purposes of paragraph (c)(2)(i)(B), the term ''delivery'' does not include the delivery of an obligation to an underwriter or member of the selling group, if any.

(*5*) The issuer, underwriter, or member of the selling group does not have actual knowledge that the certificate described in paragraph (c)(2)(i)(B)(*4*) of this section is false. The issuer, underwriter, or member of the selling group shall be deemed to have actual knowledge that the certificate described in paragraph (c)(2)(i)(B)(*4*) of this section is false if the issuer, underwriter, or member of the selling group has a United States address for the beneficial owner (other than a financial institution as defined in §1.165–12(c)(v) that represents that it will comply with the requirements of section 165(j)(3) (A), (B), or (C) and the regulations thereunder) and does not have documentary evidence as described in §1.6049–5(c)(1) that the beneficial owner is not a United States person.

(C) The obligation is issued only outside the United States and its possessions by an issuer that does not significantly engage in interstate commerce with respect to the issuance of such obligation either directly or through its agent, an underwriter, or a member of the selling group. In the case of an issuer that is a United States person, such issuer may only satisfy the test set forth in this paragraph (c)(2)(i)(C) if—

(*1*) It is engaged through a branch in the active conduct of a banking business, within the meaning of section 954(c)(3)(B) as in effect before the Tax Reform Act of 1986, and the regulations thereunder, outside the United States;

(*2*) The obligation is issued outside of the United States by the branch in connection with that trade or business;

(*3*) The obligation that is so issued is sold directly to the public and is not issued as a part of a larger issuance made by means of a public offering; and

(*4*) The issuer either maintains documentary evidence as described in subdivision (iii) of A–5 of §35a.9999–4T that the purchaser is not a United States person (provided that the issuer has no actual knowledge that the documentary evidence is false) or on delivery of the obligation the issuer receives a statement signed by the person entitled to physical delivery thereof and stating either that the obligation is not being acquired by or on behalf of a United States person or that, if a beneficial interest in the obligation is being acquired by a United States person, such person is a financial institution as defined in §1.165–12(c)(v) or is acquiring through a financial institution and the obligation is held by a financial institution that has agreed to comply with the requirements of 165(j)(3) (A), (B) or (C) and the regulations thereunder and that it is not purchasing for offer to resell or for resale inside the United States (provided that the issuer has no actual knowledge that the statement is false).

In addition, an issuer that is a controlled foreign corporation within the meaning of section 957 (a) that is engaged in the active conduct of a banking business outside the United States within the meaning of section 954(c)(3)(B) as in effect before the Tax Reform Act of 1986, and the regulations thereunder, can only satisfy the provisions of this paragraph (c)(2)(i)(C), if it meets the requirements of this paragraph (c)(2)(i)(C)(2), (3) and (4).

(D) The obligation is issued after September 7, 1990, and all of the conditions set forth in this paragraph (c)(2)(i)(D) are met with respect to such obligation.

(*1*) *Offers and sales*—(*i*) *Issuer*. The issuer does not offer or sell the obligation during the restricted period to a person who is within the United States or its possessions or to a United States person.

(*ii*) *Distributors*. (*A*) The distributor of the obligation does not offer or sell the obligation during the restricted period to a person who is within the United States or its possessions or to a United States person.

(*B*) The distributor of the obligation will be deemed to satisfy the requirements of paragraph (c)(2)(i)(D)(*1*)(*ii*)(*A*) of this section if the distributor of the obligation convenants that it will not offer or sell the obligation during the restricted period to a person who is within the United States or its possessions or to a United States person; and the distributor of the obligation has in effect, in connection with the offer and sale of the obligation during the restricted period, procedures reasonably designed to ensure that its employees or agents who are directly engaged in selling the obligation are aware that the obligation cannot be offered or sold during the restricted period to a person who is within the United States or its possessions or is a United States person.

(*iii*) *Certain rules*. For purposes of paragraph (c)(2)(i)(D)(*1*) (*i*) and (*ii*) of this section:

(*A*) An offer or sale will be considered to be made to a person who is within the United States or its possessions if the offeror or seller of the obligation has an address within the United States or its possessions for the offeree or buyer of the obligation with respect to the offer or sale.

(*B*) An offer or sale of an obligation will not be treated as made to a person within the United States or its possessions or to a United States person if the person to whom the offer or sale is made is: An exempt distributor, as defined in paragraph (c)(2)(i)(D)(*5*) of this section; An international organization as defined in section 7701(a)(18) and the regulations thereunder, or a foreign central bank as defined in section 895 and the regulations thereunder; or The foreign branch of a United States financial institution as described in paragraph (c)(2)(i)(D)(*6*)(*i*) of this section.

Paragraph (c)(2)(i)(D)(*1*)(*iii*)(*B*) regarding an exempt distributor will only apply to an offer to the United States office of an exempt distributor, and paragraph (c)(2)(i)(D)(*1*)(*iii*)(*B*) regarding an international organization or foreign central bank will only apply to an offer to an international organization or foreign central bank, if such offer is made directly and specifically to the United States office, organization or bank.

(*C*) A sale of an obligation will not be treated as made to a person within the United States or its possessions or to a United States person if the person to whom the sale is made is a person described in paragraph (c)(2)(i)(D)(*6*)(*ii*) of this section.

(*2*) *Delivery*. In connection with the sale of the obligation during the restricted period, neither the issuer nor any distributor delivers the obligation in definitive form within the United States or it possessions.

(*3*) *Certification*—(*i*) *In general*. On the earlier of the date of the first actual payment of interest by the issuer on the obligation or the date of delivery by the issuer of the obligation in definitive form, a certificate is provided to the issuer of the obligation stating that on such date:

(*A*) The obligation is owned by a person that is not a United States person:

(*B*) The obligation is owned by a United States person described in paragraph (c)(2)(i)(D)(*6*) of this section; or

(*C*) The obligation is owned by a financial institution for purposes of resale during the restricted period, and such financial institution certifies in addition that it has not acquired the obligation for purposes of resale directly or indirectly to a United States person or to a person within the United States or its possessions.

A certificate described in paragraph (c)(2)(i)(D)(*3*)(*i*) (*A*) or (*B*) of this section may not be given with respect to an obligation that is owned by a financial institution for purposes of resale during the restricted period. For purposes of paragraph (c)(2)(i)(D) (*2*) and (*3*) of this section, a temporary global security (as defined in §1.163–5 (c)(1)(ii)(B)) is not considered to be an obligation in definitive form. If the issuer does not make the obligation available for delivery in definitive form within a reasonable period of time after the end of the restricted period, then the obligation shall be treated as not satisfying the requirements of this paragraph (c)(2)(i)(D)(*3*). The certificate must be signed (or sent, as provided in paragraph (c)(2)(i)(D)(*3*)(*ii*) of this section) either by the owner of the obligation or by a financial institution or clearing organization through which the owner holds the obligation, directly or indirectly. For purposes of this paragraph (c)(2)(i)(D)(*3*), the term ''financial institution'' means a financial institution described in §1.165–12(c)(i)(v). When a certificate is provided by a clearing organization, the certificate must be based on statements provided to it by its member organizations. The requirement of this paragraph (c)(1)(D)(*3*) shall be deemed not to be satisfied with respect to an obligation if the issuer knows or has reason to know that the certificate with respect to such obligation is false. The certificate must be retained by the issuer (and statements by member organizations must be retained by the clearing organization, in the case of certificates based on such statements) for a period of four calendar years following the year in which the certificate is received.

(*ii*) *Electronic certification*. The certificate required by paragraph (c)(2)(i)(D)(*3*)(*i*) of this section (including a statement provided to a clearing organization by a member organization) may be provided electronically, but only if the person receiving such electronic certificate maintains adequate records, for the retention period described in paragraph (c)(2)(i)(D)(*3*)(*i*) of this section, establishing that such certificate was received in respect of the subject obligation, and only if there is a written agreement entered into prior to the time of certification (including the written membership rules of a clearing organization) to which the sender and recipient are subject, providing that the electronic certificate shall have the effect of a signed certificate described in paragraph (c)(2)(i)(D)(*3*)(*i*) of this section.

(*iii*) *Exception for certain obligations.* This paragraph (c)(2)(i)(D)(*3*) shall not apply, and no certificate shall be required, in the case of an obligation that is sold during the restricted period and that satisfies all of the following requirements:

(*A*) The interest and principal with respect to the obligation are denominated only in the currency of a single foreign country.

(*B*) The interest and principal with respect to the obligation are payable only within that foreign country (according to rules similar to those set forth in §1.163–5(c)(2)(v)).

(*C*) The obligation is offered and sold in accordance with practices and documentation customary in that foreign country.

(*D*) The distributor covenants to use reasonable efforts to sell the obligation within that foreign country.

(*E*) The obligation is not listed, or the subject of an application for listing, on an exchange located outside that foreign country.

(*F*) The Commissioner has designated that foreign country as a foreign country in which certification under paragraph (c)(2)(i)(D)(*3*)(*i*) of this section is not permissible.

(*G*) The issuance of the obligation is subject to guidelines or restrictions imposed by governmental, banking or securities authorities in that foreign country.

(*H*) More than 80 percent by value of the obligations included in the offering of which the obligation is a part are offered and sold to non-distributors by distributors maintaining an office located in that foreign country. Foreign currency denominated obligations that are convertible into U.S. dollar denominated obligations or that by their terms are linked to the U.S. dollar in a way which effectively converts the obligations to U.S. dollar denominated obligations do not satisfy the requirements of this paragraph (c)(2)(i)(D)(*3*)(*iii*). A foreign currency denominated obligation will not be treated as linked, by its terms, to the U.S. dollar solely because the obligation is the subject of a swap transaction.

(*4*) *Distributor.* For purposes of this paragraph (c)(2)(i)(D), the term ''distributor'' means:

(*i*) A person that offers or sells the obligation during the restricted period pursuant to a written contract with the issuer;

(*ii*) Any person that offers or sells the obligation during the restricted period pursuant to a written contract with a person described in paragraph (c)(2)(i)(D) (*4*) (*i*); and

(*iii*) Any affiliate that acquires the obligation from another member of its affiliated group for the purpose of offering or selling the obligation during the restricted period, but only if the transferor member of the group is the issuer or a person described in paragraph (c)(2)(i)(D) (*4*)(*i*) or (*ii*) of this section. The terms ''affiliate'' and ''affiliated group'' have the same meanings as in section 1504(a) of the Code, but without regard to the exceptions contained in section 1504(b) and substituting ''50 percent'' for ''80 percent'' each time it appears.

For purposes of this paragraph (c)(2)(i)(D)(*4*), a written contract does not include a confirmation or other notice of the transaction.

(*5*) *Exempt distributor.* For purposes of this paragraph (c)(2)(i)(D), the term ''exempt distributor'' means a distributor that convenants in its contract with the issuer or with a distributor described in paragraph (c)(2)(i)(D)(*4*)(*i*) that it is buying the obligation for the purpose of resale in connection with the original issuance of the obligation, and that if it retains the obligation for its own account, it will only do so in accordance with the requirements of paragraph (c)(2)(i)(D)(*6*) of this section. In the latter case, the convenant will constitute the certificate required under paragraph (c)(2)(i)(D)(*6*). The provisions of paragraph (c)(2)(i)(D)(*7*) governing the restricted period for unsold allotments or subscriptions shall apply to any obligation retained for investment by an exempt distributor.

(*6*) *Certain United States persons.* A person is described in this paragraph (c)(2)(i)(D)(*6*) if the requirements of this paragraph are satisfied and the person is:

(*i*) The foreign branch of a United States financial institution purchasing for its own account or for resale, or

(*ii*) A United States person who acquired the obligation through the foreign branch of a United States financial institution and who, for purposes of the certification required in paragraph (c)(2)(i)(D)(*3*) of this section, holds the obligation through such financial institution on the date of certification.

For purposes of paragraph (c)(2)(i)(D)(*6*)(*ii*) of this section, a United States person will be considered to acquire and hold an obligation through the foreign branch of a United States financial institution if the United States person has an account with the United States office of a financial institution, and the transaction is executed by a foreign office of that financial institution, or by the foreign office of another financial institution acting on behalf of that financial institution. This paragraph (c)(2)(i)(D)(*6*) will apply, however, only if the United States financial institution (or the United States office of a foreign financial institution) holding the obligation provides a certificate to the issuer or distributor selling the obligation within a reasonable time stating that it agrees to comply with the requirements of section 165(j)(3)(A), (B), or (C) and the regulations thereunder. For purposes of this paragraph (c)(2)(i)(D)(*6*), the term ''financial institution'' means a financial institution as defined in §1.165–12(c)(1)(v). As an alternative to the certification required above, a financial institution may provide a blanket certificate to the issuer or distributor selling the obligation stating that the financial institution will comply with the requirements of section 165(j)(3)(A), (B) or (C) and the regulations thereunder. A blanket certificate must be received by the issuer or the distributor in the year of the issuance of the obligation or in either of the preceding two calendar years, and must be retained by the issuer or distributor for at least four years after the end of the last calendar year to which it relates.

(*7*) *Restricted period.* For purposes of this paragraph (c)(2)(i)(D), the restricted period with respect to an obligation begins on the earlier of the closing date (or the date on which the issuer receives the loan proceeds, if there is no closing with respect to the obligation), or the first date on which the obligation is offered to persons other than a distributor. The restricted period with respect to an obligation ends on the expiration of the forty day period beginning on the closing date (or the date on which the issuer receives the loan proceeds, if there is no closing with respect to the obligation). Notwithstanding the preceding sentence, any offer or sale of the obligation by the issuer or a distributor shall be deemed to be during the restricted period if the issuer or distributor holds the obligation as part of an unsold allotment or subscription.

(*8*) *Clearing organization.* For purposes of this paragraph (c)(2)(i)(D), a ''clearing organization'' is an entity which is in the business of holding obligations for member organizations and transferring obligations among such members by credit or debit to the account of a member without the necessity of physical delivery of the obligation.

(ii) *Special rules.* An obligation shall not be considered to be described in paragraph (c)(2)(i)(C) of this section if it is—

(A) Guaranteed by a United States shareholder of the issuer;

(B) Convertible into a debt or equity interest in a United States shareholder of the issuer; or

(C) Substantially identical to an obligation issued by a United States shareholder of the issuer.

For purposes of this paragraph (c)(2)(ii), the term ''United States shareholder'' is defined as it is defined in section 951 (b) and the regulations thereunder. For purposes of this paragraph (c)(2)(ii)(C), obligations are substantially identical if the face amount, interest rate, term of the issue, due dates for payments, and maturity date of each is substantially identical to the other.

(iii) *Interstate commerce.* For purposes of this paragraph, the term ''interstate commerce'' means trade or commerce in obligations or any transportation or communication relating thereto between any foreign country and the United States or its possessions.

(A) An issuer will not be considered to engage significantly in interstate commerce with respect to the issuance of an obligation if the only activities with respect to which the issuer uses the means or instrumentalities of interstate commerce are activities of a preparatory or auxiliary character that do not involve communication between a prospective purchaser and an issuer, its agent, an underwriter, or member of the selling group if either is inside the United States or its possessions. Activities of a preparatory or auxiliary character include, but are not limited to, the following activities:

(*1*) Establishment or participation in establishment of policies concerning the issuance of obligations and the allocation of funding by a United States shareholder with respect to obligations issued by a foreign corporation or by a United States office with respect to obligations issued by a foreign branch;

(*2*) Negotiation between the issuer and underwriters as to the terms and pricing of an issue;

(*3*) Transfer of funds to an office of an issuer in the United States or its possessions by a foreign branch or to a United States shareholder by a foreign corporation;

(*4*) Consultation by an issuer with accountants and lawyers or other financial advisors in the United States or its possessions regarding the issuance of an obligation;

(*5*) Document drafting and printing; and

(*6*) Provision of payment or delivery instructions to members of the selling group by an issuer's office or agent that is located in the United States or its possessions.

(B) Activities that will not be considered to be of a preparatory or auxiliary character include, but are not limited to, any of the following activities:

(*1*) Negotiation or communication between a prospective purchaser and an issuer, its agent, an underwriter, or a member of the selling group concerning the sale of an obligation if either is inside the United States or its possessions;

(*2*) Involvement of an issuer's office, its agent, an underwriter, or a member of the selling group in the United States or its possessions in the offer or sale of a particular obligation, either directly with the prospective purchaser, or through the issuer in a foreign country;

(*3*) Delivery of an obligation in the United States or its possessions; or

(*4*) Advertising or otherwise promoting an obligation in the United States or its possessions.

(C) The following examples illustrate the application of this subdivision (iii) of §1.163–5(c)(2).

Example 1. Foreign corporation A, a corporation organized in and doing business in foreign country Z, and not a controlled foreign corporation within the meaning of section 957(a) that is engaged in the conduct of a banking business within the meaning of section 954(c)(3)(B) as in effect before the Tax Reform Act of 1986, issues its debentures outside the United States. The debentures are not guaranteed by a United States shareholder of A, nor are they convertible into a debt or equity interest of a United States shareholder of A, nor are they substantially identical to an obligation issued by a United States shareholder of A. A consults its accountants and lawyers in the United States for certain securities and tax advice regarding the debt offering. The underwriting and selling group in respect to A's offering is composed entirely of foreign securities firms, some of which are foreign subsidiaries of United States securities firms. A U.S. affiliate of the foreign underwriter communicates payment and delivery instructions to the selling group. All offering circulars for the offering are mailed and delivered outside the United States and its possessions. All debentures are delivered and paid for outside the United States and its possessions. No office located in the United States or in a United States possession is involved in the sale of debentures. Interest on the debentures is payable only outside the United States and its possessions. A is not significantly engaged in interstate commerce with respect to the offering.

Example 2. B, a United States bank, does business in foreign country X through a branch located in X. The branch is a staffed and operating unit engaged in the active conduct of a banking business consisting of one or more of the activities set forth in § 1.954–2(d)(2)(ii). As part of its ongoing business, the branch in X issues negotiable certificates of deposit with a maturity in excess of one year to customers upon request. The certificates of deposit are not guaranteed by a United States shareholder of B, nor are they convertible into a debt or equity interest of a United States shareholder of B, nor are they substantially identical to an obligation issued by a United States shareholder of B. Policies regarding the issuance of negotiable certificates of deposit and funding allocations for foreign branches are set in the United States at B's main office. Branch personnel decide whether to issue a negotiable certificate of deposit based on the guidelines established by the United States offices of B, but without communicating with the United States offices of B with respect to the issuance of a particular obligation. Negotiable certificates of deposits are delivered and paid for outside the United States and its possessions. Interest on the negotiable certificates of deposit is payable only outside the United States and its possessions. B maintains documentary evidence described in § 1.163–5(c)(2)(i)(C)(*4*). After the issuance of negotiable certificates of deposit by the foreign branch of B, the foreign branch sends the funds to a United States branch of B for use in domestic operations. B is not significantly engaged in interstate commerce with respect to the issuance of such obligation.

Example 3. The facts in Example (2) apply except that the foreign branch of B consulted, by telephone, the main office in the United States to request approval of the issuance of the certificate of deposit at a particular rate of interest. The main office granted permission to issue the negotiable certificate of deposit to the customer by a telex sent from the main office of B to the branch in X. B is significantly engaged in interstate commerce with respect to the issuance of the obligation as a result of involvement of B's United States office in the issuance of the obligation.

Example 4. The facts in Example (2) apply with the additional fact that a customer contacted the foreign branch of B through a telex originating in the United States or its possessions. Subsequent to the telex, the foreign branch issued the negotiable certificate of deposit and recorded it on the books. B is significantly engaged in interstate commerce with respect to the issuance of the obligation as a result of its communication by telex with a customer in the United States.

(iv) *Possessions.* For purposes of this section, the term ''possessions'' includes Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, Wake Island, and Northern Mariana Islands.

(v) *Interest payable outside of the United States.* Interest will be considered payable only outside the United States and its possessions if payment of such interest can be made only upon presentation of a coupon, or upon making of any other demand for payment, outside of the United States and its possessions to the issuer or a paying agent. The fact that payment is made by a draft drawn on a United States bank account or by a wire or other electronic transfer from a United States account does not affect this result. Interest payments will be considered to be made within the United States if the payments are made by a transfer of funds into an account maintained by the payee in the United States or mailed to an address in the United States, if—

(A) The interest is paid on an obligation issued by either a United States person, a controlled foreign corporation as defined in section 957 (a), or a foreign corporation if 50 percent or more of the gross income of the foreign corporation from all sources of the 3-year period ending with the close of its taxable year preceding the original issuance of the obligation (or for such part of the period that the foreign corporation has been in existence) was effectively connected with the conduct of a trade or business within the United States; and

(B) The interest is paid to a person other than—

(*1*) A person who may satisfy the requirements of section 165 (j)(3) (A), (B), or (C) and the regulations thereunder; and

(*2*) A financial institution as a step in the clearance of funds and such interest is promptly credited to an account maintained outside the United States for such financial institution or for persons for which the financial institution has collected such interest.

Interest is considered to be paid within the United States and its possessions if a coupon is presented, or a demand for payment is otherwise made, to the issuer or a paying agent (whether a United States or foreign person) in the United States and its possessions even if the funds paid are credited to an account maintained by the payee outside the United States and its possessions. Interest will be considered payable only outside the United States and its possessions notwithstanding that such interest may become payable at the office of the issuer or its United States paying agent under the following conditions: the issuer has appointed paying agents located outside the United States and its possessions with the reasonable expectation that such paying agents will be able to pay the interest in United States dollars, and the full amount of such payment at the offices of all such paying agents is illegal or effectively precluded because of the imposition of exchange controls or other similar restrictions on the full payment or receipt of interest in United States dollars. A lawsuit brought in the United States or its possessions for payment of the obligation or interest thereon as a result of a default shall not be considered to be a demand for payment. For purposes of this subdivision (v), interest includes original issue discount as defined in section 1273(a). Therefore, an amount equal to the original issue discount as defined in section 1273(a) is payable only outside the United States and its possessions. The amount of market discount as defined in section 1278(a) does not affect the amount of interest to be considered payable only outside the United States and its possessions.

(vi) *Rules relating to obligations issued after December 31, 1982 and on or before September 21, 1984.* Whether an obligation originally issued after December 31, 1982 and on or before September 21, 1984, or an obligation originally issued after September 21, 1984 pursuant to the exercise of a warrant or the conversion of a convertible obligation, which warrant or obligation (including conversion privilege) was issued after December 31, 1982 and on or before September 21, 1984, is described in section 163(f)(2)(B) shall be determined under the rules provided in §5f.163–1(c) as in effect prior to its removal. Notwithstanding the preceding sentence, an issuer will be considered to satisfy the requirements of section 163(f)(2)(B) with respect to an obligation issued after December 31, 1982 and on or before September 21, 1984 or after September 21, 1984 pursuant to the exercise of a warrant or the conversion of a convertible obligation, which warrant or obligation (including conversion privilege) was issued after December 31, 1982 and on or before September 21, 1984, if the issuer substantially complied with the proposed regulations provided in §1.163–5(c), which were published in the FEDERAL REGISTER on September 2, 1983 (48 FR 39953) and superseded by temporary regulations published in the FEDERAL REGISTER on August 22, 1984 (49 FR 33228).

(3) *Effective date*—(i) *In general.* These regulations apply generally to obligations issued after January 20, 1987. A taxpayer may choose to apply the rules of §1.163–5(c) with respect to an obligation issued after December 31, 1982 and on or before January 20, 1987. If this choice is made, the rules of §1.163–5(c) will apply in lieu of §1.163–5T(c) except that the legend requirement under §1.163–5(c)(1)(ii)(B) does not apply with respect to a bearer obligation evidenced exclusively by a book entry and that the certification requirement under §1.163–5T(c)(2)(B)(*4*) applies in lieu of the certification under §1.163–5(c)(2)(i)(B)(4).

(ii) *Special rules.* If an obligation is originally issued after September 7, 1990 pursuant to the exercise of a warrant or the conversion of a convertible obligation, which warrant or obligation (including conversion privilege) was issued on or before May 10, 1990, then the issuer may choose to apply either the rules of §1.163–5(c)(2)(i)(A) or §1.163–5(c)(2)(i)(B), or the rules of §1.163–5(c)(2)(i)(D). The issuer of an obligation may choose to apply either the rules of §1.163–5(c)(2)(i) (A) or (B), or the rules of §1.163–5(c)(2)(i)(D), to an obligation that is originally issued after May 10, 1990, and on or before September 7, 1990. However, any issuer choosing to apply the rules of §1.163–5(c)(2)(i)(A) must apply the definition of United States person used for such purposes on December 31, 1989, and must obtain any certificates that would have been required under applicable law on December 31, 1989.

[T.D. 8110, 51 FR 45456, Dec. 19, 1986, as amended by T.D. 8203, 53 FR 17926, May 19, 1988; T.D. 8300, 55 FR 19624, May 10, 1990; T.D. 8734, 62 FR 53416, Oct. 14, 1997]

§ 1.163–5T Denial of interest deduction on certain obligations issued after December 31, 1982, unless issued in registered form (temporary).

(a)–(c) [Reserved]

(d) *Pass-through certificates.* (1) A pass-through or participation certificate evidencing an interest in a pool of mortgage loans which under subpart E of subchapter J of the Code is treated as a trust of which the grantor is the owner (or similar evidence of interest in a similar pooled fund or pooled trust treated as a grantor trust) (''pass-through certificate'') is considered to be a ''registration-required obligation'' under section 163(f)(2)(A) and § 1.163–5(c) if the pass-through certificate is described in section 163(f)(2)(A) and § 1.163–5(c) without regard to whether any obligation held by the fund or trust to which the pass-through certificate relates is described in section 163(f)(2)(A) and § 1.163–5(c). A pass-through certificate is considered to be described in section 163(f)(2)(B) and § 1.163–5(c) if the pass-through certificate is described in section 163(f)(2)(B) and § 1.163–5(c) without regard to whether any obligation held by the fund or trust to which the pass-through certificate relates is described in section 163(f)(2)(B) and § 1.163–5(c).

(2) An obligation held by a fund or trust in which ownership interests are represented by pass-through certificates is considered to be in registered form under section 149(a) and the regulations thereunder or to be described in section 163(f)(2) (A) or (B), if the obligation held by the fund or trust is in registered form under section 149(a) and the regulations thereunder or is described in section 163(f)(2) (A) or (B), respectively, without regard to whether the pass-through certificates are so considered.

(3) For purposes of section 4701, a pass-through certificate is considered to be issued solely by the recipient of the proceeds from the issuance of the pass-through certificate (hereinafter the ''sponsor''). The sponsor is therefore liable for any excise tax under section 4701 that may be imposed with reference to the principal amount of the pass-through certificate.

(4) In order to implement the purpose of section 163, § 1.163–5(c) and this section, the Commissioner may characterize a certificate or other evidence of interest in a fund or trust which under subpart E of subchapter J of the Code is treated as a trust of which the grantor is the owner and any obligation held by such fund or trust in accordance with the substance of the arrangement they represent and may impose the penalties provided under sections 163(f)(1) and 4701 in the appropriate amounts and on the appropriate persons. This provision may be applied, for example, where a corporation issues obligations purportedly in registered form, contributes them to a grantor trust as its only assets, and arranges for the sale to investors of bearer certificates of interest in the trust which do not meet the requirements of section 163(f)(2)(B). If this provision is applied, the obligations held by the fund or trust will not be considered to be issued in registered form or to meet the requirements of section 163(f)(2)(B). The corporation will not be allowed a deduction for the payment of interest on the obligations held by the trust, and the excise tax under section 4701, calculated with reference to the principal amount of the obligations held by the trust will be imposed on the corporation may be collected from the corporation and its agents. This paragraph (d)(4) will not be applied so as to alter the tax consequences of transactions as to which rulings have been issued by the Internal Revenue Service prior to September 19, 1985.

(5) The rules set forth in this paragraph (d) apply solely for purposes of sections 4701, 163(f)(2)(A), 163(f)(2)(B), § 1.163–5(c), and any other section that refers to this section for the definition of the term ''registration-required obligation'' (such as the regulations under sections 871(h) and 881(c)). The treatment of obligations described in this paragraph (d) for purposes of section 163(f)(2) (A) and (B) does not affect the

determination of whether bearer obligations that are issued or guaranteed by the United States Government, a United States Government-owned agency, a United States Government sponsored enterprise (within the meaning of §1.163–5(c)(1)) or that are backed (as described in the Treasury Department News Release R–2835 of September 10, 1984 and Treasury Department News Release R–2847 of September 14, 1984) by obligations issued by the United States Government, a United States Government-owned agency, or a United States Government sponsored enterprise comply with the requirements of section 163(f)(2)(B) and the regulations thereunder.

(6) The provisions of paragraphs (d) (1) through (5) may be illustrated by the following example:

Commercial Bank K forms a pool of 1000 residential mortgage loans, each made to a different individual homeowner, by assigning them to Commercial Bank L, an unrelated entity serving as trustee of the pool. Commercial Bank L immediately sells in a public offering certificates of interest in the trust of a maturity of 10 years in registered form. Commercial Bank L transfers the cash proceeds of the offering to Commercial Bank K. The certificates of interest in the trust are of a type offered to the public and are not described in section 163(f)(2)(B). Pursuant to paragraph (d)(1), the certificates of interest in the pool are registration-required obligations without regard to the fact that the obligations held by the trust are not registration-required obligations.

(e) *Regular interests in REMICS.* (1) A regular interest in a REMIC, as defined in sections 860D and 860G and the regulations thereunder, is considered to be a ''registration-required obligation'' under section 163(f)(2)(A) and §1.163–5(c) if the regular interest is described in section 163(f)(2)(A) and §1.163–5(c), without regard to whether any obligation held by the REMIC to which the regular interest relates is described in section 163(f)(2)(A) and §1.163–5(c). A regular interest in a REMIC is considered to be described in section 163(f)(2)(B) and §1.163–5(c), if the regular interest is described in section 163(f)(2)(B) and §1.163(c), without regard to whether any obligation held by the REMIC to which the regular interest relates is described in section 163(f)(2)(B) and §1.163–5(c).

(2) An obligation held by a REMIC is considered to be described in section 163(f)(2) (A) or (B) if such obligation is described in section 163(f)(2) (A) or (B), respectively, without regard to whether the regular interests in the REMIC are so considered.

(3) For purposes of section 4701, a regular interest is considered to be issued solely by the recipient of the proceeds from the issuance of the regular interest (hereinafter the ''sponsor''). The sponsor is therefore liable for any excise tax under section 4701 that may be imposed with reference to the principal amount of the regular interest.

(4) In order to implement the purpose of section 163, §1.163–5(c), and this section, the Commissioner may characterize a regular interest in a REMIC and any obligation held by such REMIC in accordance with the substance of the arrangement they represent and may impose the penalties provided under sections 163(f)(1) and 4701 in the appropriate amounts and on the appropriate persons. This provision may be applied, for example, where a corporation issues an obligation that is purportedly in registered form and that will qualify as a ''qualified mortgage'' within the meaning of section 860G(a)(3) in the hands of a REMIC, contributes the obligation to a REMIC as its only asset, and arranges for the sale to investors of regular interests in the REMIC in bearer form that do not meet the requirements of section 163(f)(2)(B). If this provision is applied, the obligation held by the REMIC will not be considered to be issued in registered form or to meet the requirements of section 163(f)(2)(B). The corporation will not be allowed a deduction for the payment of interest on the obligation held by the REMIC, and the excise tax under section 4701, calculated with reference to the principal amount of the obligation held by the REMIC, will be imposed on the corporation and may be collected from the corporation and its agents.

[T.D. 8202, 53 FR 17928, May 19, 1988, as amended by T.D. 8300, 55 FR 19626, May 10, 1990]

§ 1.163–6T Reduction of deduction where section 25 credit taken (temporary).

(a) *In general.* The amount of the deduction under section 163 for interest paid or accrued during any taxable year on a certified indebtedness amount with respect to a mortgage credit certificate which has been issued under section 25 shall be reduced by the amount of the credit allowable with respect to such interest under section 25 (determined without regard to section 26).

(b) *Cross reference.* See §§ 1.25–1T through 1.25–8T with respect to rules relating to mortgage credit certificates.

[T.D. 8023, 50 FR 19355, May 8, 1985]

§ 1.163–7 Deduction for OID on certain debt instruments.

(a) *General rule.* Except as otherwise provided in paragraph (b) of this section, an issuer (including a transferee) determines the amount of OID that is deductible each year under section 163(e)(1) by using the constant yield method described in § 1.1272–1(b). This determination, however, is made without regard to section 1272(a)(7) (relating to acquisition premium) and § 1.1273–1(d) (relating to de minimis OID). An issuer is permitted a deduction under section 163(e)(1) only to the extent the issuer is primarily liable on the debt instrument. For certain limitations on the deductibility of OID, see sections 163(e) and 1275(b)(2). To determine the amount of interest (OID) that is deductible each year on a debt instrument that provides for contingent payments, see § 1.1275–4.

(b) *Special rules for de minimis OID*—(1) *Stated interest.* If a debt instrument has a de minimis amount of OID (within the meaning of § 1.1273–1(d)), the issuer treats all stated interest on the debt instrument as qualified stated interest. See §§ 1.446–2(b) and 1.461–1 for the treatment of qualified stated interest.

(2) *Deduction of de minimis OID on other than a constant yield basis.* In lieu of deducting de minimis OID under the general rule of paragraph (a) of this section, an issuer of a debt instrument with a de minimis amount of OID (other than a de minimis amount treated as qualified stated interest under paragraph (b)(1) of this section) may choose to deduct the OID at maturity, on a straight-line basis over the term of the debt instrument, or in proportion to stated interest payments. The issuer makes this choice by reporting the de minimis OID in a manner consistent with the method chosen on the issuer's timely filed Federal income tax return for the taxable year in which the debt instrument is issued.

(c) *Deduction upon repurchase.* Except to the extent disallowed by any other section of the Internal Revenue Code (e.g., section 249) or this paragraph (c), if a debt instrument is repurchased by the issuer for a price in excess of its adjusted issue price (as defined in § 1.1275–1(b)), the excess (repurchase premium) is deductible as interest for the taxable year in which the repurchase occurs. If the issuer repurchases a debt instrument in a debt-for-debt exchange, the repurchase price is the issue price of the newly issued debt instrument (reduced by any unstated interest within the meaning of section 483). However, if the issue price of the newly issued debt instrument is determined under either section 1273(b)(4) or section 1274, any repurchase premium is not deductible in the year of the repurchase, but is amortized over the term of the newly issued debt instrument in the same manner as if it were OID.

(d) *Choice of accrual periods to determine whether a debt instrument is an applicable high yield discount obligation (AHYDO).* Section 163(e)(5) affects an issuer's OID deductions for certain high yield debt instruments that have significant OID. For purposes of section 163(i)(2), which defines significant OID, the issuer's choice of accrual periods to determine OID accruals is used to determine whether a debt instrument has significant OID. See § 1.1275–2(e) for rules relating to the issuer's obligation to disclose certain information to holders.

(e) *Qualified reopening*—(1) *In general.* In a qualified reopening of an issue of debt instruments, if a holder pays more or less than the adjusted issue price of the original debt instruments to acquire an additional debt instrument, the issuer treats this difference as an adjustment to the issuer's interest expense for the original and additional debt instruments. As provided by paragraphs (e)(2) through (5) of this section, the adjustment is taken into account over the term of the instrument using constant yield principles.

(2) *Positive adjustment.* If the difference is positive (that is, the holder pays more than the adjusted issue price of the original debt instrument), then, with respect to the issuer but not the holder, the difference increases the aggregate adjusted issue prices of all of the debt instruments in the issue, both original and additional.

(3) *Negative adjustment.* If the difference is negative (that is, the holder pays less than the adjusted issue price of the original debt instrument), then, with respect to the issuer but not the holder, the difference reduces the aggregate adjusted issue prices of all of the debt instruments in the issue, both original and additional.

(4) *Determination of issuer's interest accruals.* As of the reopening date, the issuer must redetermine the yield of the debt instruments in the issue for purposes of applying the constant yield method described in §1.1272–1(b) to determine the issuer's accruals of interest expense over the remaining term of the debt instruments in the issue. This redetermined yield is based on the aggregate adjusted issue prices of the debt instruments in the issue (as determined under this paragraph (e)) and the remaining payment schedule of the debt instruments in the issue. If the aggregate adjusted issue prices of the debt instruments in the issue (as determined under this paragraph (e)) are less than the aggregate stated redemption price at maturity of the instruments (determined as of the reopening date) by a *de minimis* amount (within the meaning of §1.1273–1(d)), the issuer may use the rules in paragraph (b) of this section to determine the issuer's accruals of interest expense.

(5) *Effect of adjustments on issuer's adjusted issue price.* The adjustments made under this paragraph (e) are taken into account for purposes of determining the issuer's adjusted issue price under §1.1275–1(b).

(6) *Definitions.* The terms *additional debt instrument*, *original debt instrument*, *qualified reopening*, and *reopening date* have the same meanings as in §1.1275–2(k).

(f) *Effective dates.* This section (other than paragraph (e) of this section) applies to debt instruments issued on or after April 4, 1994. Taxpayers, however, may rely on this section (other than paragraph (e) of this section) for debt instruments issued after December 21, 1992, and before April 4, 1994. Paragraph (e) of this section applies to qualified reopenings where the reopening date is on or after March 13, 2001.

[T.D. 8517, 59 FR 4804, Feb. 2, 1994, as amended by T.D. 8674, 61 FR 30138, June 14, 1996; T.D. 8934, 66 FR 2815, Jan. 12, 2001]

§1.163–8T Allocation of interest expense among expenditures (temporary).

(a) *In general*—(1) *Application.* This section prescribes rules for allocating interest expense for purposes of applying sections 469 (the ''passive loss limitation'') and 163 (d) and (h) (the ''nonbusiness interest limitations'').

(2) *Cross-references.* This paragraph provides an overview of the manner in which interest expense is allocated for the purposes of applying the passive loss limitation and nonbusiness interest limitations and the manner in which interest expense allocated under this section is treated. See paragraph (b) of this section for definitions of certain terms, paragraph (c) for the rules for allocating debt and interest expense among expenditures, paragraphs (d) and (e) for the treatment of debt repayments and refinancings, paragraph (j) for the rules for reallocating debt upon the occurrence of certain events, paragraph (m) for the coordination of the rules in this section with other limitations on the deductibility of interest expense, and paragraph (n) of this section for effective date and transitional rules.

(3) *Manner of allocation.* In general, interest expense on a debt is allocated in the same manner as the debt to which such interest expense relates is allocated. Debt is allocated by tracing disbursements of the debt proceeds to specific expenditures. This section prescribes rules for tracing debt proceeds to specific expenditures.

(4) *Treatment of interest expenses*—(i) *General rule.* Except as otherwise provided in paragraph (m) of this section (relating to limitations on interest expense other than the passive loss and nonbusiness interest limitations), interest expense allocated under the rules of this section is treated in the following manner:

(A) Interest expense allocated to a trade or business expenditure (as defined in paragraph (b)(7) of this section) is taken into account under section 163 (h)(2)(A);

(B) Interest expense allocated to a passive activity expenditure (as defined in paragraph (b)(4) of this section) or a former passive activity expenditure (as defined in paragraph (b)(2) of this section) is taken into account for purposes of section 469 in determining the income or loss from the activity to which such expenditure relates;

(C) Interest expense allocated to an investment expenditure (as defined in paragraph (b)(3) of this section) is treated for purposes of section 163(d) as investment interest;

(D) Interest expense allocated to a personal expenditure (as defined in paragraph (b)(5) of this section) is treated for purposes of section 163(h) as personal interest; and

(E) Interest expense allocated to a portfolio expenditure (as defined in paragraph (b)(6) of this section) is treated for purposes of section 469(e)(2)(B)(ii) as interest expense described in section 469(e)(1)(A)(i)(III).

(ii) *Examples.* The following examples illustrate the application of this paragraph (a)(4):

Example 1. Taxpayer A, an individual, incurs interest expense allocated under the rules of this section to the following expenditures:

$6,000 Passive activity expenditure.
$4,000 Personal expenditure.

The $6,000 interest expense allocated to the passive activity expenditure is taken into account for purposes of section 469 in computing A's income or loss from the activity to which such interest relates. Pursuant to section 163(h), A may not deduct the $4,000 interest expense allocated to the personal expenditure (except to the extent such interest is qualified residence interest, within the meaning of section 163(h)(3)).

Example 2. (i) Corporation M, a closely held C corporation (within the meaning of section 469 (j)(1)) has $10,000 of interest expense for a taxable year. Under the rules of this section, M's interest expense is allocated to the following expenditures:

$2,000 Passive activity expenditure.
$3,000 Portfolio expenditure.
$5,000 Other expenditures.

(ii) Under section 163(d)(3)(D) and this paragraph (a)(4), the $2,000 interest expense allocated to the passive activity expenditure is taken into account in computing M's passive activity loss for the taxable year, but, pursuant to section 469(e)(1) and this paragraph (a)(4), the interest expense allocated to the portfolio expenditure and the other expenditures is not taken into account for such purposes.

(iii) Since M is a closely held C corporation, its passive activity loss is allowable under section 469(e)(2)(A) as a deduction from net active income. Under section 469(e)(2)(B) and this paragraph (a)(4), the $5,000 interest expense allocated to other expenditures is taken into account in computing M's net active income, but the interest expense allocated to the passive activity expenditure and the portfolio expenditure is not taken into account for such purposes.

(iv) Since M is a corporation, the $3,000 interest expense allocated to the portfolio expenditure is allowable without regard to section 163(d). If M were an individual, however, the interest expense allocated to the portfolio expenditure would be treated as investment interest for purposes of applying the limitation of section 163(d).

(b) *Definitions.* For purposes of this section—

(1) ''Former passive activity'' means an activity described in section 469(f)(3), but only if an unused deduction or credit (within the meaning of section 469(f)(1) (A) or (B)) is allocable to the activity under section 469(b) for the taxable year.

(2) ''Former passive activity expenditure'' means an expenditure that is taken into account under section 469 in computing the income or loss from a former passive activity of the taxpayer or an expenditure (including an expenditure properly chargeable to capital account) that would be so taken into account if such expenditure were otherwise deductible.

(3) ''Investment expenditure'' means an expenditure (other than a passive activity expenditure) properly chargeable to capital account with respect to property held for investment (within the meaning of section 163(d)(5)(A)) or

an expenditure in connection with the holding of such property.

(4) ''Passive activity expenditure'' means an expenditure that is taken into account under section 469 in computing income or loss from a passive activity of the taxpayer or an expenditure (including an expenditure properly chargeable to capital account) that would be so taken into account if such expenditure were otherwise deductible. For purposes of this section, the term ''passive activity expenditure'' does not include any expenditure with respect to any low-income housing project in any taxable year in which any benefit is allowed with respect to such project under section 502 of the Tax Reform Act of 1986.

(5) ''Personal expenditure'' means an expenditure that is not a trade or business expenditure, a passive activity expenditure, or an investment expenditure.

(6) ''Portfolio expenditure'' means an investment expenditure properly chargeable to capital account with respect to property producing income of a type described in section 469(e)(1)(A) or an investment expenditure for an expense clearly and directly allocable to such income.

(7) ''Trade or business expenditure'' means an expenditure (other than a passive activity expenditure or an investment expenditure) in connection with the conduct of any trade or business other than the trade or business of performing services as an employee.

(c) *Allocation of debt and interest expense*—(1) *Allocation in accordance with use of proceeds*. Debt is allocated to expenditures in accordance with the use of the debt proceeds and, except as provided in paragraph (m) of this section, interest expense accruing on a debt during any period is allocated to expenditures in the same manner as the debt is allocated from time to time during such period. Except as provided in paragraph (m) of this section, debt proceeds and related interest expense are allocated solely by reference to the use of such proceeds, and the allocation is not affected by the use of an interest in any property to secure the repayment of such debt or interest. The following example illustrates the principles of this paragraph (c)(1):

Example. Taxpayer A, an individual, pledges corporate stock held for investment as security for a loan and uses the debt proceeds to purchase an automobile for personal use. Interest expense accruing on the debt is allocated to the personal expenditure to purchase the automobile even though the debt is secured by investment property.

(2) *Allocation period*—(i) *Allocation of debt*. Debt is allocated to an expenditure for the period beginning on the date the proceeds of the debt are used or treated as used under the rules of this section to make the expenditure and ending on the earlier of—

(A) The date the debt is repaid; or

(B) The date the debt is reallocated in accordance with the rules in paragraphs (c)(4) and (j) of this section.

(ii) *Allocation of interest expense*—(A) *In general*. Except as otherwise provided in paragraph (m) of this section, interest expense accruing on a debt for any period is allocated in the same manner as the debt is allocated from time to time, regardless of when the interest is paid.

(B) *Effect of compounding*. Accrued interest is treated as a debt until it is paid and any interest accruing on unpaid interest is allocated in the same manner as the unpaid interest is allocated. For the taxable year in which a debt is reallocated under the rules in paragraphs (c)(4) and (j) of this section, however, compound interest accruing on such debt (other than compound interest accruing on interest that accrued before the beginning of the year) may be allocated between the original expenditure and the new expenditure on a straight-line basis (*i.e.*, by allocating an equal amount of such interest expense to each day during the taxable year). In addition, a taxpayer may treat a year as consisting of 12 30-day months for purposes of allocating interest on a straight-line basis.

(C) *Accrual of interest expense*. For purposes of this paragraph (c)(2)(ii), the amount of interest expense that accrues during any period is determined by taking into account relevant provisions of the loan agreement and any applicable law such as sections 163(e), 483, and 1271 through 1275.

(iii) *Examples*. The following examples illustrate the principles of this paragraph (c)(2):

Example 1. (i) On January 1, taxpayer B, a calendar year taxpayer, borrows $1,000 at an interest rate of 11 percent, compounded semiannually. B immediately uses the debt proceeds to purchase an investment security. On July 1, B sells the investment security for $1,000 and uses the sales proceeds to make a passive activity expenditure. On December 31, B pays accrued interest on the $1,000 debt for the entire year.

(ii) Under this paragraph (c)(2) and paragraph (j) of this section, the $1,000 debt is allocated to the investment expenditure for the period from January 1 through June 30, and to the passive activity expenditure from July 1 through December 31. Interest expense accruing on the $1,000 debt is allocated in accordance with the allocation of the debt from time to time during the year even though the debt was allocated to the passive activity expenditure on the date the interest was paid. Thus, the $55 interest expense for the period from January 1 through June 30 is allocated to the investment expenditure. In addition, during the period from July 1 through December 31, the interest expense allocated to the investment expenditure is a debt, the proceeds of which are treated as used to make an investment expenditure. Accordingly, an additional $3 of interest expense for the period from July 1 through December 31 ($55×.055) is allocated to the investment expenditure. The remaining $55 of interest expense for the period from July 1 through December 31 ($1,000×.055) is allocated to the passive activity expenditure.

(iii) Alternatively, under the rule in paragraph (c)(2)(ii)(B) of this section, B may allocate the interest expense on a straight-line basis and may also treat the year as consisting of 12 30-day months for this purpose. In that case, $56.50 of interest expense (180/360×$113) would be allocated to the investment expenditure and the remaining $56.50 of interest expense would be allocated to the passive activity expenditure.

Example 2. On January 1, 1988, taxpayer C borrows $10,000 at an interest rate of 11 percent, compounded annually. All interest and principal on the debt is payable in a lump sum on December 31, 1992. C immediately uses the debt proceeds to make a passive activity expenditure. C materially participates in the activity in 1990, 1991, and 1992. Therefore, under paragraphs (c)(2) (i) and (j) of this section, the debt is allocated to a passive activity expenditure from January 1, 1988, through December 31, 1989, and to a former passive activity expenditure from January 1, 1990, through December 31, 1992. In accordance with the loan agreement (and consistent with §1.1272–1(d)(1) of the proposed regulations, 51 FR 12022, April 8, 1986), interest expense accruing during any period is determined on the basis of annual compounding. Accordingly, the interest expense on the debt is allocated as follows:

Year	Amount		Expenditure
1988	$10,000 × .11	$1,100	Passive activity.
1989	11,100 × .11	1,221	Passive activity.
1990	12,321 × .11 = 1,355		
	1,355 × 2,321/12,321	255	Passive activity.
	1,355 × 10,000/12,321	1,100	Former passive activity.
		1,355	
1991	13,676 × .11 = 1,504		
	1,504 × 2,576/13,676	283	Passive activity.
	1,504 × 11,100/13,676	1,221	Former passive activity.
		1,504	
1992	15,180 × .11 = 1,670		
	1,670 × 2,859/15,180	315	Passive activity.
	1,670 × 12,321/15,180	1,355	Former passive activity.
		1,670	

(3) *Allocation of debt; proceeds not disbursed to borrower*—(i) *Third-party financing.* If a lender disburses debt proceeds to a person other than the borrower in consideration for the sale or use of property, for services, or for any other purpose, the debt is treated for purposes of this section as if the borrower used an amount of the debt proceeds equal to such disbursement to make an expenditure for such property, services, or other purpose.

(ii) *Debt assumptions not involving cash disbursements.* If a taxpayer incurs or assumes a debt in consideration for the sale or use of property, for services, or for any other purpose, or takes property subject to a debt, and no debt proceeds are disbursed to the taxpayer, the debt is treated for purposes of this section as if the taxpayer used an amount of the debt proceeds equal to the balance of the debt outstanding at such time to make an expenditure for such property, services, or other purpose.

(4) *Allocation of debt; proceeds deposited in borrower's account*—(i) *Treatment of deposit.* For purposes of this section, a deposit of debt proceeds in an account is treated as an investment expenditure, and amounts held in an account (whether or not interest bearing) are treated as property held for investment. Debt allocated to an account under this paragraph (c)(4)(i) must be reallocated as required by paragraph (j) of this section whenever debt proceeds held in the account are used for another expenditure. This paragraph (c)(4) provides rules for determining when debt proceeds are expended from the account. The following example illustrates the principles of this paragraph (c)(4)(i):

Example. Taxpayer C, a calendar year taxpayer, borrows $100,000 on January 1 and immediately uses the proceeds to open a noninterest-bearing checking account. No other amounts are deposited in the account during the year, and no portion of the principal amount of the debt is repaid during the year. On April 1, C uses $20,000 of the debt proceeds held in the account for a passive activity expenditure. On September 1, C uses an additional $40,000 of the debt proceeds held in the account for a personal expenditure. Under this paragraph (c)(4)(i), from January 1 through March 31 the entire $100,000 debt is allocated to an investment expenditure for the account. From April 1 through August 31, $20,000 of the debt is allocated to the passive activity expenditure, and $80,000 of the debt is allocated to the investment expenditure for the account. From September 1 through December 31, $40,000 of the debt is allocated to the personal expenditure, $20,000 is allocated to the passive activity expenditure, and $40,000 is allocated to an investment expenditure for the account.

(ii) *Expenditures from account; general ordering rule.* Except as provided in paragraph (c)(4)(iii) (B) or (C) of this section, debt proceeds deposited in an account are treated as expended before—

(A) Any unborrowed amounts held in the account at the time such debt proceeds are deposited; and

(B) Any amounts (borrowed or unborrowed) that are deposited in the account after such debt proceeds are deposited.

The following example illustrates the application of this paragraph (c)(4)(ii):

Example. On January 10, taxpayer E opens a checking account, depositing $500 of proceeds of Debt A and $1,000 of unborrowed funds. The following chart summarizes the transactions which occur during the year with respect to the account:

Date	Transaction
Jan. 10	$500 proceeds of Debt A and $1,000 unborowed funds deposited.
Jan. 11	$500 proceeds of Debt B deposited.
Feb. 17	$800 personal expenditure.
Feb. 26	$700 passive activity expenditure.
June 21	$1,000 proceeds of Debt C deposited.
Nov. 24	$800 investment expenditure.
Dec. 20	$600 personal expenditure.

The $800 personal expenditure is treated as made from the $500 proceeds of Debt A and $300 of the proceeds of Debt B. The $700 passive activity expenditure is treated as made from the remaining $200 proceeds of Debt B and $500 of unborrowed funds. The $800 investment expenditure is treated as made entirely from the proceeds of Debt C. The $600 personal expenditure is treated as made from the remaining $200 proceeds of Debt C and $400 of unborrowed funds. Under paragraph (c)(4)(i) of this section, debt is allocated to an investment expenditure for periods during which debt proceeds are held in the account.

(iii) *Expenditures from account; supplemental ordering rules*—(A) *Checking or similar accounts.* Except as otherwise provided in this paragraph (c)(4)(iii), an expenditure from a checking or similar account is treated as made at the time the check is written on the account, provided the check is delivered or mailed to the payee within a reasonable period after the writing of the check. For this purpose, the taxpayer may treat checks written on the same day as written in any order. In the absence of evidence to the contrary, a check is presumed to be written on the date appearing on the check and to be delivered or mailed to the payee within a reasonable period thereafter. Evidence to the contrary may include the fact that a check does not clear within a reasonable period after the date appearing on the check.

(B) *Expenditures within 15 days after deposit of borrowed funds.* The taxpayer may treat any expenditure made from an account within 15 days after debt proceeds are deposited in such account as made from such proceeds to the extent thereof even if under paragraph (c)(4)(ii) of this section the debt proceeds would be treated as used to make one or more other expenditures. Any such expenditures and the debt proceeds from which such expenditures are treated as made are disregarded in applying paragraph (c)(4)(ii) of this section. The following examples illustrate the application of this paragraph (c)(4)(iii)(B):

Example 1. Taxpayer D incurs a $1,000 debt on June 5 and immediately deposits the proceeds in an account (''Account A''). On June 17, D transfers $2,000 from Account A to another account (''Account B''). On June 30, D writes a $1,500 check on Account B for a passive activity expenditure. In addition, numerous deposits of borrowed and unborrowed amounts and expenditures occur with respect to both accounts throughout the month of June. Notwithstanding these other transactions, D may treat $1,000 of the deposit to Account B on June 17 as an expenditure from the debt proceeds deposited in Account A on June 5. In addition, D may similarly treat $1,000 of the passive activity expenditure on June 30 as made from debt proceeds treated as deposited in Account B on June 17.

Example 2. The facts are the same as in the example in paragraph (c)(4)(ii) of this section, except that the proceeds of Debt B are deposited on February 11 rather than on January 11. Since the $700 passive activity expenditure occurs within 15 days after the proceeds of Debt B are deposited in the account, E may treat such expenditure as being made from the proceeds of Debt B to the extent thereof. If E treats the passive activity expenditure in this manner, the expenditures from the account are treated as follows: The $800 personal expenditure is treated as made from the $500 proceeds of Debt A and $300 of unborrowed funds. The $700 passive activity expenditure is treated as made from the $500 proceeds of Debt B and $200 of unborrowed funds. The remaining expenditures are treated as in the example in paragraph (c)(4)(ii) of this section.

(C) *Interest on segregated account.* In the case of an account consisting solely of the proceeds of a debt and interest earned on such account, the taxpayer may treat any expenditure from such account as made first from amounts constituting interest (rather than debt proceeds) to the extent of the balance of such interest in the account at the time of the expenditure, determined by applying the rules in this paragraph (c)(4). To the extent any expenditure is treated as made from interest under this paragraph (c)(4)(iii)(C), the expenditure is disregarded in applying paragraph (c)(4)(ii) of this section.

(iv) *Optional method for determining date of reallocation.* Solely for the purpose of determining the date on which debt allocated to an account under paragraph (c)(4)(i) of this section is reallocated, the taxpayer may treat all expenditures made during any calendar month from debt proceeds in the account as occurring on the later of the first day of such month or the date on which such debt proceeds are deposited in the account. This paragraph (c)(4)(iv) applies only if all expenditures from an account during the same calendar month are similarly treated. The following example illustrates the application of this paragraph (c)(4)(iv):

Example. On January 10, taxpayer G opens a checking account, depositing $500 of proceeds of Debt A and $1,000 of unborrowed funds. The following chart summarizes the transactions which occur during the year with respect to the account (note that these facts are the same as the facts of the example in paragraph (c)(4)(ii) of this section):

Date	Transaction
Jan. 10	$500 proceeds of Debt A and $1,000 unborrowed funds deposited.
Jan. 11	$500 proceeds of Debt B deposited.
Feb. 17	$800 personal expenditure.
Feb. 26	$700 passive activity expenditure.
June 21	$1,000 proceeds of Debt C deposited.
Nov. 24	$800 investment expenditure.
Dec. 20	$600 personal expenditure.

Assume that G chooses to apply the optional rule of this paragraph (c)(4)(iv) to all expenditures. For purposes of determining the date on which debt is allocated to the $800 personal expenditure made on February 17, the $500 treated as made from the proceeds of Debt A and the $300 treated as made from the proceeds of Debt B are treated as expenditures occurring on February 1. Accordingly, Debt A is allocated to an investment expenditure for the account from January 10 through January 31 and to the personal expenditure from February 1 through December 31, and $300 of Debt B is allocated to an investment expenditure for the account from January 11 through January 31 and to the personal expenditure from February 1 through December 31. The remaining $200 of Debt B is allocated to an investment expenditure for the account from January 11 through January 31 and to the passive activity expenditure from February 1 through December 31. The $800 of Debt C used to make the investment expenditure on November 24 is allocated to an investment expenditure for the account from June 21 through October 31 and to an investment expenditure from November 1 through December 31. The remaining $200 of Debt C is allocated to an investment expenditure for the account from June 21 through November 30 and to a personal expenditure from December 1 through December 31.

(v) *Simultaneous deposits*—(A) *In general.* If the proceeds of two or more debts are deposited in an account simultaneously, such proceeds are treated for purposes of this paragraph (c)(4) as deposited in the order in which the debts were incurred.

(B) *Order in which debts incurred.* If two or more debts are incurred simultaneously or are treated under applicable law as incurred simultaneously, the debts are treated for purposes of this paragraph (c)(4)(v) as incurred in any order the taxpayer selects.

(C) *Borrowings on which interest accrues at different rates.* If interest does not accrue at the same fixed or variable rate on the entire amount of a borrowing, each portion of the borrowing on which interest accrues at a different fixed or variable rate is treated as a separate debt for purposes of this paragraph (c)(4)(v).

(vi) *Multiple accounts.* The rules in this paragraph (c)(4) apply separately to each account of a taxpayer.

(5) *Allocation of debt; proceeds received in cash*—(i) *Expenditure within 15 days of receiving debt proceeds.* If a taxpayer receives the proceeds of a debt in cash, the taxpayer may treat any cash expenditure made within 15 days after receiving the cash as made from such debt proceeds to the extent thereof and may treat such expenditure as made on the date the taxpayer received the cash. The following example illustrates the rule in this paragraph (c)(5)(i):

Example. Taxpayer F incurs a $1,000 debt on August 4 and receives the debt proceeds in cash. F deposits $1,500 cash in an account on August 15 and on August 27 writes a check on the account for a passive activity expenditure. In addition, F engages in numerous other cash transactions throughout the month of August, and numerous deposits of borrowed and unborrowed amounts and expenditures occur with respect to the account during the same period. Notwithstanding these other transactions, F may treat $1,000 of the deposit on August 15 as an expenditure made from the debt proceeds on August 4. In addition, under the rule in paragraph (c)(4)(v)(B) of this section, F may treat the passive activity expenditure on August 27 as made from the $1,000 debt proceeds treated as deposited in the account.

(ii) *Other expenditures.* Except as provided in paragraphs (c)(5) (i) and (iii) of this section, any debt proceeds a taxpayer (other than a corporation) receives in cash are treated as used to make personal expenditures. For purposes of this paragraph (c)(5), debt proceeds are received in cash if, for example, a withdrawal of cash from an account is treated under the rules of this section as an expenditure of debt proceeds.

(iii) *Special rules for certain taxpayers.* [Reserved]

(6) *Special rules*—(i) *Qualified residence debt.* [Reserved]

(ii) *Debt used to pay interest.* To the extent proceeds of a debt are used to pay interest, such debt is allocated in the same manner as the debt on which such interest accrued is allocated from time to time. The following example illustrates the application of this paragraph (c)(6)(ii):

Example. On January 1, taxpayer H incurs a debt of $1,000, bearing interest at an annual rate of 10 percent, compounded annually, payable at the end of each year (''Debt A''). H immediately opens a checking account, in which H deposits the proceeds of Debt A. No other amounts are deposited in the account during the year. On April 1, H writes a check for a personal expenditure in the amount of $1,000. On December 31, H borrows $100 (''Debt B'') and immediately uses the proceeds of Debt B to pay the accrued interest of $100 on Debt A. From January 1 through March 31, Debt A is allocated, under the rule in paragraph (c)(4)(i) of this section, to the investment expenditure for the account. From April 1 through December 31, Debt A is allocated to the personal expenditure. Under the rule in paragraph (c)(2)(ii) of this section, $25 of the interest on Debt A for the year is allocated to the investment expenditure, and $75 of the interest on Debt A for the year is allocated to the personal expenditure. Accordingly, for the purpose of allocating the interest on Debt B for all periods until Debt B is repaid, $25 of Debt B is allocated to the investment expenditure, and $75 of Debt B is allocated to the personal expenditure.

(iii) *Debt used to pay borrowing costs*—(A) *Borrowing costs with respect to different debt.* To the extent the proceeds of a debt (the ''ancillary debt'') are used to pay borrowing costs (other than interest) with respect to another debt (the ''primary debt''), the ancillary debt is allocated in the same manner as the primary debt is allocated from time to time. To the extent the primary debt is repaid, the ancillary debt will continue to be allocated in the same manner as the primary debt was allocated immediately before its repayment. The following example illustrates the rule in this paragraph (c)(6)(iii)(A):

Example. Taxpayer I incurs debts of $60,000 (''Debt A'') and $10,000 (''Debt B''). I immediately uses $30,000 of the proceeds of Debt A to make a trade or business expenditure, $20,000 to make a passive activity expenditure, and $10,000 to make an investment expenditure. I immediately use $3,000 of the proceeds of Debt B to pay borrowing costs (other than interest) with respect to Debt A (such as loan origination, loan commitment, abstract, and recording fees) and deposits the remaining $7,000 in an account. Under the rule in this paragraph (c)(6)(iii)(A), the $3,000 of Debt B used to pay expenses of incurring Debt A is allocated $1,500 to the trade or business expenditure ($3,000 × $30,000/$60,000), $1,000 to the passive activity expenditure ($3,000 × $20,000/$60,000), and $500 ($3,000 × $10,000/$60,000) to the investment expenditure. The manner in which the $3,000 of Debt B used to pay expenses of incurring Debt A is allocated may change if the allocation of Debt A changes, but such allocation will be unaffected by any repayment of Debt A. The remaining $7,000 of Debt B is allocated to an investment expenditure for the account until such time, if any, as this amount is used for a different expenditure.

(B) *Borrowing costs with respect to same debt.* To the extent the proceeds of a debt are used to pay borrowing costs (other than interest) with respect to such debt, such debt is allocated in the same manner as the remaining debt is allocated from time to time. The remaining debt for this purpose is the portion of the debt that is not used to pay borrowing costs (other than interst) with respect to such debt. Any repayment of the debt is treated as a repayment of the debt allocated under this paragraph (c)(6)(iii)(B) and the remaining debt is the same proportion as such amount bear to each other. The following example illustrates the application of this paragraph (c)(6)(iii)(B):

Example. (i) Taxpayer J borrows $85,000. The lender disburses $80,000 of this amount to J, retaining $5,000 for borrowing costs (other than interest) with respect to the loan. J immediately uses $40,000 of the debt proceeds to make a personal expenditure, $20,000 to make a passive activity expenditure, and $20,000 to make an investment expenditure. Under the rule in this paragraph (c)(6)(iii)(B), the $5,000 used to pay borrowing costs is allocated $2,500 ($5,000 × $40,000/$80,000) to the personal expenditure, $1,250 ($5,000 × $20,000/$80,000) to the investment expenditure. The manner in which this $5,000 is allocated may change if the allocation of the remaining $80,000 of debt is changed.

(ii) Assume that J repays $50,000 of the debt. The repayment is treated as a repayment of $2,941 ($50,000 × $5,000/$85,000) of the debt used to pay borrowing costs and a repayment of $47,059 ($50,000 × $80,000/$85,000) of the remaining debt. Under paragraph (d) of this section, J is treated as repaying the $42,500 of debt allocated to the personal expenditure ($2,500 of debt used to pay borrowing costs and $40,000 of remaining debt). In addition, assuming that under paragraph (d)(2) J chooses to treat the allocation to the passive activity expenditure as having occurred before the allocation to the investment expenditure, J is treated as repaying $7,500 of debt allocated to the passive activity expenditure ($441 of debt used to pay borrowing costs and $7,059 of remaining debt).

(iv) *Allocation of debt before actual receipt of debt proceeds.* If interest properly accrues on a debt during any period before the debt proceeds are actually received or used to make an expenditure, the debt is allocated to an investment expenditure for such period.

(7) *Antiabuse rules.* [Reserved]

(d) *Debt repayments*—(1) *General ordering rule.* If, at the time any portion of a debt is repaid, such debt is allocated to more than one expenditure, the debt is treated for purposes of this section as repaid in the following order:

(i) Amounts allocated to personal expenditures;

(ii) Amounts allocated to investment expenditures and passive activity expenditures (other than passive activity expenditures described in paragraph (d)(1)(iii) of this section);

(iii) Amounts allocated to passive activity expenditures in connection with a rental real estate activity with respect to which the taxpayer actively participates (within the meaning of section 469(i));

(iv) Amounts allocated to former passive activity expenditures; and

(v) Amounts allocated to trade or business expenditures and to expenditures described in the last sentence of paragraph (b)(4) of this section.

(2) *Supplemental ordering rules for expenditures in same class.* Amounts allocated to two or more expenditures that are described in the subdivision of paragraph (d)(1) of this section (e.g., amounts allocated to different personal expenditures) are treated as repaid in the order in which the amounts were allocated (or reallocated) to such expenditures. For purposes of this paragraph (d)(2), the taxpayer may treat allocations and reallocations that occur on the same day as occurring in any order (without regard to the order in which expenditures are treated as made under paragraph (c)(4)(iii)(A) of this section).

(3) *Continuous borrowings.* In the case of borrowings pursuant to a line of credit or similar account or arrangement that allows a taxpayer to borrow funds periodically under a single loan agreement—

(i) All borrowings on which interest accrues at the same fixed or variable rate are treated as a single debt; and

(ii) Borrowings or portions of borrowings on which interest accrues at different fixed or variable rates are treated as different debts, and such debts are treated as repaid for purposes of this paragraph (d) in the order in which such borrowings are treated as repaid under the loan agreement.

(4) *Examples.* The following examples illustrate the application of this paragraph (d):

Example 1. Taxpayer B borrows $100,000 (''Debt A'') on July 12, immediately deposits the proceeds in an account, and uses the debt proceeds to make the following expenditures on the following dates:

August 31—$40,000 passive activity expenditure #1.

October 5—$20,000 passive activity expenditure #2.

December 24—$40,000 personal expenditure.

On January 19 of the following year, B repays $90,000 of Debt A (leaving $10,000 of Debt A outstanding). The $40,000 of Debt A allocated to the personal expenditure, the $40,000 allocated to passive activity expenditure #1, and $10,000 of the $20,000 allocated to passive activity expenditure #2 are treated as repaid.

Example 2. (i) Taxpayer A obtains a line of credit. Interest on any borrowing on the line of credit accrues at the lender's ''prime lending rate'' on the date of the borrowing plus two percentage points. The loan documents provide that borrowings on the line of credit are treated as repaid in the order the borrowings were made. A borrows $30,000 (''Borrowing #1'') on the line of credit and immediately uses $20,000 of the debt proceeds to make a personal expenditure (''personal expenditure #1'') and $10,000 to make a trade or business expenditure (''trade or business expenditure #1''). A subsequently borrows another $20,000 (''Borrowing #2'') on the line of credit and immediately uses $15,000 of the debt proceeds to make a personal expenditure (''personal expenditure #2'') and $5,000 to make a trade or business expenditure (''trade or business expenditure #2''). A then repays $40,000 of the borrowings.

(ii) If the prime lending rate plus two percentage points was the same on both the date of Borrowing #1 and the date of Borrowing #2, the borrowings are treated for purposes of this paragraph (d) as a single debt, and A is treated as having repaid $35,000 of debt allocated to personal expenditure #1 and personal expenditure #2, and $5,000 of debt allocated to trade or business expenditure #1.

(iii) If the prime lending rate plus two percentage points was different on the date of Borrowing #1 and Borrowing #2, the borrowings are treated as two debts, and, in accordance with the loan agreement, the $40,000 repaid amount is treated as a repayment of Borrowing #1 and $10,000 of Borrowing #2. Accordingly, A is treated as having repaid $20,000 of debt allocated to personal expenditure #1, $10,000 of debt allocated to trade or business expenditure #1, and $10,000 of debt allocated to personal expenditure #2.

(e) *Debt refinancings*—(1) *In general.* To the extent proceeds of any debt (the ''replacement debt'') are used to repay any portion of a debt, the replacement debt is allocated to the expenditures to which the repaid debt was allocated. The amount of replacement debt allocated to any such expenditure is equal to the amount of debt allocated to such expenditure that was repaid with proceeds of the replacement debt. To the extent proceeds of the replacement debt are used for expenditures other than repayment of a debt, the replacement debt is allocated to expenditures in accordance with the rules of this section.

(2) *Example.* The following example illustrates the application of this paragraph (e):

Example. Taxpayer C borrows $100,000 (''Debt A'') on July 12, immediately deposits the debt proceeds in an account, and uses the proceeds to make the following expenditures on the following dates (note that the facts of this example are the same as the facts of example (1) in paragraph (d)(4) of this section):

August 31—$40,000 passive activity expenditure #1.

October 5—$20,000 passive activity expenditure #2.

December 24—$40,000 personal expenditure #1.

On January 19 of the following year, C borrows $120,000 (''Debt B'') and uses $90,000 of the proceeds of repay $90,000 of Debt A (leaving $10,000 of Debt A outstanding). In addition, C uses $30,000 of the proceeds of Debt B to make a personal expenditure (''personal expenditure #2''). Debt B is allocated $40,000 to personal expenditure #1, $40,000 to passive activity expenditure #1, $10,000 to passive activity expenditure #2, and $30,000 to personal expenditure #2. Under paragraph (d)(1) of this section, Debt B will be treated as repaid in the following order: (1) amounts allocated to personal expenditure #1, (2) amounts allocated to personal expenditure #2, (3) amounts allocated to passive activity expenditure #1, and (4) amounts allocated to passive activity expenditure #2.

(f) *Debt allocated to distributions by passthrough entities.* [Reserved]

(g) *Repayment of passthrough entity debt.* [Reserved]

(h) *Debt allocated to expenditures for interests in passthrough entities.* [Reserved]

(i) *Allocation of debt to loans between passthrough entities and interest holders.* [Reserved]

(j) *Reallocation of debt*—(1) *Debt allocated to capital expenditures*—(i) *Time of reallocation.* Except as provided in paragraph (j)(2) of this section, debt allocated to an expenditure properly chargeable to capital account with respect to an asset (the ''first expenditure'') is reallocated to another expenditure on the earlier of—

(A) The date on which proceeds from a disposition of such asset are used for another expenditure; or

(B) The date on which the character of the first expenditure changes (e.g., from a passive activity expenditure to an expenditure that is not a passive activity expenditure) by reason of a change in the use of the asset with respect to which the first expenditure was capitalized.

(ii) *Limitation on amount reallocated.* The amount of debt reallocated under paragraph (j)(1)(i)(A) of this section may not exceed the proceeds from the disposition of the asset. The amount of debt reallocated under paragraph (j)(1)(i)(B) of this section may not exceed the fair market value of the asset on the date of the change in use. In applying this paragraph (j)(1)(ii) with respect to a debt in any case in which two or more debts are allocable to expenditures properly chargeable to capital account with respect to the same asset, only a ratable portion (determined with respect to any such debt by dividing the amount of such debt by the aggregate amount of all such debts) of the fair market value or proceeds from the disposition of such asset shall be taken into account.

(iii) *Treatment of loans made by the taxpayer.* Except as provided in paragraph (j)(1)(iv) of this section, an expenditure to make a loan is treated as an expenditure properly chargeable to capital account with respect to an asset, and for purposes of paragraph (j)(1)(i)(A) of this section any repayment of the loan is treated as a disposition of the asset. Paragraph (j)(3) of this section applies to any repayment of a loan in installments.

(iv) *Treatment of accounts.* Debt allocated to an account under paragraph (c)(4)(i) of this section is treated as allocated to an expenditure properly chargeable to capital account with respect to an asset, and any expenditure from the account is treated as a disposition of the asset. See paragraph (c)(4) of this section for rules under which debt proceeds allocated to an account are treated as used for another expenditure.

(2) *Disposition proceeds in excess of debt.* If the proceeds from the disposition of an asset exceed the amount of debt reallocated by reason of such disposition, or two or more debts are reallocated by reason of the disposition of an asset, the proceeds of the disposition are treated as an account to which the rules in paragraph (c)(4) of this section apply.

(3) *Special rule for deferred payment sales.* If any portion of the proceeds of a disposition of an asset are received subsequent to the disposition—

(i) The portion of the proceeds to be received subsequent to the disposition is treated for periods prior to the receipt as used to make an investment expenditure; and

(ii) Debt reallocated by reason of the disposition is allocated to such investment expenditure to the extent such debt exceeds the proceeds of the disposition previously received (other than proceeds used to repay such debt).

(4) *Examples.* The following examples illustrate the application of this paragraph (j):

Example 1. On January 1, 1988, taxpayer D sells an asset for $25,000. Immediately before the sale, the amount of debt allocated to expenditures properly chargeable to capital account with respect to the asset was $15,000. The proceeds of the disposition are treated as an account consisting of $15,000 of debt proceeds and $10,000 of unborrowed funds to which paragraph (c)(4) of this section applies. Thus, if D immediately makes a $10,000 personal expenditure from the proceeds and within 15 days deposits the remaining proceeds in an account, D may, pursuant to paragraph (c)(4)(iii)(B) of this section, treat the entire $15,000 deposited in the account as proceeds of a debt.

Example 2. The facts are the same as in example (1) except that, instead of receiving all $25,000 of the sale proceeds on January 1, 1988, D receives 5,000 on that date, $10,000 on January 1, 1989, and $10,000 on January 1, 1990. D does not use any portion of the sale proceeds to repay the debt. Between January 1, 1988, and December 31, 1988, D is treated under paragraph (j)(3) of this section as making an investment expenditure of $20,000 to which $10,000 of debt is allocated. In addition, the remaining $5,000 of debt is reallocated on January 1, 1988, in accordance with D's use of the sales proceeds received on that date. Between January 1, 1989, and December 31, 1989, D is treated as making an investment expenditure of $10,000 to which no debt is allocated. In addition, as of January 1, 1989, $10,000 of debt is reallocated in accordance with D's use of the sales proceeds received on that date.

Example 3. The facts are the same as in example (2), except that D immediately uses the $5,000 sale proceeds received on January 1, 1988, to repay $5,000 of the $15,000 debt. Between January 1, 1988, and December 31, 1988, D is treated as making an investment expenditure of $20,000 to which the remaining balance ($10,000) of the debt is reallocated. The results in 1989 are as described in example (2).

(k) *Modification of rules in the case of interest expense allocated to foreign source income.* [Reserved]

(l) [Reserved]

(m) *Coordination with other provisions*—(1) *Effect of other limitations*—(i) *In general.* All debt is allocated among expenditures pursuant to the rules in this section, without regard to any limitations on the deductibility of interest expense on such debt. The applicability of the passive loss and nonbusiness interest limitations to interest on such debt, however, may be affected by other limitations on the deductibility of interest expense.

(ii) *Disallowance provisions.* (Interest expense that is not allowable as a deduction by reason of a disallowance provision (within the meaning of paragraph (m)(7)(ii) of this section) is not taken into account for any taxable year for purposes of applying the passive loss and nonbusiness interest limitations.

(iii) *Deferral provisions.* Interest expense that is not allowable as a deduction for the taxable year in which paid or accrued by reason of a deferral provision (within the meaning of paragraph (m)(7)(iii) of this section) is allocated in the same manner as the debt giving rise to the interest expense is allocated for such taxable year. Such interest expense is taken into account for purposes of applying the passive loss and nonbusiness interest limitations for the taxable year in which such interest expense is allowable under such deferral provision.

(iv) *Capitalization provisions.* Interest expense that is capitalized pursuant to a capitalization provision (within the meaning of paragraph (m)(7)(i) of this section) is not taken into account as interest for any taxable year for purposes of applying the passive loss and nonbusiness interest limitations.

(2) *Effect on other limitations*—(i) *General rule.* Except as provided in paragraph (m)(2)(ii) of this section, any limitation on the deductibility of an item (other than the passive loss and nonbusiness interest limitations) applies without regard to the manner in which debt is allocated under this section. Thus, for example, interest expense treated under section 265(a)(2) as interest on indebtedness incurred or

continued to purchase or carry obligations the interest on which is wholly exempt from Federal income tax is not deductible regardless of the expenditure to which the underlying debt is allocated under this section.

(ii) *Exception*. Capitalization provisions (within the meaning of paragraph (m)(7)(i) of this section) do not apply to interest expense allocated to any personal expenditure under the rules of this section.

(3) *Qualified residence interest*. Qualified residence interest (within the meaning of section 163(h)(3)) is allowable as a deduction without regard to the manner in which such interest expense is allocated under the rules of this section. In addition, qualified residence interest is not taken into account in determining the income or loss from any activity for purposes of section 469 or in determining the amount of investment interest for purposes of section 163(d). The following example illustrates the rule in this paragraph (m)(3):

Example. Taxpayer E, an individual, incurs a $20,000 debt secured by a residence and immediately uses the proceeds to purchase an automobile exclusively for E's personal use. Under the rules in this section, the debt and interest expense on the debt are allocated to a personal expenditure. If, however, the interest on the debt is qualified residence interest within the meaning of section 163(h)(3), the interest is not treated as personal interest for purposes of section 163(h).

(4) *Interest described in section 163(h)(2)(E)*. Interest described in section 163(h)(2)(E) is allowable as a deduction without regard to the rules of this section.

(5) *Interest on deemed distributee debt*. [Reserved]

(6) *Examples*. The following examples illustrate the relationship between the passive loss and nonbusiness interest limitations and other limitations on the deductibility of interest expense:

Example 1. Debt is allocated pursuant to the rules in this section to an investment expenditure for the purchase of taxable investment securities. Pursuant to section 265(a)(2), the debt is treated as indebtedness incurred or continued to purchase or carry obligations the interest on which is wholly exempt from Federal income tax, and, accordingly, interest on the debt is disallowed. If section 265(a)(2) subsequently ceases to apply (because, for example, the taxpayer ceases to hold any tax-exempt obligations), and the debt at such time continues to be allocated to an investment expenditure, interest on the debt that accrues after such time is subject to section 163(d).

Example 2. An accrual method taxpayer incurs a debt payable to a cash method lender who is related to the taxpayer within the meaning of section 267(b). During the period in which interest on the debt is not deductible by reason of section 267(a)(2), the debt is allocated to a passive activity expenditure. Thus, interest that accrues on the debt for such period is also allocated to the passive activity expenditure. When such interest expense becomes deductible under section 267(a)(2), it will be allocated to the passive activity expenditure, regardless of how the debt is allocated at such time.

Example 3. A taxpayer incurs debt that is allocated under the rules of this section to an investment expenditure. Under section 263A(f), however, interest expense on such debt is capitalized during the production period (within the meaning of section 263A(f)(4)(B)) of property used in a passive activity of the taxpayer. The capitalized interest expense is not allocated to the investment expenditure, and depreciation deductions attributable to the capitalized interest expense are subject to the passive loss limitation as long as the property is used in a passive activity. However, interest expense on the debt for periods after the production period is allocated to the investment expenditure as long as the debt remains allocated to the investment expenditure.

(7) *Other limitations on interest expense*—(i) *Capitalization provisions*. A capitalization provision is any provision that requires or allows interest expense to be capitalized. Capitalization provisions include sections 263(g), 263A(f), and 266.

(ii) *Disallowance provisions*. A disallowance provision is any provision (other than the passive loss and nonbusiness interest limitations) that disallows a deduction for interest expense for all taxable years and is not a capitalization provision. Disallowance provisions include sections 163(f)(2), 264(a)(2), 264(a)(4), 265(a)(2), 265(b)(2), 279(a), 291(e)(1)(B)(ii), 805(b)(1), and 834(c)(5).

(iii) *Deferral provisions*. A deferral provision is any provision (other than the passive loss and nonbusiness interest limitations) that disallows a deduction for interest expense for any taxable year and is not a capitalization or disallowance provision. Deferral provisions include sections 267(a)(2), 465, 1277, and 1282.

(n) *Effective date*—(1) *In general.* This section applies to interest expense paid or accrued in taxable years beginning after December 31, 1986.

(2) *Transitional rule for certain expenditures.* For purposes of determining whether debt is allocated to expenditures made on or before August 3, 1987, paragraphs (c)(4)(iii)(B) and (c)(5)(i) of this section are applied by substituting ''90 days'' for ''15 days.''

(3) *Transitional rule for certain debt*—(i) *General rule.* Except as provided in paragraph (n)(3)(ii) of this section, any debt outstanding on December 31, 1986, that is properly attributable to a business or rental activity is treated for purposes of this section as debt allocated to expenditures properly chargeable to capital account with respect to the assets held for use or for sale to customers in such business or rental activity. Debt is properly attributable to a business or rental activity for purposes of this section (regardless of whether such debt otherwise would be allocable under this section to expenditures in connection with such activity) if the taxpayer has properly and consistently deducted interest expense (including interest subject to limitation under section 163(d) as in effect prior to the Tax Reform Act of 1986) on such debt on Schedule C, E, or F of Form 1040 in computing income or loss from such business or rental activity for taxable years beginning before January 1, 1987. For purposes of this paragraph (n)(3), amended returns filed after July 2, 1987 are disregarded in determining whether a taxpayer has consistently deducted interest expense on Schedule C, E, or F of Form 1040 in computing income or loss from a business or rental activity.

(ii) *Exceptions*—(A) *Debt financed distributions by passthrough entities.* [Reserved]

(B) *Election out.* This paragraph (n)(3) does not apply with respect to debt of a taxpayer who elects under paragraph (n)(3) (viii) of this section to allocate debt outstanding on December 31, 1986, in accordance with the provisions of this section other than this paragraph (n)(3) (*i.e.*, in accordance with the use of the debt proceeds).

(iii) *Business or rental activity.* For purposes of this paragraph (n)(3), a business or rental activity is any trade or business or rental activity of the taxpayer. For this purpose—

(A) A trade or business includes a business or profession the income and deductions of which (or, in the case of a partner or S corporation shareholder, the taxpayer's share thereof) are properly reported on Schedule C, E, or F of Form 1040; and

(B) A rental activity includes an activity of renting property the income and deductions of which (or, in the case of a partner or S corporation shareholder, the taxpayer's share thereof) are properly reported on Schedule E of Form 1040.

(iv) *Example.* The following example illustrates the circumstances in which debt is properly attributable to a business or rental activity:

Example. Taxpayer H incurred a debt in 1979 and properly deducted the interest expense on the debt on Schedule C of Form 1040 for each year from 1979 through 1986. Under this paragraph (n) (3), the debt is properly attributable to the business the results of which are reported on Schedule C.

(v) *Allocation requirement*—(A) *In general.* Debt outstanding on December 31, 1986, that is properly attributable (within the meaning of paragraph (n)(3)(i) of this section) to a business or rental activity must be allocated in a reasonable and consistent manner among the assets held for use or for sale to customers in such activity on the last day of the taxable year that includes December 31, 1986. The taxpayer shall specify the manner in which such debt is allocated by filing a statement in accordance with paragraph (n)(3)(vii) of this section. If the taxpayer does not file such a statement or fails to allocate such debt in a reasonable and consistent manner, the Commissioner shall allocate the debt.

(B) *Reasonable and consistent manner—examples of improper allocation.* For purposes of this paragraph (n)(3)(v), debt is not treated as allocated in a reasonable and consistent manner if—

(*1*) The amount of debt allocated to goodwill exceeds the basis of the goodwill; or

(*2*) The amount of debt allocated to an asset exceeds the fair market value of the asset, and the amount of debt allocated to any other asset is less than the fair market value (lesser of basis or fair market value in the case of goodwill) of such other asset.

(vi) *Coordination with other provisions.* The effect of any events occurring after the last day of the taxable year that includes December 31, 1986, shall be determined under the rules of this section, applied by treating the debt allocated to an asset under paragraph (n)(3)(v) of this section as if proceeds of such debt were used to make an expenditure properly chargeable to capital account with respect to such asset on the last day of the taxable year that includes December 31, 1986. Thus, debt that is allocated to an asset in accordance with this paragraph (n)(3) must be reallocated in accordance with paragraph (j) of this section upon the occurrence with respect to such asset of any event described in such paragraph (j). Similarly, such debt is treated as repaid in the order prescribed in paragraph (d) of this section. In addition, a replacement debt (within the meaning of paragraph (e) of this section) is allocated to an expenditure properly chargeable to capital account with respect to an asset to the extent the proceeds of such debt are used to repay the portion of a debt allocated to such asset under this paragraph (n)(3).

(vii) *Form for allocation of debt.* A taxpayer shall allocate debt for purposes of this paragraph (n)(3) by attaching to the taxpayer's return for the first taxable year beginning after December 31, 1986, a statement that is prominently identified as a transitional allocation statement under §1.163–8T(n)(3) and includes the following information:

(A) A description of the business or rental activity to which the debt is properly attributable;

(B) The amount of debt allocated;

(C) The assets among which the debt is allocated;

(D) The manner in which the debt is allocated;

(E) The amount of debt allocated to each asset; and

(F) Such other information as the Commissioner may require.

(viii) *Form for election out.* A taxpayer shall elect to allocate debt outstanding on December 31, 1986, in accordance with the provisions of this section other than this paragraph (n)(3) by attaching to the taxpayer's return (or amended return) for the first taxable year beginning after December 31, 1986, a statement to that effect, prominently identified as as election out under §1.163–8T(n)(3).

(ix) *Special rule for partnerships and S corporations.* For purposes of paragraph (n)(3)(ii)(B), (v), (vii) and (viii) of this section (relating to the allocation of debt and election out), a partnership or S corporation shall be treated as the taxpayer with respect to the debt of the partnership or S corporation.

(x) *Irrevocability.* An allocation or election filed in accordance with paragraph (n)(3) (vii) or (viii) of this section may not be revoked or modified except with the consent of the Commissioner.

[T.D. 8145, 52 FR 24999, July 2, 1987, as amended by T.D. 8145, 62 FR 40270, July 28, 1997]

§ 1.163–9T Personal interest (temporary).

(a) *In general.* No deduction under any provision of Chapter 1 of the Internal Revenue Code shall be allowed for personal interest paid or accrued during the taxable year by a taxpayer other than a corporation.

(b) *Personal interest*—(1) *Definition.* For purposes of this section, personal interest is any interest expense other than—

(i) Interest paid or accrued on indebtedness properly allocable (within the meaning of §1.163–8T) to the conduct of trade or business (other than the trade or business of performing services as an employee),

(ii) Any investment interest (within the meaning of section 163(d)(3)),

(iii) Any interest that is taken into account under section 469 in computing income or loss from a passive activity of the taxpayer,

(iv) Any qualified residence interest (within the meaning of section 163(h)(3) and §1.163–10T), and

(v) Any interest payable under section 6601 with respect to the unpaid portion of the tax imposed by section 2001 for the period during which an extension of time for payment of such tax is in effect under section 6163, 6166, or 6166A (as in effect before its repeal by the Economic Recovery Tax Act of 1981).

(2) *Interest relating to taxes*—(i) *In general*. Except as provided in paragraph (b)(2)(iii) of this section, personal interest includes interest—

(A) Paid on underpayments of individual Federal, State or local income taxes and on indebtedness used to pay such taxes (within the meaning of §1.163–8T), regardless of the source of the income generating the tax liability;

(B) Paid under section 453(e)(4)(B) (interest on deferred tax resulting from certain installment sales) and section 1291(c) (interest on deferred tax attributable to passive foreign investment companies); or

(C) Paid by a trust, S corporation, or other pass-through entity on underpayments of State or local income taxes and on indebtedness used to pay such taxes.

(ii) *Example*. A, an individual, owns stock of an S corporation. On its return for 1987, the corporation underreports its taxable income. Consequently, A underreports A's share of that income on A's tax return. In 1989, A pays the resulting deficiency plus interest to the Internal Revenue Service. The interest paid by A in 1989 on the tax deficiency is personal interest, notwithstanding the fact that the additional tax liability may have arisen out of income from a trade or business. The result would be the same if A's business had been operated as a sole proprietorship.

(iii) *Certain other taxes*. Personal interest does not include interest—

(A) Paid with respect to sales, excise and similar taxes that are incurred in connection with a trade or business or an investment activity;

(B) Paid by an S corporation with respect to an underpayment of income tax from a year in which the S corporation was a C corporation or with respect to an underpayment of the taxes imposed by sections 1374 or 1375, or similar provision of State law; or

(C) Paid by a transferee under section 6901 (tax liability resulting from transferred assets), or a similar provision of State law, with respect to a C corporation's underpayment of income tax.

(3) *Cross references*. See §1.163–8T for rules for determining the allocation of interest expense to various activities. See §1.163–10T for rules concerning qualified residence interest.

(c) *Effective date*—(1) *In general*. The provisions of this section are effective for taxable years beginning after December 31, 1986. In the case of any taxable year beginning in calendar years 1987 through 1990, the amount of personal interest that is nondeductible under this section is limited to the applicable percentage of such amount.

(2) *Applicable percentages*. The applicable percentage for taxable years beginning in 1987 through 1990 are as follows:

1987: 35 percent
1988: 60 percent
1989: 80 percent
1990: 90 percent

[T.D. 8168, 52 FR 48409, Dec. 22, 1987; 68 FR 13226, Mar. 19, 2003]

§1.163–10T Qualified residence interest (temporary).

(a) *Table of contents*. This paragraph (a) lists the major paragraphs that appear in this §1.163–10T.

(3) Treatment of interest expense of the cooperative described in section 216(a)(2).

(4) Special rule to prevent tax avoidance.

(5) Other definitions.

(r) Effective date.

(b) *Treatment of qualified residence interest.* Except as provided below, qualified residence interest is deductible under section 163(a). Qualified residence interest is not subject to limitation or otherwise taken into account under section 163(d) (limitation on investment interest), section 163(h)(1) (disallowance of deduction for personal interest), section 263A (capitalization and inclusion in inventory costs of certain expenses) or section 469 (limitations on losses from passive activities). Qualified residence interest is subject to the limitation imposed by section 263(g) (certain interest in the case of straddles), section 264(a) (2) and (4) (interest paid in connection with certain insurance), section 265(a)(2) (interest relating to tax-exempt income), section 266 (carrying charges), section 267(a)(2) (interest with respect to transactions between related taxpayers) section 465 (deductions limited to amount at risk), section 1277 (deferral of interest deduction allocable to accrued market discount), and section 1282 (deferral of interest deduction allocable to accrued discount).

(c) *Determination of qualified residence interest when secured debt does not exceed adjusted purchase price*—(1) *In general.* If the sum of the average balances for the taxable year of all secured debts on a qualified residence does not exceed the adjusted purchase price (determined as of the end of the taxable year) of the qualified residence, all of the interest paid or accrued during the taxable year with respect to the secured debts is qualified residence interest. If the sum of the average balances for the taxable year of all secured debts exceeds the adjusted purchase price of the qualified residences (determined as of the end of the taxable year), the taxpayer must use either the simplified method (see paragraph (d) of this section) or the exact method (see paragraph (e) of this section) to determine the amount of interest that is qualified residence interest.

(2) *Examples.*

Example 1. T purchases a qualified residence in 1987 for $65,000. T pays $6,500 in cash and finances the remainder of the purchase with a mortgage of $58,500. In 1988, the average balance of the mortgage is $58,000. Because the average balance of the mortgage is less than the adjusted purchase price of the residence ($65,000), all of the interest paid or accrued during 1988 on the mortgage is qualified residence interest.

Example 2. The facts are the same as in example (1), except that T incurs a second mortgage on January 1, 1988, with an initial principal balance of $2,000. The average balance of the second mortgage in 1988 is $1,900. Because the sum of the average balance of the first and second mortgages ($59,900) is less than the adjusted purchase price of the residence ($65,000), all of the interest paid or accrued during 1988 on both the first and second mortgages is qualified residence interest.

Example 3. P borrows $50,000 on January 1, 1988 and secures the debt by a qualified residence. P pays the interest on the debt monthly, but makes no principal payments in 1988. There are no other debts secured by the residence during 1988. On December 31, 1988, the adjusted purchase price of the residence is $40,000. The average balance of the debt in 1988 is $50,000. Because the average balance of the debt exceeds the adjusted purchase price ($10,000), some of the interest on the debt is not qualified residence interest. The portion of the total interest that is qualified residence interest must be determined in accordance with the rules of paragraph (d) or paragraph (e) of this section.

(d) *Determination of qualified residence interest when secured debt exceeds adjusted purchase price—Simplified method*—(1) *In general.* Under the simplified method, the amount of qualified residence interest for the taxable year is equal to the total interest paid or accrued during the taxable year with respect to all secured debts multiplied by a fraction (not in excess of one), the numerator of which is the adjusted purchase price (determined as of the end of the taxable year) of the qualified residence and the denominator of which is the sum of the average balances of all secured debts.

(2) *Treatment of interest paid or accrued on secured debt that is not qualified residence interest.* Under the simplified method, the excess of the total interest paid or accrued during the taxable year with respect to all secured debts over the amount of qualified residence interest is personal interest.

(3) *Example.*

Example. R's principal residence has an adjusted purchase price on December 31, 1988, of $105,000. R has two debts secured by the residence, with the following average balances and interest payments:

Debt	Date secured	Average balance	Interest
Debt 1	June 1983	$80,000	$8,000
Debt 2	May 1987	40,000	4,800
Total	....	120,000	12,800

The amount of qualified residence interest is determined under the simplified method by multiplying the total interest ($12,800) by a fraction (expressed as a decimal amount) equal to the adjusted purchase price ($105,000) of the residence divided by the combined average balances ($120,000). For 1988, this fraction is equal to 0.875 ($105,000/$120,000). Therefore, $11,200 ($12,800×0.875) of the total interest is qualified residence interest. The remaining $1,600 in interest ($12,800–$11,200) is personal interest, even if (under the rules of §1.163–8T) such remaining interest would be allocated to some other category of interest.

(e) *Determination of qualified residence interest when secured debt exceeds adjusted purchase price—Exact method*—(1) *In general.* Under the exact method, the amount of qualified residence interest for the taxable year is determined on a debt-by-debt basis by computing the applicable debt limit for each secured debt and comparing each such applicable debt limit to the average balance of the corresponding debt. If, for the taxable year, the average balance of a secured debt does not exceed the applicable debt limit for that debt, all of the interest paid or accrued during the taxable year with respect to the debt is qualified residence interest. If the average balance of the secured debt exceeds the applicable debt limit for that debt, the amount of qualified residence interest with respect to the debt is determined by multiplying the interest paid or accrued with respect to the debt by a fraction, the numerator of which is the applicable debt limit for that debt and the denominator of which is the average balance of the debt.

(2) *Determination of applicable debt limit.* For each secured debt, the applicable debt limit for the taxable year is equal to

(i) The lesser of—

(A) The fair market value of the qualified residence as of the date the debt is first secured, and

(B) The adjusted purchase price of the qualified residence as of the end of the taxable year,

(ii) Reduced by the average balance of each debt previously secured by the qualified residence.

For purposes of paragraph (e)(2)(ii) of this section, the average balance of a debt shall be treated as not exceeding the applicable debt limit of such debt. See paragraph (n)(1)(i) of this section for the rule that increases the adjusted purchase price in paragraph (e)(2)(i)(B) of this section by the amount of any qualified indebtedness (certain medical and educational debt). See paragraph (f) of this section for special rules relating to the determination of the fair market value of the qualified residence.

(3) *Example.* (i) R's principal residence has an adjusted purchase price on December 31, 1988, of $105,000. R has two debts secured by the residence. The average balances and interest payments on each debt during 1988 and fair market value of the residence on the date each debt was secured are as follows:

Debt	Date secured	Fair market value	Average balance	Interest
Debt 1	June 1983	$100,000	$80,000	$8,000
Debt 2	May 1987	140,000	40,000	4,800
Total	....	....	120,000	12,800

(ii) The amount of qualified residence interest for 1988 under the exact method is determined as follows. Because there are no debts previously secured by the residence, the applicable debt limit for Debt 1 is $100,000 (the lesser of the adjusted purchase price as of the end of the taxable year and the fair market value of the residence at the time the debt was secured). Because the average balance of Debt 1 ($80,000) does not exceed its applicable debt limit ($100,000), all of the interest paid on the debt during 1988 ($8,000) is qualified residence interest.

(iii) The applicable debt limit for Debt 2 is $25,000 ($105,000 (the lesser of $140,000 fair market value and $105,000 adjusted purchase price) reduced by $80,000 (the average balance of Debt 1)). Because the average balance of Debt 2 ($40,000) exceeds its applicable debt limit, the amount of qualified residence interest on Debt 2 is determined by multiplying the amount of interest paid on the debt during the year ($4,800) by a fraction equal to its applicable debt limit divided by its average balance ($25,000/$40,000 = 0.625). Accordingly, $3,000 ($4,800 × 0.625) of the interest paid in 1988 on Debt 2 is qualified residence interest. The character of the remaining $1,800 of interest paid on Debt 2 is determined under the rules of paragraph (e)(4) of this section.

(4) *Treatment of interest paid or accrued with respect to secured debt that is not qualified residence interest*—(i) *In general.* Under the exact method, the excess of the interest paid or accrued during the taxable year with respect to a secured debt over the amount of qualified residence interest with respect to the debt is allocated under the rules of §1.163–8T.

(ii) *Example.* T borrows $20,000 and the entire proceeds of the debt are disbursed by the lender to T's broker to purchase securities held for investment. T secures the debt with T's principal residence. In 1990, T pays $2,000 of interest on the debt. Assume that under the rules of paragraph (e) of this section, $1,500 of the interest is qualified residence interest. The remaining $500 in interest expense would be allocated under the rules of §1.163–8T. Section 1.163–8T generally allocates debt (and the associated interest expense) by tracing disbursements of the debt proceeds to specific expenditures. Accordingly, the $500 interest expense on the debt that is not qualified residence interest is investment interest subject to section 163(d).

(iii) *Special rule if debt is allocated to more than one expenditure.* If—

(A) The average balance of a secured debt exceeds the applicable debt limit for that debt, and

(B) Under the rules of §1.163–8T, interest paid or accrued with respect to such debt is allocated to more than one expenditure,

the interest expense that is not qualified residence interest may be allocated among such expenditures, to the extent of such expenditures, in any manner selected by the taxpayer.

(iv) *Example.* (*i*) C borrows $60,000 secured by a qualified residence. C uses (within the meaning of §1.163–8T) $20,000 of the proceeds in C's trade or business, $20,000 to purchase stock held for investment and $20,000 for personal purposes. In 1990, C pays $6,000 in interest on the debt and, under the rules of §1.163–8T, $2,000 in interest is allocable to trade or business expenses, $2,000 to investment expenses and $2,000 to personal expenses. Assume that under paragraph (e) of this section, $2,500 of the interest is qualified residence interest and $3,500 of the interest is not qualified residence interest.

(*ii*) Under paragraph (e)(4)(iii) of this section, C may allocate up to $2,000 of the interest that is not qualified residence interest to any of the three categories of expenditures up to a total of $3,500 for all three categories. Therefore, for example, C may allocate $2,000 of such interest to C's trade or business and $1,500 of such interest to the purchase of stock.

(f) *Special rules*—(1) *Special rules for personal property*—(i) *In general.* If a qualified residence is personal property under State law (e.g., a boat or motorized vehicle)—

(A) For purposes of paragraphs (c)(1) and (d)(1) of this section, if the fair market value of the residence as of the date that any secured debt (outstanding during the taxable year) is first secured by the residence is less than the adjusted purchase price as of the end of the taxable year, the lowest such fair market value shall be substituted for the adjusted purchase price.

(B) For purposes of paragraphs (e)(2)(i)(A) and (f)(1)(i)(A) of this section, the fair market value of the residence as of the date the debt is first secured by the residence shall not exceed the fair market value as of any date on which the taxpayer borrows any additional amount with respect to the debt.

(ii) *Example.* D owns a recreational vehicle that is a qualified residence under paragraph (p)(4) of this section. The adjusted purchase price and fair market value of the recreational vehicle is $20,000 in 1989. In 1989, D establishes a line of credit secured by the recreational vehicle. As of June 1, 1992, the fair market value of the vehicle has decreased to $10,000. On that day, D borrows an additional amount on the debt by using the line of credit. Although under paragraphs (e)(2)(i) and (f)(1)(i)(A) of this section, fair market value is determined at the time the debt is first secured, under paragraph (f)(1)(i)(B) of this section, the fair market value is the lesser of that amount or the fair market value on the most recent date that D borrows any additional amount with respect to the line of credit. Therefore, the fair market value with respect to the debt is $10,000.

(2) *Special rule for real property*—(i) *In general.* For purposes of paragraph (e)(2)(i)(A) of this section, the fair market value of a qualified residence that is real property under State law is presumed irrebuttably to be not less than the adjusted purchase price of the residence as of the last day of the taxable year.

(ii) *Example.* (*i*) C purchases a residence on August 11, 1987, for $50,000, incurring a first mortgage. The residence is real property under State law. During 1987, C makes $10,000 in home improvements. Accordingly, the adjusted purchase price of the residence as of December 31, 1988, is $60,000. C incurs a second mortgage on May 19, 1988, as of which time the fair market value of the residence is $55,000.

(*ii*) For purposes of determining the applicable debt limit for each debt, the fair market value of the residence is generally determined as of the time the debt is first secured. Accordingly, the fair market value would be $50,000 and $55,000 with respect to the first and second mortgage, respectively. Under the special rule of paragraph (f)(2)(i) of this section, however, the fair market value with respect to both debts in 1988 is $60,000, the adjusted purchase price on December 31, 1988.

(g) *Selection of method.* For any taxable year, a taxpayer may use the simplified method (described in paragraph (d) of this section) or the exact method (described in paragraph (e) of this section) by completing the appropriate portion of Form 8598. A taxpayer with two qualified residences may use the simplified method for one residence and the exact method for the other residence.

(h) *Average balance*—(1) *Average balance defined.* For purposes of this section, the term "average balance" means the amount determined under this paragraph (h). A taxpayer is not required to use the same method to determine the average balance of all secured debts during a taxable year or of any particular secured debt from one year to the next.

(2) *Average balance reported by lender.* If a lender that is subject to section 6050H (returns relating to mortgage interest received in trade or business from individuals) reports the average balance of a secured debt on Form 1098, the taxpayer may use the average balance so reported.

(3) *Average balance computed on a daily basis*—(i) *In general.* The average balance may be determined by—

(A) Adding the outstanding balance of a debt on each day during the taxable year that the debt is secured by a qualified residence, and

(B) Dividing the sum by the number of days during the taxable year that the residence is a qualified residence.

(ii) *Example.* Taxpayer A incurs a debt of $10,000 on September 1, 1989, securing the debt with A's principal residence. The residence is A's principal residence during the entire taxable year. A pays current interest on the debt monthly, but makes no principal payments. The debt is, therefore, outstanding for 122 days with a balance each day of $10,000. The residence is a qualified residence for 365 days. The average balance of the debt for 1989 is $3,342 ($122 \times \$10{,}000/365$).

(4) *Average balance computed using the interest rate*—(i) *In general.* If all accrued interest on a secured debt is paid at least monthly, the average balance of the secured debt may be determined

by dividing the interest paid or accrued during the taxable year while the debt is secured by a qualified residence by the annual interest rate on the debt. If the interest rate on a debt varies during the taxable year, the lowest annual interest rate that applies to the debt during the taxable year must be used for purposes of this paragraph (h)(4). If the residence securing the debt is a qualified residence for less than the entire taxable year, the average balance of any secured debt may be determined by dividing the average balance determined under the preceding sentence by the percentage of the taxable year that the debt is secured by a qualified residence.

(ii) *Points and prepaid interest.* For purposes of paragraph (h)(4)(i) of this section, the amount of interest paid during the taxable year does not include any amount paid as points and includes prepaid interest only in the year accrued.

(iii) *Examples.*

Example 1. B has a line of credit secured by a qualified residence for the entire taxable year. The interest rate on the debt is 10 percent throughout the taxable year. The principal balance on the debt changes throughout the year. B pays the accrued interest on the debt monthly. B pays $2,500 in interest on the debt during the taxable year. The average balance of the debt ($25,000) may be computed by dividing the total interest paid by the interest rate ($25,000 = $2,500/0.10).

Example 2. Assume the same facts as in example 1, except that the residence is a qualified residence, and the debt is outstanding, for only one-half of the taxable year and B pays only $1,250 in interest on the debt during the taxable year. The average balance of the debt may be computed by first dividing the total interest paid by the interest rate ($12,500 = $1,250/0.10). Second, because the residence is not a qualified residence for the entire taxable year, the average balance must be determined by dividing this amount ($12,500) by the portion of the year that the residence is qualified (0.50). The average balance is therefore $25,000 ($12,500/0.50).

(5) *Average balance computed using average of beginning and ending balances*—(i) *In general.* If—

(A) A debt requires level payments at fixed equal intervals (e.g., monthly, quarterly) no less often than semi-annually during the taxable year,

(B) The taxpayer prepays no more than one month's principal on the debt during the taxable year, and

(C) No new amounts are borrowed on the debt during the taxable year,

the average balance of the debt may be determined by adding the principal balance as of the first day of the taxable year that the debt is secured by the qualified residence and the principal balance as of the last day of the taxable year that the debt is secured by the qualified residence and dividing the sum by 2. If the debt is secured by a qualified residence for less than the entire period during the taxable year that the residence is a qualified residence, the average balance may be determined by multiplying the average balance determined under the preceding sentence by a fraction, the numerator of which is the number of days during the taxable year that the debt is secured by the qualified residence and the denominator of which is the number of days during the taxable year that the residence is a qualified residence. For purposes of this paragraph (h)(5)(i), the determination of whether payments are level shall disregard the fact that the amount of the payments may be adjusted from time to time to take into account changes in the applicable interest rate.

(ii) *Example.* C borrows $10,000 in 1988, securing the debt with a second mortgage on a principal residence. The terms of the loan require C to make equal monthly payments of principal and interest so as to amortize the entire loan balance over 20 years. The balance of the debt is $9,652 on January 1, 1990, and is $9,450 on December 31, 1990. The average balance of the debt during 1990 may be computed as follows:

Balance on first day of the year: $9,652
Balance on last day of the year: $9,450

$$\text{Average balance:} \frac{\$9{,}652 + \$9{,}450}{2} = \$9{,}551$$

(6) *Highest principal balance.* The average balance of a debt may be determined by taking the highest principal balance of the debt during the taxable year.

(7) *Other methods provided by the Commissioner.* The average balance may be

determined using any other method provided by the Commissioner by form, publication, revenue ruling, or revenue procedure. Such methods may include methods similar to (but with restrictions different from) those provided in paragraph (h) of this section.

(8) *Anti-abuse rule.* If, as a result of the determination of the average balance of a debt using any of the methods specified in paragraphs (h) (4), (5), or (6) of this section, there is a significant overstatement of the amount of qualified residence interest and a principal purpose of the pattern of payments and borrowing on the debt is to cause the amount of such qualified residence interest to be overstated, the district director may redetermine the average balance using the method specified under paragraph (h)(3) of this section.

(i) [Reserved]

(j) *Determination of interest paid or accrued during the taxable year*—(1) *In general.* For purposes of determining the amount of qualified residence interest with respect to a secured debt, the amount of interest paid or accrued during the taxable year includes only interest paid or accrued while the debt is secured by a qualified residence.

(2) *Special rules for cash-basis taxpayers*—(i) *Points deductible in year paid under section 461(g)(2).* If points described in section 461(g)(2) (certain points paid in respect of debt incurred in connection with the purchase or improvement of a principal residence) are paid with respect to a debt, the amount of such points is qualified residence interest.

(ii) *Points and other prepaid interest described in section 461(g)(1).* The amount of points or other prepaid interest charged to capital account under section 461(g)(1) (prepaid interest) that is qualified residence interest shall be determined under the rules of paragraphs (c) through (e) of this section in the same manner as any other interest paid with respect to the debt in the taxable year to which such payments are allocable under section 461(g)(1).

(3) *Examples.*

Example 1. T designates a vacation home as a qualified residence as of October 1, 1987. The home is encumbered by a mortgage during the entire taxable year. For purposes of determining the amount of qualified residence interest for 1987, T may take into account the interest paid or accrued on the secured debt from October 1, 1987, through December 31, 1987.

Example 2. R purchases a principal residence on June 17, 1987. As part of the purchase price, R obtains a conventional 30-year mortgage, secured by the residence. At closing, R pays 2½ points on the mortgage and interest on the mortgage for the period June 17, 1987 through June 30, 1987. The points are actually paid by R and are not merely withheld from the loan proceeds. R incurs no additional secured debt during 1987. Assuming that the points satisfy the requirements of section 461(g) (2), the entire amount of points and the interest paid at closing are qualified residence interest.

Example 3. (*i*) On July 1, 1987, W borrows $120,000 to purchase a residence to use as a vacation home. W secures the debt with the residence. W pays 2 points, or $2,400. The debt has a term of 10 years and requires monthly payments of principal and interest. W is permitted to amortize the points at the rate of $20 per month over 120 months. W elects to treat the residence as a second residence. W has no other debt secured by the residence. The average balance of the debt in each taxable year is less than the adjusted purchase price of the residence. W sells the residence on June 30, 1990, and pays off the remaining balance of the debt.

(*ii*) W is entitled to treat the following amounts of the points as interest paid on a debt secured by a qualified residence—

1987	$120 = $20×6 months;
1988	$240 = $20×12 months;
1989	$120 = $20×6 months.
Total	$480

All of the interest paid on the debt, including the allocable points, is qualified residence interest. Upon repaying the debt, the remaining $1,920 ($2,400 − $480) in unamortized points is treated as interest paid in 1990 and, because the average balance of the secured debt in 1990 is less than the adjusted purchase price, is also qualified residence interest.

(k) *Determination of adjusted purchase price and fair market value*—(1) *Adjusted purchase price*—(i) *In general.* For purposes of this section, the adjusted purchase price of a qualified residence is equal to the taxpayer's basis in the residence as initially determined under section 1012 or other applicable sections of the Internal Revenue Code, increased by the cost of any improvements to the residence that have been added to the taxpayer's basis in the residence under section 1016(a)(1). Any other adjustments to basis, including those required under section 1033(b) (involuntary conversions), and 1034(e) (rollover of gain or sale of principal residence) are disregarded in determining the taxpayer's adjusted purchase price. If, for example, a taxpayer's second residence is rented for a portion of the year and its basis is reduced by depreciation allowed in connection with the rental use of the property, the amount of the taxpayer's adjusted purchase price in the residence is not reduced. See paragraph (m) of this section for a rule that treats the sum of the grandfathered amounts of all secured debts as the adjusted purchase price of the residence.

(ii) *Adjusted purchase price of a qualified residence acquired incident to divorce.* [Reserved]

(iii) *Examples.*

Example 1. X purchases a residence for $120,000. X's basis, as determined under section 1012, is the cost of the property, or $120,000. Accordingly, the adjusted purchase price of the residence is initially $120,000.

Example 2. Y owns a principal residence that has a basis of $30,000. Y sells the residence for $100,000 and purchases a new principal residence for $120,000. Under section 1034, Y does not recognize gain on the sale of the former residence. Under section 1034(e), Y's basis in the new residence is reduced by the amount of gain not recognized. Therefore, under section 1034(e), Y's basis in the new residence is $50,000 ($120,000 − $70,000). For purposes of section 163(h), however, the adjusted purchase price of the residence is not adjusted under section 1034(e). Therefore, the adjusted purchase price of the residence is initially $120,000.

Example 3. Z acquires a residence by gift. The donor's basis in the residence was $30,000. Z's basis in the residence, determined under section 1015, is $30,000. Accordingly, the adjusted purchase price of the residence is initially $30,000.

(2) *Fair market value*—(i) *In general.* For purposes of this section, the fair market value of a qualified residence on any date is the fair market value of the taxpayer's interest in the residence on such date. In addition, the fair market value determined under this paragraph (k)(2)(i) shall be determined by taking into account the cost of improvements to the residence reasonably expected to be made with the proceeds of the debt.

(ii) *Example.* In 1988, the adjusted purchase price of P's second residence is $65,000 and the fair market value of the residence is $70,000. At that time, P incurs an additional debt of $10,000, the proceeds of which P reasonably expects to use to add two bedrooms to the residence. Because the fair market value is determined by taking into account the cost of improvements to the residence that are reasonably expected to be made with the proceeds of the debt, the fair market value of the residence with respect to the debt incurred in 1988 is $80,000 ($70,000+$10,000).

(3) *Allocation of adjusted purchase price and fair market value.* If a property includes both a qualified residence and other property, the adjusted purchase price and the fair market value of such property must be allocated between the qualified residence and the other property. See paragraph (p)(4) of this section for rules governing such an allocation.

(l) [Reserved]

(m) *Grandfathered amount*—(1) *Substitution for adjusted purchase price.* If, for the taxable year, the sum of the grandfathered amounts, if any, of all secured debts exceeds the adjusted purchase price of the qualified residence, such sum may be treated as the adjusted purchase price of the residence under paragraphs (c), (d) and (e) of this section.

(2) *Determination of grandfathered amount*—(i) *In general.* For any taxable year, the grandfathered amount of any secured debt that was incurred on or before August 16, 1986, and was secured by the residence continuously from August 16, 1986, through the end of the taxable year, is the average balance of the debt for the taxable year. A secured debt that was not incurred and secured on or before August 16, 1986, has no grandfathered amount.

(ii) *Special rule for lines of credit and certain other debt.* If, with respect to a debt described in paragraph (m)(2)(i) of this section, a taxpayer has borrowed any additional amounts after August 16, 1986, the grandfathered amount of such debt is equal to the lesser of—

(A) The average balance of the debt for the taxable year, or

(B) The principal balance of the debt as of August 16, 1986, reduced (but not below zero) by all principal payments after August 16, 1986, and before the first day of the current taxable year.

For purposes of this paragraph (m)(2)(ii), a taxpayer shall not be considered to have borrowed any additional amount with respect to a debt merely because accrued interest is added to the principal balance of the debt, so long as such accrued interest is paid by the taxpayer no less often than quarterly.

(iii) *Fair market value limitation.* The grandfathered amount of any debt for any taxable year may not exceed the fair market value of the residence on August 16, 1986, reduced by the principal balance on that day of all previously secured debt.

(iv) *Examples.*

Example 1. As of August 16, 1986, T has one debt secured by T's principal residence. The debt is a conventional self-amortizing mortgage and, on August 16, 1986, it has an outstanding principal balance of $75,000. In 1987, the average balance of the mortgage is $73,000. The adjusted purchase price of the residence as of the end of 1987 is $50,000. Because the mortgage was incurred and secured on or before August 16, 1986 and T has not borrowed any additional amounts with respect to the mortgage, the grandfathered amount is the average balance, $73,000. Because the grandfathered amount exceeds the adjusted purchase price ($50,000), T may treat the grandfathered amount as the adjusted purchase price in determining the amount of qualified residence interest.

Example 2. (i) The facts are the same as in example (1), except that in May 1986, T also obtains a home equity line of credit that, on August 16, 1986, has a principal balance of $40,000. In November 1986, T borrows an additional $10,000 on the home equity line, increasing the balance to $50,000. In December 1986, T repays $5,000 of principal on the home equity line. The average balance of the home equity line in 1987 is $45,000.

(ii) Because T has borrowed additional amounts on the line of credit after August 16, 1986, the grandfathered amount for that debt must be determined under the rules of paragraph (m)(2)(ii) of this section. Accordingly, the grandfathered amount for the line of credit is equal to the lesser of $45,000, the average balance of the debt in 1987, and $35,000, the principal balance on August 16, 1986, reduced by all principal payments between August 17, 1986, and December 31, 1986 ($40,000–$5,000). The sum of the grandfathered amounts with respect to the residence is $108,000 ($73,000+$35,000). Because the sum of the grandfathered amounts exceeds the adjusted purchase price ($50,000), T may treat the sum as the adjusted purchase price in determining the qualified residence interest for 1987.

(3) *Refinancing of grandfathered debt*—(i) *In general.* A debt incurred and secured on or before August 16, 1986, is refinanced if some or all of the outstanding balance of such a debt (the "original debt") is repaid out of the proceeds of a second debt secured by the same qualified residence (the "replacement debt"). In the case of a refinancing, the replacement debt is treated as a debt incurred and secured on or before August 16, 1986, and the grandfathered amount of such debt is the amount (but not less than zero) determined pursuant to paragraph (m)(3)(ii) of this section.

(ii) *Determination of grandfathered amount*—(A) *Exact refinancing.* If—

(*1*) The entire proceeds of a replacement debt are used to refinance one or more original debts, and

(*2*) The taxpayer has not borrowed any additional amounts after August 16, 1986, with respect to the original debt or debts,

the grandfathered amount of the replacement debt is the average balance of the replacement debt. For purposes of the preceding sentence, the fact that proceeds of a replacement debt are used to pay costs of obtaining the replacement debt (including points or other closing costs) shall be disregarded in determining whether the entire proceeds of the replacement debt have been used to refinance one or more original debts.

(B) *Refinancing other than exact refinancings*—(*1*) *Year of refinancing.* In the taxable year in which an original debt is refinanced, the grandfathered amount of the original and replacement debts is equal to the lesser of—

(*i*) The sum of the average balances of the original debt and the replacement debt, and

(*ii*) The principal balance of the original debt as of August 16, 1986, reduced by all principal payments on the original debt after August 16, 1986, and before the first day of the current taxable year.

(*2*) *In subsequent years.* In any taxable year after the taxable year in which an original debt is refinanced, the grandfathered amount of the replacement debt is equal to the least of—

(*i*) The average balance of the replacement debt for the taxable year,

(*ii*) The amount of the replacement debt used to repay the principal balance of the original debt, reduced by all principal payments on the replacement debt after the date of the refinancing and before the first day of the current taxable year, or

(*iii*) The principal balance of the original debt on August 16, 1986, reduced by all principal payments on the original debt after August 16, 1986, and before the date of the refinancing, and further reduced by all principal payments on the replacement debt after the date of the refinancing and before the first day of the current taxable year.

(C) *Example*. (*i*) *Facts*. On August 16, 1986, T has a single debt secured by a principal residence with a balance of $150,000. On July 1, 1988, T refinances the debt, which still has a principal balance of $150,000, with a new secured debt. The principal balance of the replacement debt throughout 1988 and 1989 is $150,000. The adjusted purchase price of the residence is $100,000 throughout 1987, 1988 and 1989. The average balance of the original debt was $150,000 in 1987 and $75,000 in 1988. The average balance of the replacement debt is $75,000 in 1988 and $150,000 in 1989.

(*ii*) *Grandfathered amount in 1987*. The original debt was incurred and secured on or before August 16, 1986 and T has not borrowed any additional amounts with respect to the debt. Therefore, its grandfathered amount in 1987 is its average balance ($150,000). This amount is treated as the adjusted purchase price for 1987 and all of the interest paid on the debt is qualified residence interest.

(*iii*) *Grandfathered amount in 1988*. Because the replacement debt was used to refinance a debt incurred and secured on or before August 16, 1986, the replacement debt is treated as a grandfathered debt. Because all of the proceeds of the replacement debt were used in the refinancing and because no amounts have been borrowed after August 16, 1986, on the original debt, the grandfathered amount for the original debt is its average balance ($75,000) and the grandfathered amount for the replacement debt is its average balance ($75,000). Since the sum of the grandfathered amounts ($150,000) exceeds the adjusted purchase price of the residence, the sum of the grandfathered amounts may be substituted for the adjusted purchase price for 1988 and all of the interest paid on the debt is qualified residence interest.

(*iv*) *Grandfathered amount in 1989*. The grandfathered amount for the placement debt is its average balance ($150,000). This amount is treated as the adjusted purchase price for 1989 and all of the interest paid on the mortgage is qualified residence interest.

(4) *Limitation on term of grandfathered debt*—(i) *In general*. An original debt or replacement debt shall not have any grandfathered amount in any taxable year that begins after the date, as determined on August 16, 1986, that the original debt was required to be repaid in full (the ''maturity date''). If a replacement debt is used to refinance more than one original debt, the maturity date is determined by reference to the original debt that, as of August 16, 1986, had the latest maturity date.

(ii) *Special rule for nonamortizing debt*. If an original debt was actually incurred and secured on or before August 16, 1986, and if as of such date the terms of such debt did not require the amortization of its principal over its original term, the maturity date of the replacement debt is the earlier of the maturity date of the replacement debt or the date 30 years after the date the original debt is first refinanced.

(iii) *Example*. C incurs a debt on May 10, 1986, the final payment of which is due May 1, 2006. C incurs a second debt on August 11, 1990, with a term of 20 years and uses the proceeds of the second debt to refinance the first debt. Because, under paragraph (m)(4)(i) of this section, a replacement debt will not have any grandfathered amount in any taxable year that begins after the maturity date of the original debt (May 1, 2006), the second debt has no grandfathered amount in any taxable year after 2006.

(n) *Qualified indebtedness (secured debt used for medical and educational purposes)*—(1) *In general*—(i) *Treatment of* *qualified indebtedness.* The amount of any qualified indebtedness resulting from a secured debt may be added to the adjusted purchase price under paragraph (e)(2)(i)(B) of this section to determine the applicable debt limit for that secured debt and any other debt subsequently secured by the qualified residence.

(ii) *Determination of amount of qualified indebtedness.* If, as of the end of the taxable year (or the last day in the taxable year that the debt is secured), at least 90 percent of the proceeds of a secured debt are used (within the meaning of paragraph (n)(2) of this section) to pay for qualified medical and educational expenses (within the meaning of paragraphs (n)(3) and (n)(4) of this section), the amount of qualified indebtedness resulting from that debt for the taxable year is equal to the average balance of such debt for the taxable year.

(iii) *Determination of amount of qualified indebtedness for mixed-use debt.* If, as of the end of the taxable year (or the last day in the taxable year that the debt is secured), more than ten percent of the proceeds of a secured debt are used to pay for expenses other than qualified medical and educational expenses, the amount of qualified indebtedness resulting from that debt for the taxable year shall equal the lesser of—

(A) The average balance of the debt, or

(B) The amount of the proceeds of the debt used to pay for qualified medical and educational expenses through the end of the taxable year, reduced by any principal payments on the debt before the first day of the current taxable year.

(iv) *Example.* (*i*) C incurs a $10,000 debt on April 20, 1987, which is secured on that date by C's principal residence. C immediately uses (within the meaning of paragraph (n)(2) of this section) $4,000 of the proceeds of the debt to pay for a qualified medical expense. C makes no principal payments on the debt during 1987. During 1988 and 1989, C makes principal payments of $1,000 per year. The average balance of the debt during 1988 is $9,500 and the average balance during 1989 is $8,500.

(*ii*) Under paragraph (n)(1)(iii) of this section, C determines the amount of qualified indebtedness for 1988 as follows:

Average balance		$9,500
Amount of debt used to pay for qualified medical expenses	$4,000	
Less payments of principal before 1988	$0	
Net qualified expenses		$4,000

The amount of qualified indebtedness for 1988 is, therefore, $4,000 (lesser of $9,500 average balance or $4,000 net qualified expenses). This amount may be added to the adjusted purchase price of C's principal residence under paragraph (e)(2)(i)(B) of this section for purposes of computing the applicable debt limit for this debt and any other debt subsequently secured by the principal residence.

(*iii*) C determines the amount of qualified indebtedness for 1989 as follows:

Average balance		$8,500
Amount of debt used to pay for qualified medical expenses	$4,000	
Less payments of principal before 1988	$1,000	
Net qualified expenses		$3,000

The amount of qualified indebtedness for 1989 is, therefore, $3,000 (lesser of $8,500 average balance or $3,000 net qualified expenses).

(v) *Prevention of double counting in year of refinancing*—(A) *In general.* A debt used to pay for qualified medical or educational expenses is refinanced if some or all of the outstanding balance of the debt (the ''original debt'') is repaid out of the proceeds of a second debt (the ''replacement debt''). If, in the year of a refinancing, the combined qualified indebtedness of the original debt and the replacement debt exceeds the combined qualified expenses of such debts, the amount of qualified indebtedness for each such debt shall be determined by multiplying the amount of qualified indebtedness for each such debt by a fraction, the numerator of which is the combined qualified expenses and the denominator of which is the combined qualified indebtedness.

(B) *Definitions.* For purposes of paragraph (n)(1)(v)(A) of this section—

(*1*) The term ''combined qualified indebtedness'' means the sum of the qualified indebtedness (determined without regard to paragraph (n)(1)(v) of this section) for the original debt and the replacement debt.

(*2*) The term ''combined qualified expenses'' means the amount of the proceeds of the original debt used to pay for qualified medical and educational expenses through the end of the current taxable year, reduced by any principal payments on the debt before the first day of the current taxable year, and increased by the amount, if any, of the proceeds of the replacement debt used to pay such expenses through the end of the current taxable year other than as part of the refinancing.

(C) *Example*. (*i*) On August 11, 1987, C incurs a $8,000 debt secured by a principal residence. C uses (within the meaning of paragraph (n)(2)(i) of this section) $5,000 of the proceeds of the debt to pay for qualified educational expenses. C makes no principal payments on the debt. On July 1, 1988, C incurs a new debt in the amount of $8,000 secured by C's principal residence and uses all of the proceeds of the new debt to repay the original debt. Under paragraph (n)(2)(ii) of this section $5,000 of the new debt is treated as being used to pay for qualified educational expenses. C makes no principal payments (other than the refinancing) during 1987 or 1988 on either debt and pays all accrued interest monthly. The average balance of each debt in 1988 is $4,000.

(*ii*) Under paragraph (n)(1)(iii) of this section, the amount of qualified indebtedness for 1988 with respect to the original debt is $4,000 (the lesser of its average balance ($4,000) and the amount of the debt used to pay for qualified medical and educational expenses ($5,000)). Similarly, the amount of qualified indebtedness for 1988 with respect to the replacement debt is also $4,000. Both debts, however, are subject in 1988 to the limitation in paragraph (n)(1)(v)(A) of this section. The combined qualified indebtedness, determined without regard to the limitation, is $8,000 ($4,000 of qualified indebtedness from each debt). The combined qualified expenses are $5,000 ($5,000 from the original debt and $0 from the replacement debt). The amount of qualified indebtedness from each debt must, therefore, be reduced by a fraction, the numerator of which is $5,000 (the combined qualified expenses) and the denominator of which is $8,000 (the combined qualified indebtedness). After application of the limitation, the amount of qualified indebtedness for the original debt is $2,500 ($4,000 × × 5⁄8). Similarly, the amount of qualified indebtedness for the replacement debt is $2,500. Note that the total qualified indebtedness for both the original and the replacement debt is $5,000 ($2,500 + $2,500). Therefore, C is entitled to the same amount of qualified indebtedness as C would have been entitled to if C had not refinanced the debt.

(vi) *Special rule for principal payments in excess of qualified expenses*. For purposes of paragraph (n)(1)(iii)(B), (n)(1)(v)(B)(*2*) and (n)(2)(ii) of this section, a principal payment is taken into account only to the extent that the payment, when added to all prior payments, does not exceed the amount used on or before the date of the payment to pay for qualified medical and educational expenses.

(2) *Debt used to pay for qualified medical or educational expenses*—(i) *In general*. For purposes of this section, the proceeds of a debt are used to pay for qualified medical or educational expenses to the extent that—

(A) The taxpayer pays qualified medical or educational expenses within 90 days before or after the date that amounts are actually borrowed with respect to the debt, the proceeds of the debt are not directly allocable to another expense under §1.163–8T(c)(3) (allocation of debt; proceeds not disbursed to borrower) and the proceeds of any other debt are not allocable to the medical or educational expenses under §1.163–8T(c)(3), or

(B) The proceeds of the debt are otherwise allocated to such expenditures under §1.163–8T.

(ii) *Special rule for refinancings*. For purposes of this section, the proceeds of a debt are used to pay for qualified medical and educational expenses to the extent that the proceeds of the debt are allocated under §1.163–8T to the repayment of another debt (the ''original debt''), but only to the extent of the amount of the original debt used to pay for qualified medical and educational expenses, reduced by any principal payments on such debt up to the time of the refinancing.

(iii) *Other special rules.* The following special rules apply for purposes of this section.

(A) Proceeds of a debt are used to pay for qualified medical or educational expenses as of the later of the taxable year in which such proceeds are borrowed or the taxable year in which such expenses are paid.

(B) The amount of debt which may be treated as being used to pay for qualified medical or educational expenses may not exceed the amount of such expenses.

(C) Proceeds of a debt may not be treated as being used to pay for qualified medical or educational expenses to the extent that:

(*1*) The proceeds have been repaid as of the time the expense is paid;

(*2*) The proceeds are actually borrowed before August 17, 1986; or

(*3*) The medical or educational expenses are paid before August 17, 1986.

(iv) *Examples*—

Example 1. A pays a $5,000 qualified educational expense from a checking account that A maintains at Bank 1 on November 9, 1987. On January 1, 1988, A incurs a $20,000 debt that is secured by A's residence and places the proceeds of the debt in a savings account that A also maintains at Bank 1. A pays another $5,000 qualified educations expense on March 15 from a checking account that A maintains at Bank 2. Under paragraph (n)(2) of this section, the debt proceeds are used to pay for both educational expenses, regardless of other deposits to, or expenditures from, the accounts, because both expenditures are made within 90 days before or after the debt was incurred.

Example 2. B pays a $5,000 qualified educational expense from a checking account on November 1, 1987. On November 30, 1987, B incurs a debt secured by B's residence, and the lender disburses the debt proceeds directly to a person who sells B a new car. Although the educational expense is paid within 90 days of the date the debt is incurred, the proceeds of the debt are not used to pay for the educational expense because the proceeds are directly allocable to the purchase of the new car under §1.163–8T(c)(3).

Example 3. On November 1, 1987, C borrows $5,000 from C's college. The proceeds of this debt are not disbursed to C, but rather are used to pay tuition fees for C's attendance at the college. On November 30, 1987, C incurs a second debt and secures the debt by C's residence. Although the $5,000 educational expense is paid within 90 days before the second debt is incurred, the proceeds of the second debt are not used to pay for the educational expense, because the proceeds of the first debt are directly allocable to the educational expense under §1.163–8T(c)(3).

Example 4. On January 1, 1988, D incurs a $20,000 debt secured by a qualified residence. D places the proceeds of the debt in a separate account (*i.e.*, the proceeds of the debt are the only deposit in the account). D makes payments of $5,000 each for qualified educational expenses on September 1, 1988, September 1, 1989, September 1, 1990, and September 1, 1991. Because the debt proceeds are allocated to educational expenses as of the date the expenses are paid, under the rules of §1.163–8T(c)(4), the following amounts of the debt proceeds are used to pay for qualified educational expenses as of the end of each year:

1988: $5,000
1989: $10,000
1990: $15,000
1991: $20,000

Example 5. During 1987 E incurs a $10,000 debt secured by a principal residence. E uses (within the meaning of paragraph (n)(2)(i) of this section) all of the proceeds of the debt to pay for qualified educational expenses. On August 20, 1988, at which time the balance of the debt is $9,500, E incurs a new debt in the amount of $9,500 secured by E's principal residence and uses all of the proceeds of the new debt to repay the original debt. Under paragraph (n)(2)(ii) of this section, all of the proceeds of the new debt are used to pay for qualified educational expenses.

(3) *Qualified medical expenses.* Qualified medical expenses are amounts that are paid for medical care (within the meaning of section 213(d)(1) (A) and (B)) for the taxpayer, the taxpayer's spouse, or a dependent of the taxpayer (within the meaning of section 152), and that are not compensated for by insurance or otherwise.

(4) *Qualified educational expenses.* Qualified educational expenses are amounts that are paid for tuition, fees, books, supplies and equipment required for enrollment, attendance or courses of instruction at an educational organization described in section 170(b)(1)(A)(ii) and for any reasonable living expenses while away from home while in attendance at such an institution, for the taxpayer, the taxpayer's spouse or a dependent of the taxpayer (within the meaning of section 152) and that are not reimbursed by scholarship or otherwise.

(o) *Secured debt*—(1) *In general.* For purposes of this section, the term ''secured debt'' means a debt that is on the security of any instrument (such as a mortgage, deed of trust, or land contract)—

(i) That makes the interest of the debtor in the qualified residence specific security for the payment of the debt,

(ii) Under which, in the event of default, the residence could be subjected to the satisfaction of the debt with the same priority as a mortgage or deed of trust in the jurisdiction in which the property is situated, and

(iii) That is recorded, where permitted, or is otherwise perfected in accordance with applicable State law.

A debt will not be considered to be secured by a qualified residence if it is secured solely by virtue of a lien upon the general assets of the taxpayer or by a security interest, such as a mechanic's lien or judgment lien, that attaches to the property without the consent of the debtor.

(2) *Special rule for debt in certain States.* Debt will not fail to be treated as secured solely because, under an applicable State or local homestead law or other debtor protection law in effect on August 16, 1986, the security interest is ineffective or the enforceability of the security interest is restricted.

(3) *Times at which debt is treated as secured.* For purposes of this section, a debt is treated as secured as of the date on which each of the requirements of paragraph (o)(1) of this section are satisfied, regardless of when amounts are actually borrowed with respect to the debt. For purposes of this paragraph (o)(3), if the instrument is recorded within a commercially reasonable time after the security interest is granted, the instrument will be treated as recorded on the date that the security interest was granted.

(4) *Partially secured debt*—(i) *In general.* If the security interest is limited to a prescribed maximum amount or portion of the residence, and the average balance of the debt exceeds such amount or the value of such portion, such excess shall not be treated as secured debt for purposes of this section.

(ii) *Example.* T borrows $80,000 on January 1, 1991. T secures the debt with a principal residence. The security in the residence for the debt, however, is limited to $20,000. T pays $8,000 in interest on the debt in 1991 and the average balance of the debt in that year is $80,000. Because the average balance of the debt exceeds the maximum amount of the security interest, such excess is not treated as secured debt. Therefore, for purposes of applying the limitation on qualified residence interest, the average balance of the secured debt is $20,000 (the maximum amount of the security interest) and the interest paid or accrued on the secured debt is $2,000 (the total interest paid on the debt multiplied by the ratio of the average balance of the secured debt ($20,000) and the average balance of the total debt ($80,000)).

(5) *Election to treat debt as not secured by a qualified residence*—(i) *In general.* For purposes of this section, a taxpayer may elect to treat any debt that is secured by a qualified residence as not secured by the qualified residence. An election made under this paragraph shall be effective for the taxable year for which the election is made and for all subsequent taxable years unless revoked with the consent of the Commissioner.

(ii) *Example.* T owns a principal residence with a fair market value of $75,000 and an adjusted purchase price of $40,000. In 1988, debt A, the proceeds of which were used to purchase the residence, has an average balance of $15,000. The proceeds of debt B, which is secured by a second mortgage on the property, are allocable to T's trade or business under §1.163–8T and has an average balance of $25,000. In 1988, T incurs debt C, which is also secured by T's principal residence and which has an average balance in 1988 of $5,000. In the absence of an election to treat debt B as unsecured, the applicable debt limit for debt C in 1988 under paragraph (e) of this section would be zero dollars ($40,000 − $15,000 − $25,000) and none of the interest paid on debt C would be qualified residence interest. If, however, T makes or has previously made an election pursuant to paragraph (o)(5)(i) of this section to treat debt B as not secured by the residence, the applicable debt limit for debt C would be $25,000 ($40,000 − $15,000), and all of the interest paid on debt C during the taxable year would be qualified residence interest. Since the proceeds of debt B are allocable to T's trade or business under § 1.163–8T, interest on debt B may be deductible under other sections of the Internal Revenue Code.

(iii) *Allocation of debt secured by two qualified residences.* [Reserved]

(p) *Definition of qualified residence*—(1) *In general.* The term ''qualified residence'' means the taxpayer's principal residence (as defined in paragraph (p)(2) of this section), or the taxpayer's second residence (as defined in paragraph (p)(3) of this section).

(2) *Principal residence.* The term ''principal residence'' means the taxpayer's principal residence within the meaning of section 1034. For purposes of this section, a taxpayer cannot have more than one principal residence at any one time.

(3) *Second residence*—(i) *In general.* The term ''second residence'' means—

(A) A residence within the meaning of paragraph (p)(3)(ii) of this section,

(B) That the taxpayer uses as a residence within the meaning of paragraph (p)(3)(iii) of this section, and

(C) That the taxpayer elects to treat as a second residence pursuant to paragraph (p)(3)(iv) of this section.

A taxpayer cannot have more than one second residence at any time.

(ii) *Definition of residence.* Whether property is a residence shall be determined based on all the facts and circumstances, including the good faith of the taxpayer. A residence generally includes a house, condominium, mobile home, boat, or house trailer, that contains sleeping space and toilet and cooking facilities. A residence does not include personal property, such as furniture or a television, that, in accordance with the applicable local law, is not a fixture.

(iii) *Use as a residence.* If a residence is rented at any time during the taxable year, it is considered to be used as a residence only if the taxpayer uses it during the taxable year as a residence within the meaning of section 280A(d). If a residence is not rented at any time during the taxable year, it shall be considered to be used as a residence. For purposes of the preceding sentence, a residence will be deemed to be rented during any period that the taxpayer holds the residence out for rental or resale or repairs or renovates the residence with the intention of holding it out for rental or resale.

(iv) *Election of second residence.* A taxpayer may elect a different residence (other than the taxpayer's principal residence) to be the taxpayer's second residence for each taxable year. A taxpayer may not elect different residences as second residences at different times of the same taxable year except as provided below—

(A) If the taxpayer acquires a new residence during the taxable year, the taxpayer may elect the new residence as a taxpayer's second residence as of the date acquired;

(B) If property that was the taxpayer's principal residence during the taxable year ceases to qualify as the taxpayer's principal residence, the taxpayer may elect that property as the taxpayer's second residence as of the date that the property ceases to be the taxpayer's principal residence; or

(C) If property that was the taxpayer's second residence is sold during the taxable year or becomes the taxpayer's principal residence, the taxpayer may elect a new second residence as of such day.

(4) *Allocations between residence and other property*—(i) *In general.* For purposes of this section, the adjusted purchase price and fair market value of property must be allocated between the portion of the property that is a qualified residence and the portion that is not a qualified residence. Neither the average balance of the secured debt nor the interest paid or accrued on secured debt is so allocated. Property that is not used for residential purposes does not qualify as a residence. For example, if a portion of the property is used as an office in the taxpayer's trade or business, that portion of the property does not qualify as a residence.

(ii) *Special rule for rental of residence.* If a taxpayer rents a portion of his or her principal or second residence to another person (a ''tenant''), such portion may be treated as used by the taxpayer for residential purposes if, but only if—

(A) Such rented portion is used by the tenant primarily for residential purposes,

(B) The rented portion is not a self-contained residential unit containing separate sleeping space and toilet and cooking facilities, and

(C) The total number of tenants renting (directly or by sublease) the same or different portions of the residence at any time during the taxable year does not exceed two. For this purpose, if two persons (and the dependents, as defined by section 152, of either of them) share the same sleeping quarters, they shall be treated as a single tenant.

(iii) *Examples.*

Example 1. D, a dentist, uses a room in D's principal residence as an office which qualifies under section 280A(c)(1)(B) as a portion of the dwelling unit used exclusively on a regular basis as a place of business for meeting with patients in the normal course of D's trade or business. D's adjusted purchase price of the property is $65,000; $10,000 of which is allocable under paragraph (o)(4)(i) of this section to the room used as an office. For purposes of this section, D's residence does not include the room used as an office. The adjusted purchase price of the residence is, accordingly, $55,000. Similarly, the fair market value of D's residence must be allocated between the office and the remainder of the property.

Example 2. J rents out the basement of property that is otherwise used as J's principal residence. The basement is a self-contained residential unit, with sleeping space and toilet and cooking facilities. The adjusted purchase price of the property is $100,000; $15,000 of which is allocable under paragraph (o)(4)(i) of this section to the basement. For purposes of this section, J's residence does not include the basement and the adjusted purchase price of the residence is $85,000. Similarly, the fair market value of the residence must be allocated between the basement unit and the remainder of the property.

(5) *Residence under construction*—(i) *In general.* A taxpayer may treat a residence under construction as a qualified residence for a period of up to 24 months, but only if the residence becomes a qualified residence, without regard to this paragraph (p)(5)(i), as of the time that the residence is ready for occupancy.

(ii) *Example.* X owns a residential lot suitable for the construction of a vacation home. On April 20, 1987, X obtains a mortgage secured by the lot and any property to be constructed on the lot. On August 9, 1987, X begins construction of a residence on the lot. The residence is ready for occupancy on November 9, 1989. The residence is used as a residence within the meaning of paragraph (p)(3)(iii) of this section during 1989 and X elects to treat the residence as his second residence for the period November 9, 1989, through December 31, 1989. Since the residence under construction is a qualified residence as of the first day that the residence is ready for occupancy (November 9, 1987), X may treat the residence as his second residence under paragraph (p)(5)(i) of this section for up to 24 months of the period during which the residence is under construction, commencing on or after the date that construction is begun (August 9, 1987). If X treats the residence under construction as X's second residence beginning on August 9, 1987, the residence under construction would cease to qualify as a qualified residence under paragraph (p)(5)(i) on August 8, 1989. The residence's status as a qualified residence for future periods would be determined without regard to paragraph (p)(5)(i) of this section.

(6) *Special rule for time-sharing arrangements.* Property that is otherwise a qualified residence will not fail to qualify as such solely because the taxpayer's interest in or right to use the property is restricted by an arrangement whereby two or more persons with interests in the property agree to exercise control over the property for different periods during the taxable year. For purposes of determining the use of a residence under paragraph (p)(3)(iii) of this section, a taxpayer will not be considered to have used or rented a residence during any period that the taxpayer does not have the right to use the property or to receive any benefits from the rental of the property.

(q) *Special rules for tenant-stockholders in cooperative housing corporations*—(1) *In general.* For purposes of this section, a residence includes stock in a cooperative housing corporation owned by a tenant-stockholder if the house or apartment which the tenant-stockholder is entitled to occupy by virtue of owning such stock is a residence within the meaning of paragraph (p)(3)(ii) of this section.

(2) *Special rule where stock may not be used to secure debt.* For purposes of this section, if stock described in paragraph (q)(1) of this section may not be used to secure debt because of restrictions under local or State law or because of restrictions in the cooperative agreement (other than restrictions the principal purpose of which is to permit the tenant-stockholder to treat unsecured debt as secured debt under this paragraph (q)(2)), debt may be treated as secured by such stock to the extent that the proceeds of the debt are allocated to the purchase of the stock under the rules of §1.163–8T. For purposes of this paragraph (q)(2), proceeds of debt incurred prior to January 1, 1987, may be treated as allocated to the purchase of such stock to the extent that the tenant-stockholder has properly and consistently deducted interest expense on such debt as home mortgage interest attributable to such stock on Schedule A of Form 1040 in determining his taxable income for taxable years beginning before January 1, 1987. For purposes of this paragraph (q)(2), amended returns filed after December 22, 1987, are disregarded.

(3) *Treatment of interest expense of the cooperative described in section 216(a)(2).* For purposes of section 163(h) and §1.163–9T (disallowance of deduction for personal interest) and section 163(d) (limitation on investment interest), any amount allowable as a deduction to a tenant-stockholder under section 216(a)(2) shall be treated as interest paid or accrued by the tenant-stockholder. If a tenant-stockholder's stock in a cooperative housing corporation is a qualified residence of the tenant-shareholder, any amount allowable as a deduction to the tenant-stockholder under section 216(a)(2) is qualified residence interest.

(4) *Special rule to prevent tax avoidance.* If the amount treated as qualified residence interest under this section exceeds the amount which would be so treated if the tenant-stockholder were treated as directly owning his proportionate share of the assets and liabilities of the cooperative and one of the principal purposes of the cooperative arrangement is to permit the tenant-stockholder to increase the amount of qualified residence interest, the district director may determine that such excess is not qualified residence interest.

(5) *Other definitions.* For purposes of this section, the terms "tenant-stockholder," "cooperative housing corporation" and "proportionate share" shall have the meaning given by section 216 and the regulations thereunder.

(r) *Effective date.* The provisions of this section are effective for taxable years beginning after December 31, 1986.

[T.D. 8168, 52 FR 48410, Dec. 22, 1987]

§ 1.163–11 Allocation of certain prepaid qualified mortgage insurance premiums.

(a) *Allocation*—(1) *In general.* As provided in section 163(h)(3)(E), premiums paid or accrued for qualified mortgage insurance during the taxable year in connection with acquisition indebtedness with respect to a qualified residence (as defined in section 163(h)(4)(A)) of the taxpayer shall be treated as qualified residence interest (as defined in section 163(h)(3)(A)). If an individual taxpayer pays such a premium that is properly allocable to a mortgage the payment of which extends to periods beyond the close of the taxable year in which the premium is paid, the taxpayer must allocate the premium to determine the amount treated as qualified residence interest for each taxable year. The premium must be allocated ratably over the shorter of—

(i) The stated term of the mortgage; or

(ii) A period of 84 months, beginning with the month in which the insurance was obtained.

(2) *Limitation.* If a mortgage is satisfied before the end of its stated term, no deduction as qualified residence interest shall be allowed for any amount of the premium that is allocable to periods after the mortgage is satisfied.

(b) *Scope.* The allocation requirement in paragraph (a) of this section applies only to mortgage insurance provided by the Federal Housing Administration or private mortgage insurance (as defined by section 2 of the Homeowners Protection Act of 1998 (12 U.S.C. 4901) as in effect on December 20, 2006). It does not apply to mortgage insurance provided by the Department of Veterans Affairs or the Rural Housing Service. Paragraph (a) of this section applies whether the qualified mortgage insurance premiums are paid in cash or are financed, without regard to source.

(c) *Limitation on the treatment of mortgage insurance premiums as interest.* This section applies to prepaid qualified mortgage insurance premiums described in paragraph (a) of this section that are paid or accrued on or after January 1, 2011, and during periods to which section 163(h)(3)(E) is applicable. This section does not apply to any amount of prepaid qualified mortgage insurance premiums that are allocable to any periods to which section 163(h)(3)(E) is not applicable.

(d) *Effective/applicability date.* This section is applicable on and after January 1, 2011. For regulations applicable before January 1, 2011, see §1.163–11T in effect prior to January 1, 2011 (§1.163–11T as contained in 26 CFR part 1 edition revised as of April 1, 2011).

[T.D. 9588, 77 FR 26699, May 7, 2012]

§1.163–12 Deduction of original issue discount on instrument held by related foreign person.

(a) *General rules*—(1) *Deferral of deduction.* Except as provided in paragraph (b) of this section, section 163(e)(3) requires a taxpayer to use the cash method of accounting with respect to the deduction of original issue discount owed to a related foreign person. A deduction for an otherwise deductible portion of original issue discount with respect to a debt instrument will not be allowable as a deduction to the issuer until paid if, at the close of the issuer's taxable year in which such amount would otherwise be deductible, the person holding the debt instrument is a related foreign person. For purposes of this section, a related foreign person is any person that is not a United States person within the meaning of section 7701(a)(30), and that is related (within the meaning of section 267(b)) to the issuer at the close of the taxable year in which the amount incurred by the taxpayer would otherwise be deductible. Section 267(f) defines "controlled group" for purposes of section 267(b) without regard to the limitations of section 1563(b). An amount is treated as paid for purposes of this section if the amount is considered paid for purposes of section 1441 or section 1442 (including an amount taken into account pursuant to section 871(a)(1)(C), section 881(a)(3), or section 884(f)). The rules of this paragraph (a) apply even if the original issue discount is not subject to United States tax, or is subject to a reduced rate of tax, pursuant to a provision of the Internal Revenue Code or a treaty obligation of the United States. For purposes of this section, original issue discount is an amount described in section 1273, whether from sources inside or outside the United States.

(2) *Change in method of accounting.* A taxpayer that uses a method of accounting other than that required by the rules of this section must change its method of accounting to conform its method to the rules of this section. The taxpayer's change in method must be made pursuant to the rules of section 446(e), the regulations thereunder, and any applicable administrative procedures prescribed by the Commissioner. Because the rules of this section prescribe a method of accounting, these rules apply in the determination of a taxpayer's earnings and profits pursuant to §1.312–6(a).

(b) *Exceptions and special rules*—(1) *Effectively connected income.* The provisions of section 267(a)(2) and the regulations thereunder, and not the provisions of paragraph (a) of this section, apply to an amount of original issue discount that is income of the related foreign person that is effectively connected with the conduct of a United States trade or business of such related foreign person. An amount described in this paragraph (b)(1) thus is allowable as a deduction as of the day on which the amount is includible in the gross income of the related foreign person as effectively connected income under sections 872(a)(2) or 882(b) (or, if later, as of the day on which the deduction would be so allowable but for section 267(a)(2)). However, this paragraph (b)(1) does not apply if the related foreign person is exempt from United States income tax on the amount owed, or is subject to a reduced rate of tax, pursuant to a treaty obligation of the United States (such as under an article relating to the taxation of business profits).

(2) *Certain obligations issued by natural persons.* This section does not apply to any debt instrument described in section 163(e)(4) (relating to obligations issued by natural persons before March 2, 1984, and to loans between natural persons).

(3) *Amounts owed to a foreign personal holding company, controlled foreign corporation, or passive foreign investment company*—(i) *Foreign personal holding companies.* If an amount to which paragraph (a) of this section otherwise applies is owed to a related foreign person that is a foreign personal holding company within the meaning of section 552, then the amount is allowable as a deduction as of the day on which the amount is includible in the income of the foreign personal holding company. The day on which the amount is includible in income is determined with reference to the method of accounting under which the foreign personal holding company computes its taxable income and earnings and profits for purposes of sections 551 through 558. See section 551(c) and the regulations thereunder for the reporting requirements of the foreign personal holding company provisions (sections 551 through 558).

(ii) *Controlled foreign corporations.* If an amount to which paragraph (a) of this section otherwise applies is owed to a related foreign person that is a controlled foreign corporation within the meaning of section 957, then the amount is allowable as a deduction as of the day on which the amount is includible in the income of the controlled foreign corporation. The day on which the amount is includible in income is determined with reference to the method of accounting under which the controlled foreign corporation computes its taxable income and earnings and profits for purposes of sections 951 through 964. See section 6038 and the regulations thereunder for the reporting requirements of the controlled foreign corporation provisions (sections 951 through 964).

(iii) *Passive foreign investment companies.* If an amount to which paragraph (a) of this section otherwise applies is owed to a related foreign person that is a passive foreign investment company within the meaning of section 1296, then the amount is allowable as a deduction as of the day on which amount is includible in the income of the passive foreign investment company. The day on which the amount is includible in income is determined with reference to the method of accounting under which the earnings and profits of the passive foreign investment company are computed for purposes of sections 1291 through 1297. See sections 1291 through 1297 and the regulations thereunder for the reporting requirements of the passive foreign investment company provisions. This exception shall apply, however, only if the person that owes the amount at issue has made and has in effect an election pursuant to section 1295 with respect to the passive foreign investment company to which the amount at issue is owed.

(c) *Application of section 267.* Except as limited in paragraph (b)(1) of this section, the provisions of section 267 and the regulations thereunder shall apply to any amount of original issue discount to which the provisions of this section do not apply.

(d) *Effective date.* The rules of this section are effective with respect to all original issue discount on debt instruments issued after June 9, 1984.

[T.D. 8465, 58 FR 236, Jan. 5, 1993; 58 FR 8098, Feb. 11, 1993]

§ 1.163–13 Treatment of bond issuance premium.

(a) *General rule.* If a debt instrument is issued with bond issuance premium, this section limits the amount of the issuer's interest deduction otherwise allowable under section 163(a). In general, the issuer determines its interest deduction by offsetting the interest allocable to an accrual period with the bond issuance premium allocable to that period. Bond issuance premium is allocable to an accrual period based on a constant yield. The use of a constant yield to amortize bond issuance premium is intended to generally conform the treatment of debt instruments having bond issuance premium with those having original issue discount. Unless otherwise provided, the terms used in this section have the same meaning as those terms in section 163(e), sections

1271 through 1275, and the corresponding regulations. Moreover, unless otherwise provided, the provisions of this section apply in a manner consistent with those of section 163(e), sections 1271 through 1275, and the corresponding regulations. In addition, the anti-abuse rule in §1.1275–2(g) applies for purposes of this section. For rules dealing with the treatment of bond premium by a holder, see §§1.171–1 through 1.171–5.

(b) *Exceptions.* This section does not apply to—

(1) A debt instrument described in section 1272(a)(6)(C) (regular interests in a REMIC, qualified mortgages held by a REMIC, and certain other debt instruments, or pools of debt instruments, with payments subject to acceleration); or

(2) A debt instrument to which §1.1275–4 applies (relating to certain debt instruments that provide for contingent payments).

(c) *Bond issuance premium.* Bond issuance premium is the excess, if any, of the issue price of a debt instrument over its stated redemption price at maturity. For purposes of this section, the issue price of a convertible bond (as defined in §1.171–1(e)(1)(iii)(C)) does not include an amount equal to the value of the conversion option (as determined under §1.171–1(e)(1)(iii)(A)).

(d) *Offsetting qualified stated interest with bond issuance premium*—(1) *In general.* An issuer amortizes bond issuance premium by offsetting the qualified stated interest allocable to an accrual period with the bond issuance premium allocable to the accrual period. This offset occurs when the issuer takes the qualified stated interest into account under its regular method of accounting.

(2) *Qualified stated interest allocable to an accrual period.* See §1.446–2(b) to determine the accrual period to which qualified stated interest is allocable and to determine the accrual of qualified stated interest within an accrual period.

(3) *Bond issuance premium allocable to an accrual period.* The bond issuance premium allocable to an accrual period is determined under this paragraph (d)(3). Within an accrual period, the bond issuance premium allocable to the period accrues ratably.

(i) *Step one: Determine the debt instrument's yield to maturity.* The yield to maturity of a debt instrument is determined under the rules of §1.1272–1(b)(1)(i).

(ii) *Step two: Determine the accrual periods.* The accrual periods are determined under the rules of §1.1272–1(b)(1)(ii).

(iii) *Step three: Determine the bond issuance premium allocable to the accrual period.* The bond issuance premium allocable to an accrual period is the excess of the qualified stated interest allocable to the accrual period over the product of the adjusted issue price at the beginning of the accrual period and the yield. In performing this calculation, the yield must be stated appropriately taking into account the length of the particular accrual period. Principles similar to those in §1.1272–1(b)(4) apply in determining the bond issuance premium allocable to an accrual period.

(4) *Bond issuance premium in excess of qualified stated interest*—(i) *Ordinary income.* If the bond issuance premium allocable to an accrual period exceeds the qualified stated interest allocable to the accrual period, the excess is treated as ordinary income by the issuer for the accrual period. However, the amount treated as ordinary income is limited to the amount by which the issuer's total interest deductions on the debt instrument in prior accrual periods exceed the total amount treated by the issuer as ordinary income on the debt instrument in prior accrual periods.

(ii) *Carryforward.* If the bond issuance premium allocable to an accrual period exceeds the sum of the qualified stated interest allocable to the accrual period and the amount treated as ordinary income for the accrual period under paragraph (d)(4)(i) of this section, the excess is carried forward to the next accrual period and is treated as bond issuance premium allocable to that period. If a carryforward exists on the date the debt instrument is retired, the carryforward is treated as ordinary income on that date.

(e) *Special rules*—(1) *Variable rate debt instruments.* An issuer determines bond issuance premium on a variable rate debt instrument by reference to the stated redemption price at maturity of the equivalent fixed rate debt instrument constructed for the variable rate debt instrument. The issuer also allocates any bond issuance premium among the accrual periods by reference to the equivalent fixed rate debt instrument. The issuer constructs the equivalent fixed rate debt instrument, as of the issue date, by using the principles of § 1.1275–5(e).

(2) *Inflation-indexed debt instruments.* An issuer determines bond issuance premium on an inflation-indexed debt instrument by assuming that there will be no inflation or deflation over the term of the instrument. The issuer also allocates any bond issuance premium among the accrual periods by assuming that there will be no inflation or deflation over the term of the instrument. The bond issuance premium allocable to an accrual period offsets qualified stated interest allocable to the period. Notwithstanding paragraph (d)(4) of this section, if the bond issuance premium allocable to an accrual period exceeds the qualified stated interest allocable to the period, the excess is treated as a deflation adjustment under § 1.1275–7(f)(1)(ii). See § 1.1275–7 for other rules relating to inflation-indexed debt instruments.

(3) *Certain debt instruments subject to contingencies*—(i) *In general.* Except as provided in paragraph (e)(3)(ii) of this section, the rules of § 1.1272–1(c) apply to determine a debt instrument's payment schedule for purposes of this section. For example, an issuer uses the payment schedule determined under § 1.1272–1(c) to determine the amount, if any, of bond issuance premium on the debt instrument, the yield and maturity of the debt instrument, and the allocation of bond issuance premium to an accrual period.

(ii) *Mandatory sinking fund provision.* Notwithstanding paragraph (e)(3)(i) of this section, if a debt instrument is subject to a mandatory sinking fund provision described in § 1.1272–1(c)(3), the issuer must determine the payment schedule by assuming that a pro rata portion of the debt instrument will be called under the sinking fund provision.

(4) *Remote and incidental contingencies.* For purposes of determining the amount of bond issuance premium and allocating bond issuance premium among accrual periods, if a bond provides for a contingency that is remote or incidental (within the meaning of § 1.1275–2(h)), the issuer takes the contingency into account under the rules for remote and incidental contingencies in § 1.1275–2(h).

(f) *Example.* The following example illustrates the rules of this section:

Example. (i) *Facts.* On February 1, 1999, X issues for $110,000 a debt instrument maturing on February 1, 2006, with a stated principal amount of $100,000, payable at maturity. The debt instrument provides for unconditional payments of interest of $10,000, payable on February 1 of each year. X uses the calendar year as its taxable year, X uses the cash receipts and disbursements method of accounting, and X decides to use annual accrual periods ending on February 1 of each year. X's calculations assume a 30-day month and 360-day year.

(ii) *Amount of bond issuance premium.* The issue price of the debt instrument is $110,000. Because the interest payments on the debt instrument are qualified stated interest, the stated redemption price at maturity of the debt instrument is $100,000. Therefore, the amount of bond issuance premium is $10,000 ($110,000 − $100,000).

(iii) *Bond issuance premium allocable to the first accrual period.* Based on the payment schedule and the issue price of the debt instrument, the yield of the debt instrument is 8.07 percent, compounded annually. (Although, for purposes of simplicity, the yield as stated is rounded to two decimal places, the computations do not reflect this rounding convention.) The bond issuance premium allocable to the accrual period ending on February 1, 2000, is the excess of the qualified stated interest allocable to the period ($10,000) over the product of the adjusted issue price at the beginning of the period ($110,000) and the yield (8.07 percent, compounded annually). Therefore, the bond issuance premium allocable to the accrual period is $1,118.17 ($10,000 − $8,881.83).

(iv) *Premium used to offset interest.* Although X makes an interest payment of $10,000 on February 1, 2000, X only deducts interest of $8,881.83, the qualified stated interest allocable to the period ($10,000) offset with the bond issuance premium allocable to the period ($1,118.17).

(g) *Effective date.* This section applies to debt instruments issued on or after March 2, 1998.

(h) *Accounting method changes*—(1) *Consent to change*. An issuer required to change its method of accounting for bond issuance premium to comply with this section must secure the consent of the Commissioner in accordance with the requirements of §1.446–1(e). Paragraph (h)(2) of this section provides the Commissioner's automatic consent for certain changes.

(2) *Automatic consent*. The Commissioner grants consent for an issuer to change its method of accounting for bond issuance premium on debt instruments issued on or after March 2, 1998. Because this change is made on a cut-off basis, no items of income or deduction are omitted or duplicated and, therefore, no adjustment under section 481 is allowed. The consent granted by this paragraph (h)(2) applies provided—

(i) The change is made to comply with this section;

(ii) The change is made for the first taxable year for which the issuer must account for a debt instrument under this section; and

(iii) The issuer attaches to its federal income tax return for the taxable year containing the change a statement that it has changed its method of accounting under this section.

[T.D. 8746, 62 FR 68176, Dec. 31, 1997, as amended by T.D. 8838, 64 FR 48547, Sept. 7, 1999]

§ 1.163(d)–1 Time and manner for making elections under the Omnibus Budget Reconciliation Act of 1993 and the Jobs and Growth Tax Relief Reconciliation Act of 2003.

(a) *Description*. Section 163(d)(4)(B)(iii), as added by section 13206(d) of the Omnibus Budget Reconciliation Act of 1993 (Pub. L. 103–66, 107 Stat. 467), allows an electing taxpayer to take all or a portion of certain net capital gain attributable to dispositions of property held for investment into account as investment income. Section 163(d)(4)(B), as amended by section 302(b) of the Jobs and Growth Tax Relief Reconciliation Act of 2003 (Pub. L. 108–27, 117 Stat. 762), allows an electing taxpayer to take all or a portion of qualified dividend income, as defined in section 1(h)(11)(B), into account as investment income. As a consequence, the net capital gain and qualified dividend income taken into account as investment income under these elections are not eligible to be taxed at the capital gains rates. An election may be made for net capital gain recognized by noncorporate taxpayers during any taxable year beginning after December 31, 1992. An election may be made for qualified dividend income received by noncorporate taxpayers during any taxable year beginning after December 31, 2002, but before January 1, 2009.

(b) *Time and manner for making the elections*. The elections for net capital gain and qualified dividend income must be made on or before the due date (including extensions) of the income tax return for the taxable year in which the net capital gain is recognized or the qualified dividend income is received. The elections are to be made on Form 4952, ''Investment Interest Expense Deduction,'' in accordance with the form and its instructions.

(c) *Revocability of elections*. The elections described in this section are revocable with the consent of the Commissioner.

(d) *Effective date*. The rules set forth in this section regarding the net capital gain election apply beginning December 12, 1996. The rules set forth in this section regarding the qualified dividend income election apply to any taxable year beginning after December 31, 2002, but before January 1, 2009.

[T.D. 9191, 70 FR 13100, Mar. 18, 2005]

§ 1.164–1 Deduction for taxes.

(a) *In general*. Only the following taxes shall be allowed as a deduction under this section for the taxable year within which paid or accrued, according to the method of accounting used in computing taxable income:

(1) State and local, and foreign, real property taxes.

(2) State and local personal property taxes.

(3) State and local, and foreign, income, war profits, and excess profits taxes.

(4) State and local general sales taxes.

(5) State and local taxes on the sale of gasoline, diesel fuel, and other motor fuels.

In addition, there shall be allowed as a deduction under this section State and local and foreign taxes not described in subparagraphs (1) through (5) of this paragraph which are paid or accrued within the taxable year in carrying on a trade or business or an activity described in section 212 (relating to expenses for production of income). For example, dealers or investors in securities and dealers or investors in real estate may deduct State stock transfer and real estate transfer taxes, respectively, under section 164, to the extent they are expenses incurred in carrying on a trade or business or an activity for the production of income. In general, taxes are deductible only by the person upon whom they are imposed. However, see §1.164–5 in the case of certain taxes paid by the consumer. Also, in the case of a qualified State individual income tax (as defined in section 6362 and the regulations thereunder) which is determined by reference to a percentage of the Federal income tax (pursuant to section 6362 (c)), an accrual method taxpayer shall use the cash receipts and disbursements method to compute the amount of his deduction therefor. Thus, the deduction under section 164 is in the amount actually paid with respect to the qualified tax, rather than the amount accrued with respect thereto, during the taxable year even though the taxpayer uses the accrual method of accounting for other purposes. In addition, see paragraph (f)(1) of §301.6361–1 of this chapter (Regulations on Procedure and Administration) with respect to rules relating to allocation and reallocation of amounts collected on account of the Federal income tax and qualified taxes.

(b) *Taxable years beginning before January 1, 1964*. For taxable years beginning before January 1, 1964, except as otherwise provided in §§1.164–2 through 1.164–8, inclusive, taxes imposed by the United States, any State, territory, possession of the United States, or a political subdivision of any of the foregoing, or by any foreign country, are deductible from gross income for the taxable year in which paid or accrued, according to the method of accounting used in computing taxable income. For this purpose, postage is not a tax and automobile license or registration fees are ordinarily taxes.

(c) *Cross references*. For the definition of the term ''real property taxes'', see paragraph (d) of §1.164–3. For the definition of the term ''foreign taxes'', see paragraph (d) of §1.164–3. For the definition of the term ''general sales taxes'', see paragraph (f) of §1.164–3. For the treatment of gasoline, diesel fuel, and other motor fuel taxes, see §1.164–5. For apportionment of taxes on real property between seller and purchaser, see section 164(d) and §1.164–6. For the general rule for taxable year of deduction, see section 461. For provisions disallowing any deduction for the tax paid at the source on interest from tax-free covenant bonds, see section 1451(f).

[T.D. 6780, 29 FR 18145, Dec. 22, 1964, as amended by T.D. 7577, 43 FR 59357, Dec. 20, 1978]

§ 1.164–2 Deduction denied in case of certain taxes.

This section and §1.275 describe certain taxes for which no deduction is allowed. In the case of taxable years beginning before January 1, 1964, the denial is provided for by section 164(b) (prior to being amended by section 207 of the Revenue Act of 1964 (78 Stat. 40)). In the case of taxable years beginning after December 31, 1963, the denial is governed by sections 164 and 275. No deduction is allowed for the following taxes:

(a) *Federal income taxes*. Federal income taxes, including the taxes imposed by section 3101, relating to the tax on employees under the Federal Insurance Contributions Act (chapter 21 of the Code); sections 3201 and 3211, relating to the taxes on railroad employees and railroad employee representatives; section 3402, relating to the tax withheld at source on wages; and by corresponding provisions of prior internal revenue laws.

(b) *Federal war profits and excess profits taxes*. Federal war profits and excess profits taxes including those imposed by title II of the Revenue Act of 1917 (39 Stat. 1000), title III of the Revenue Act of 1918 (40 Stat. 1088), title III of the Revenue Act of 1921 (42 Stat. 271), section 216 of the National Industrial Recovery Act (48 Stat. 208), section 702 of the Revenue Act of 1934 (48 Stat. 770), Subchapter D, Chapter 1 of the Internal Revenue Code of 1939, and Subchapter E, Chapter 2 of the Internal Revenue Code of 1939.

(c) *Estate and gift taxes.* Estate, inheritance, legacy, succession, and gift taxes.

(d) *Foreign income, war profits, and excess profits taxes.* Income, war profits, and excess profits taxes imposed by the authority of any foreign country or possession of the United States, if the taxpayer chooses to take to any extent the benefits of section 901, relating to the credit for taxes of foreign countries and possessions of the United States.

(e) *Real property taxes.* Taxes on real property, to the extent that section 164(d) and §1.164–6 require such taxes to be treated as imposed on another taxpayer.

(f) *Federal duties and excise taxes.* Federal import or tariff duties, business, license, privilege, excise, and stamp taxes (not described in paragraphs (a), (b), (c), or (h) of this section, or §1.164–4) paid or accrued within the taxable year. The fact that any such tax is not deductible as a tax under section 164 does not prevent (1) its deduction under section 162 or section 212, provided it represents an ordinary and necessary expense paid or incurred during the taxable year by a corporation or an individual in the conduct of any trade or business or, in the case of an individual for the production or collection of income, for the management, conservation, or maintenance of property held for the production of income, or in connection with the determination, collection, or refund of any tax, or (2) its being taken into account during the taxable year by a corporation or an individual as a part of the cost of acquiring or producing property in the trade or business or, in the case of an individual, as a part of the cost of property held for the production of income with respect to which it relates.

(g) *Taxes for local benefits.* Except as provided in §1.164–4, taxes assessed against local benefits of a kind tending to increase the value of the property assessed.

(h) *Excise tax on real estate investment trusts.* The excise tax imposed on certain real estate investment trusts by section 4981.

[T.D. 6780, 29 FR 18145, Dec. 22, 1964, as amended by T.D. 7767, 46 FR 11263, Feb. 6, 1981]

§1.164–3 Definitions and special rules.

For purposes of section 164 and §1.164–1 to §1.164–8, inclusive—

(a) *State or local taxes.* A State or local tax includes only a tax imposed by a State, a possession of the United States, or a political subdivision of any of the foregoing, or by the District of Columbia.

(b) *Real property taxes.* The term ''real property taxes'' means taxes imposed on interests in real property and levied for the general public welfare, but it does not include taxes assessed against local benefits. See §1.164–4.

(c) *Personal property taxes.* The term ''personal property tax'' means an ad valorem tax which is imposed on an annual basis in respect of personal property. To qualify as a personal property tax, a tax must meet the following three tests:

(1) The tax must be ad valorem—that is, substantially in proportion to the value of the personal property. A tax which is based on criteria other than value does not qualify as ad valorem. For example, a motor vehicle tax based on weight, model year, and horsepower, or any of these characteristics is not an ad valorem tax. However, a tax which is partly based on value and partly based on other criteria may qualify in part. For example, in the case of a motor vehicle tax of 1 percent of value plus 40 cents per hundredweight, the part of the tax equal to 1 percent of value qualifies as an ad valorem tax and the balance does not qualify.

(2) The tax must be imposed on an annual basis, even if collected more frequently or less frequently.

(3) The tax must be imposed in respect of personal property. A tax may be considered to be imposed in respect of personal property even if in form it is imposed on the exercise of a privilege. Thus, for taxable years beginning after December 31, 1963, State and local taxes on the registration or licensing

of highway motor vehicles are not deductible as personal property taxes unless and to the extent that the tests prescribed in this subparagraph are met. For example, an annual ad valorem tax qualifies as a personal property tax although it is denominated a registration fee imposed for the privilege of registering motor vehicles or of using them on the highways.

(d) *Foreign taxes.* The term ''foreign tax'' includes only a tax imposed by the authority of a foreign country. A tax-imposed by a political subdivision of a foreign country is considered to be imposed by the authority of that foreign country.

(e) *Sales tax.* (1) The term ''sales tax'' means a tax imposed upon persons engaged in selling tangible personal property, or upon the consumers of such property, including persons selling gasoline or other motor vehicle fuels at wholesale or retail, which is a stated sum per unit of property sold or which is measured by the gross sales price or the gross receipts from the sale. The term also includes a tax imposed upon persons engaged in furnishing services which is measured by the gross receipts for furnishing such services.

(2) In general, the term ''consumer'' means the ultimate user or purchaser; it does not include a purchaser such as a retailer, who acquires the property for resale.

(f) *General sales tax.* A ''general sales tax'' is a sales tax which is imposed at one rate in respect of the sale at retail of a broad range of classes of items. No foreign sales tax is deductible under section 164(a) and paragraph (a)(4) of §1.164–1. To qualify as a general sales tax, a tax must meet the following two tests:

(1) The tax must be a tax in respect of sales at retail. This may include a tax imposed on persons engaged in selling property at retail or furnishing services at retail, for example, if the tax is measured by gross sales price or by gross receipts from sales or services. Rentals qualify as sales at retail if so treated under applicable State sales tax laws.

(2) The tax must be general—that is, it must be imposed at one rate in respect of the retail sales of a broad range of classes of items. A sales tax is considered to be general although imposed on sales of various classes of items at more than one rate provided that one rate applies to the retail sales of a broad range of classes of items. The term ''items'' includes both commodities and services.

(g) *Special rules relating to general sales taxes.* (1) A sales tax which is general is usually imposed at one rate in respect of the retail sales of all tangible personal property (with exceptions and additions). However, a sales tax which is selective—that is, a tax which applies at one rate with respect to retail sales of specified classes of items also qualifies as general if the specified classes represent a broad range of classes of items. A selective sales tax which does not apply at one rate to the retail sales of a broad range of classes of items is not general. For example, a tax which applies only to sales of alcoholic beverages, tobacco, admissions, luxury items, and a few other items is not general. Similarly, a tax imposed solely on services is not general. However, a selective sales tax may be deemed to be part of the general sales tax and hence may be deductible, even if imposed by a separate title, etc., of the State or local law, if imposed at the same rate as the general rate of tax (as defined in subparagraph (4) of this paragraph) which qualifies a tax in the taxing jurisdiction as a general sales tax. For example, if a State has a 5 percent general sales tax and a separate selective sales tax of 5 percent on transient accommodations, the tax on transient accommodations is deductible.

(2) A tax is imposed at one rate only if it is imposed at that rate on generally the same base for all items subject to tax. For example, a sales tax imposed at a 3 percent rate on 100 percent of the sales price of some classes of items and at a 3 percent rate on 50 percent of the sales price of other classes of items would not be imposed at one rate with respect to all such classes. However, a tax is considered to be imposed at one rate although it allows dollar exemptions, if the exemptions are designed to exclude all sales under a certain dollar amount. For example, a tax may be imposed at one rate although it applies to all sales of

tangible personal property but applies only to sales amounting to more than 10 cents.

(3) The fact that a sales tax exempts food, clothing, medical supplies, and motor vehicles, or any of them, shall not be taken into account in determining whether the tax applies to a broad range of classes of items. The fact that a sales tax applies to food, clothing, medical supplies, and motor vehicles, or any of them, at a rate which is lower than the general rate of tax (as defined in subparagraph (4) of this paragraph) is not taken into account in determining whether the tax is imposed at one rate on the retail sales of a broad range of classes of items. For purposes of this section, the term ''food'' means food for human consumption off the premises where sold, and the term ''medical supplies'' includes drugs, medicines, and medical devices.

(4) Except in the case of a lower rate of tax applicable in respect of food, clothing, medical supplies, and motor vehicles, or any of them, no deduction is allowed for a general sales tax in respect of any item if the tax is imposed on such item at a rate other than the general rate of tax. The general rate of tax is the one rate which qualifies a tax in a taxing jurisdiction as a general sales tax because the tax is imposed at such one rate on a broad range of classes of items. There can be only one general rate of tax in any one taxing jurisdiction. However, a general sales tax imposed at a lower rate or rates on food, clothing, motor vehicles, and medical supplies, or any of them, may nonetheless be deductible with respect to such items. For example, a sales tax which is imposed at 1 percent with respect to food, imposed at 3 percent with respect to a broad range of classes of tangible personal property, and imposed at 4 percent with respect to transient accommodations would qualify as a general sales tax. Taxes paid at the 1 percent and the 3 percent rates are deductible, but tax paid at the 4 percent rate is not deductible. The fact that a sales tax provides for the adjustment of the general rate of tax to reflect the sales tax rate in another taxing jurisdiction shall not be taken into account in determining whether the tax is imposed at one rate on the retail sales of a broad range of classes of items. Moreover, a general sales tax imposed at a lower rate with respect to an item in order to reflect the tax rate in another jurisdiction is also deductible at such lower rate. For example, State E imposes a general sales tax whose general rate is 3 percent. The State E sales tax law provides that in areas bordering on States with general sales taxes, selective sales taxes, or special excise taxes, the rate applied in the adjoining State will be used if such rate is under 3 percent. State F imposes a 2 percent sales tax. The 2 percent sales tax paid by residents of State E in areas bordering on State F is deductible.

(h) *Compensating use taxes.* A compensating use tax in respect of any item is treated as a general sales tax. The term ''compensating use tax'' means, in respect of any item, a tax which is imposed on the use, storage, or consumption of such item and which is complementary to a general sales tax which is deductible with respect to sales of similar items.

(i) *Special rules relating to compensating use taxes.* (1) In general, a use tax on an item is complementary to a general sales tax on similar items if the use tax is imposed on an item which was not subject to such general sales tax but which would have been subject to such general sales tax if the sale of the item had taken place within the jurisdiction imposing the use tax. For example, a tax imposed by State A on the use of a motor vehicle purchased in State B is complementary to the general sales tax of State A on similar items, if the latter tax applies to motor vehicles sold in State A.

(2) Since a compensating use tax is treated as a general sales tax, it is subject to the rule of subparagraph (C) of section 164(b)(2) and paragraph (g)(4) of this section that no deduction is allowed for a general sales tax imposed in respect of an item at a rate other than the general rate of tax (except in the case of lower rates on the sale of food, clothing, medical supplies, and motor vehicles). The fact that a compensating use tax in respect of any item provides for an adjustment in the rate of the compensating use tax or the

amount of such tax to be paid on account of a sales tax on such item imposed by another taxing jurisdiction is not taken into account in determining whether the compensating use tax is imposed in respect of the item at a rate other than the general rate of tax. For example, a compensating use tax imposed by State C on the use of an item purchased in State D is considered to be imposed at the general rate of tax even though the tax imposed by State C allows a credit for any sales tax paid on such item in State D, or the rate of such compensating use tax is adjusted to reflect the rate of sales tax imposed by State D.

[T.D. 6780, 29 FR 18146, Dec. 22, 1964]

§ 1.164–4 Taxes for local benefits.

(a) So-called taxes for local benefits referred to in paragraph (g) of § 1.164–2, more properly assessments, paid for local benefits such as street, sidewalk, and other like improvements, imposed because of and measured by some benefit inuring directly to the property against which the assessment is levied are not deductible as taxes. A tax is considered assessed against local benefits when the property subject to the tax is limited to property benefited. Special assessments are not deductible, even though an incidental benefit may inure to the public welfare. The real property taxes deductible are those levied for the general public welfare by the proper taxing authorities at a like rate against all property in the territory over which such authorities have jurisdiction. Assessments under the statutes of California relating to irrigation, and of Iowa relating to drainage, and under certain statutes of Tennessee relating to levees, are limited to property benefited, and if the assessments are so limited, the amounts paid thereunder are not deductible as taxes. For treatment of assessments for local benefits as adjustments to the basis of property, see section 1016(a)(1) and the regulations thereunder.

(b)(1) Insofar as assessments against local benefits are made for the purpose of maintenance or repair or for the purpose of meeting interest charges with respect to such benefits, they are deductible. In such cases, the burden is on the taxpayer to show the allocation of the amounts assessed to the different purposes. If the allocation cannot be made, none of the amount so paid is deductible.

(2) Taxes levied by a special taxing district which was in existence on December 31, 1963, for the purpose of retiring indebtedness existing on such date, are deductible, to the extent levied for such purpose, if (i) the district covers the whole of at least one county, (ii) if at least 1,000 persons are subject to the taxes levied by the district, and (iii) if the district levies its assessments annually at a uniform rate on the same assessed value of real property, including improvements, as is used for purposes of the real property tax generally.

[T.D. 6780, 29 FR 18147, Dec. 22, 1964]

§ 1.164–5 Certain retail sales taxes and gasoline taxes.

For taxable years beginning before January 1, 1964, any amount representing a State or local sales tax paid by a consumer of services or tangible personal property is deductible by such consumer as a tax, provided it is separately stated and not paid in connection with his trade or business. For taxable years beginning after December 31, 1963, only the amount of any separately stated State and local general sales tax (as defined in paragraph (g) of § 1.164–3) and tax on the sale of gasoline, diesel fuel or other motor fuel paid by the consumer (other than in connection with his trade or business) is deductible by the consumer as tax. The fact that, under the law imposing it, the incidence of such State or local tax does not fall on the consumer is immaterial. The requirement that the amount of tax must be separately stated will be deemed complied with where it clearly appears that at the time of sale to the consumer, the tax was added to the sales price and collected or charged as a separate item. It is not necessary, for the purpose of this section, that the consumer be furnished with a sales slip, bill, invoice, or other statement on which the tax is separately stated. For example, where the law imposing the State or local tax for which the taxpayer seeks a deduction contains a prohibition against the seller absorbing the tax, or a provision requiring a posted notice stating that the tax will be added to the quoted price, or a requirement that the tax be separately shown in advertisements or separately stated on all bills and invoices, it is presumed that the amount of the State or local tax was separately stated at the time paid by the consumer; except that such presumption shall have no application to a tax on the sale of gasoline, diesel fuel or other motor fuel imposed upon a wholesaler unless such provisions of law apply with respect to both the sale at wholesale and the sale at retail.

[T.D. 6780, 29 FR 18147, Dec. 22, 1964]

§ 1.164–6 Apportionment of taxes on real property between seller and purchaser.

(a) *Scope.* Except as provided otherwise in section 164(f) and § 1.164–8, when real property is sold, section 164(d)(1) governs the deduction by the seller and the purchaser of current real property taxes. Section 164(d)(1) performs two functions: (1) It provides a method by which a portion of the taxes for the real property tax year in which the property is sold may be deducted by the seller and a portion by the purchaser; and (2) it limits the deduction of the seller and the purchaser to the portion of the taxes corresponding to the part of the real property tax year during which each was the owner of the property. These functions are accomplished by treating a portion of the taxes for the real property tax year in which the property is sold as imposed on the seller and a portion as imposed on the purchaser. To the extent that the taxes are treated as imposed on the seller and the purchaser, each shall be allowed a deduction, under section 164(a), in the taxable year such tax is paid or accrued, or treated as paid or accrued under section 164(d)(2) (A) or (D) and this section. No deduction is allowed for taxes on real property to the extent that they are imposed on another taxpayer, or are treated as imposed on another taxpayer under section 164(d). For the election to accrue real property taxes ratably see section 461(c) and the regulations thereunder.

(b) *Application of rule of apportionment.* (1)(i) For purposes of the deduction provided by section 164(a), if real property is sold during any real property tax year, the portion of the real property tax properly allocable to that part of the real property tax year which ends on the day before the date of the sale shall be treated as a tax imposed on the seller, and the portion of such tax properly allocable to that part of such real property tax year which begins on the date of the sale shall be treated as a tax imposed on the purchased. For definition of ''real property tax year'' see paragraph (c) of this section. This rule shall apply whether or not the seller and the purchaser apportion such tax. The rule of apportionment contained in section 164(d)(1) applies even though the same real property is sold more than once during the real property tax year. (See paragraph (d)(5) of this section for rule requiring inclusion in gross income of excess deductions.)

(ii) Where the real property tax becomes a personal liability or a lien before the beginning of the real property tax year to which it relates and the real property is sold subsequent to the time the tax becomes a personal liability or a lien but prior to the beginning of the related real property tax year—

(*a*) The seller may not deduct any amount for real property taxes for the related real property tax year, and

(*b*) To the extent that he holds the property for such real property tax year, the purchaser may deduct the amount of such taxes for the taxable year they are paid (or amounts representing such taxes are paid to the seller, mortgagee, trustee or other person having an interest in the property as security) or accrued by him according to his method of accounting.

(iii) Similarly, where the real property tax becomes a personal liability or a lien after the end of the real property tax year to which it relates and the real property is sold prior to the time the tax becomes a personal liability or a lien but after the end of the related real property tax year—

(*a*) The purchaser may not deduct any amount for real property taxes for the related real property tax year, and (*b*) To the extent that he holds the property for such real property tax year, the seller may deduct the amount of such taxes for the taxable year they are paid (or amounts representing such taxes are paid to the purchaser, mortgagee, trustee, or other person having an interest in the property as security) or accrued by him according to his method of accounting.

(iv) Where the real property is sold (or purchased) during the related real property tax year the real property taxes for such year are apportioned between the parties to such sale and may be deducted by such parties in accordance with the provisions of paragraph (d) of this section.

(2) Section 164(d) does not apply to delinquent real property taxes for any real property tax year prior to the real property tax year in which the property is sold.

(3) The provisions of this paragraph may be illustrated by the following examples:

Example 1. The real property tax year in County R is April 1 to March 31. A, the owner on April 1, 1954, of real property located in County R sells the real property to B on June 30, 1954. B owns the real property from June 30, 1954, through March 31, 1955. The real property tax for the real property tax year April 1, 1954–March 31, 1955 is $365. For purposes of section 164(a), $90 (90/365×$365, April 1, 1954–June 29, 1954) of the real property tax is treated as imposed on A, the seller, and $275 (275/365× $365, June 30, 1954–March 31, 1955) of such real property tax is treated as imposed on B, the purchaser.

Example 2. In County S the real property tax year is the calendar year. The real property tax becomes a lien on June 1 and is payable on July 1 of the current real property tax year, but there is no personal liability for such tax. On April 30, 1955, C, the owner of real property in County S on January 1, 1955, sells the real property to D. On July 1, 1955, D pays the 1955 real property tax. On August 31, 1955, D sells the same real property to E. C, D, and E use the cash receipts and disbursements method of accounting. Under the provisions of section 164(d)(1), 119/365 (January 1–April 29, 1955) of the real property tax payable on July 1, 1955, for the 1955 real property tax year is treated as imposed on C, and, under the provisions of section 164(d)(2)(A), such portion is treated as having been paid by him on the date of sale. Under the provisions of section 164(d)(1), 123/365 (April 30–August 30, 1955) of the real property tax paid July 1, 1955, for the 1955 real property tax year is treated as imposed on D and may be deducted by him. Under the provisions of section 164(d)(1), 123/365 (August 31–December 31, 1955) of the real property tax due and paid on July 1, 1955, for the 1955 real property tax year is treated as imposed on E and, under the provisions of section 164(d)(2)(A) such portion is treated as having been paid by him on the date of sale.

Example 3. In State X the real property tax year is the calendar year. The real property tax becomes a lien on November 1 of the preceding calendar year. On November 15, 1955, F sells real property in State X to G. G owns the real property through December 31, 1956. Under section 164(d)(1), the real property tax (which became a lien on November 1, 1954) for the 1955 real property tax year is apportioned between F and G. No part of the real property tax for the 1956 real property tax year may be deducted by F. The entire real property tax for the 1956 real property tax year may be deducted by G when paid or accrued, depending upon the method of accounting used by him. See subparagraph (6) of paragraph (d) and section 461(c) and the regulations thereunder.

(c) *Real property tax year.* As used in section 164(d), the term ''real property tax year'' refers to the period which, under the law imposing the tax, is regarded as the period to which the tax imposed relates. Where the State and one or more local governmental units each imposes a tax on real property, the real property tax year for each tax must be determined for purposes of applying the rule of apportionment of section 164(d)(1) to each tax. The time when the tax rate is determined, the time when the assessment is made, the time when the tax becomes a lien, or the time when the tax becomes due or delinquent does not necessarily determine the real property tax year. The real property tax year may or may not correspond to the fiscal year of the governmental unit imposing the tax. In each case the State or local law determines what constitutes the real property tax year. Although the seller and the purchaser may or may not make an allocation of real property taxes, the meaning of ''real property tax year'' in section 164(d) and the application of section 164(d) do not depend upon what real property taxes were allocated nor the method of allocation used by the parties.

(d) *Special rules*—(1) *Seller using cash receipts and disbursements method of accounting.* Under the provisions of section 164(d), if the seller by reason of his method of accounting may not deduct any amount for taxes unless paid, and—

(i) The purchaser (under the law imposing the real property tax) is liable for the real property tax for the real property tax year, or

(ii) The seller (under the law imposing the real property tax) is liable for the real property tax for the real property tax year and the tax is not payable until after the date of sale,

then the portion of the tax treated under section 164(d)(1) as imposed upon the seller (whether or not actually paid by him in the taxable year in which the sale occurs) shall be considered as having been paid by him in such taxable year. Such portion may be deducted by him for the taxable year in which the sale occurs, or, if at a later time, for the taxable year (which would be proper under the taxpayer's method of accounting) in which the tax is actually paid, or an amount representing such tax is paid to the purchaser, mortgagee, trustee, or other person having an interest in the property as security.

(2) *Purchasers using the cash receipts and disbursements method of accounting.* Under the provisions of section 164(d), if the purchaser by reason of his method of accounting may not deduct any amount for taxes unless paid and the seller (under the law imposing the real property tax) is liable for the real property tax for the real property tax year, the portion of the tax treated under section 164(d)(1) as imposed upon the purchaser (whether or not actually paid by him in the taxable year in which the sale occurs) shall be considered as having been paid by him in such taxable year. Such portion may be deducted by him for the taxable year in which the sale occurs, or, if at a later time, for the taxable year (which would be proper under the taxpayer's method of accounting) in which the tax is actually paid, or an amount representing such tax is paid to the seller, mortgagee, trustee, or other person having an interest in the property as security.

(3) *Persons considered liable for tax.* Where the tax is not a liability of any person, the person who holds the property at the time the tax becomes a lien on the property shall be considered liable for the tax. As to a particular sale, in determining:

(i) Whether the other party to the sale is liable for the tax or,

(ii) The person who holds the property at the time the tax becomes a lien on the property (where the tax is not a liability of any person),

prior or subsequent sales of the property during the real property tax year shall be disregarded.

(4) *Examples.* The provisions of subparagraphs (1), (2), and (3) of this paragraph may be illustrated as follows:

Example 1. In County X the real property tax year is the calendar year. The real property tax is a personal liability of the owner of the real property on June 30 of the current real property tax year, but is not payable until February 28 of the following real property tax year. A, the owner of real property in County X on January 1, 1955, uses the cash receipts and disbursements method of accounting. On May 30, 1955, A sells the real property to B, who also uses the cash receipts and disbursements method of accounting. B retains ownership of the real property for the balance of the 1955 calendar year. Under the provisions of section 164(d)(1), 149/365 (January 1–May 29, 1955) of the real property tax payable on February 28, 1956, for the 1955 real property tax year is treated as imposed on A, the seller, and under the provisions of section 164(d)(2)(A) such portion is treated as having been paid by him on the date of sale and may be deducted by him for his taxable year in which the sale occurs (whether or not such portion is actually paid by him in that year) or for his taxable year in which the tax is actually paid or an amount representing such tax is paid. Under the provisions of section 164(d)(1), 216/365 (May 30–December 31, 1955) of the real property tax payable on February 28, 1956, for the 1955 real property tax year is treated as imposed on B, the purchaser, and may be deducted by him for his taxable year in which the tax is actually paid, or an amount representing such tax is paid.

Example 2. In County Y, the real property tax year is the calendar year. The real property tax becomes a lien on January 1, 1955, and is payable on April 30, 1955. There is no personal liability for the real property tax imposed by County Y. On April 30, 1955, C, the owner of real property in County Y on January 1, 1955, pays the real property tax for the 1955 real property tax year. On May 1, 1955, C sells the real property to D. On September 1, 1955, D sells the real property to E. C, D, and E use the cash receipts and disbursements method of accounting. Under the provisions of section 164(d)(1), 120/365 (January 1–April 30, 1955) of the real property tax is treated as imposed upon C and may be deducted by him for his taxable year in which the tax is actually paid. Under section 164(d)(1), 123/365 (May 1–August 31, 1955) of the real property tax is treated as imposed upon D and, under the provisions of section 164(d)(2)(A), is treated as having been paid by him on May 1, 1955, and may be deducted by D for his taxable year in which the sale from C to him occurs (whether or not such portion is actually paid by him in that year), or for his taxable year in which an amount representing such tax is paid. Since, according to paragraph (d)(3) of this section, the prior sale by C to D is disregarded, under the provisions of section 164(d)(1), 122/365 (September 1–December 31, 1955) of the real property tax is treated as imposed on E and, under the provisions of section 164(d)(2)(A), is treated as having been paid by him on September 1, 1955, and may be deducted by E for his taxable year in which the sale from D to him occurs (whether or not such portion is actually paid by him in that year), or for his taxable year in which an amount representing such tax is paid.

Example 3. In County X the real property tax year is the calendar year and the real property taxes are assessed and become a lien on June 30 of the current real property tax year, but are not payable until September 1 of that year. There is no personal liability for the real property tax imposed by County X. A, the owner on January 1, 1955, of real property in County X, uses the cash receipts and disbursements method of accounting. On July 15, 1955, A sells the real property to B. Under the provisions of section 164(d)(1), 195/365 (January 1–July 14, 1955) of the real property tax payable on September 1, 1955, for the 1955 real property tax year is treated as imposed on A, and may be deducted by him for his taxable year in which the sale occurs (whether or not such portion is actually paid by him in that year) or for his taxable year in which the tax is actually paid or an amount representing such tax is paid. Under the provisions of section 164(d)(1), 170/365 (July 15–December 31, 1955) of the real property tax is treated as imposed on B and may be deducted by him for his taxable year in which the sale occurs (whether or not such portion is actually paid by him in that year), or for his taxable year in which the tax is actually paid or an amount representing such tax is paid.

(5) *Treatment of excess deduction.* If, for a taxable year prior to the taxable year of sale of real property, a taxpayer has deducted an amount for real property tax in excess of the portion of such real property tax treated as imposed on him under the provisions of section 164(d), the excess of the amount deducted over the portion treated as imposed on him shall be included in his gross income for the taxable year of the sale, subject to the provisions of section 111, relating to the recovery of bad debts, prior taxes, and delinquency amounts. The provisions of this subparagraph may be illustrated as follows:

Example 1. In Borough Y the real property tax is due and payable on November 30 for the succeeding calendar year, which is also the real property tax year. On November 30, 1954, taxpayer A, who reports his income on a calendar year under the cash receipts and disbursements method of accounting, pays the real property tax on real property owned by him in Borough Y for the 1955 real property tax year. On June 30, 1955, A sells the real property. Under the provisions of section 164(d), only 180/365 (January 1–June 29, 1955) of the real property tax for the 1955 real property tax year is treated as imposed on A, and the excess of the amount of real property tax for 1955 deducted by A, on his 1954 income tax return, over the 180/365 portion of such tax treated as imposed on him under section 164(d), must be included in gross income in A's 1955 income tax return, subject to the provisions of section 111.

Example 2. In County Z the real property tax year is the calendar year. The real property tax becomes a personal liability of the owner of real property on January 1 of the current real property tax year, and is payable on July 1 of the current real property tax year. On May 1, 1955, A, the owner of real property in County Z on January 1, 1955, sells the real property to B. On November 1, 1955, B sells the same real property to C. B uses the cash receipts and disbursements method of accounting and reports his income on the basis of a fiscal year ending July 31. B, on July 1, 1955, pays the entire real property tax for the real property tax year ending December 31, 1955. Under the provisions of section 164(d), only 184/365 (May 1–October 31, 1955) of the real property tax for the 1955 real property tax year is treated as imposed on B, and the excess of the amount of real property tax for 1955 deducted by B on his income tax return for the fiscal year ending July 31, 1955, over the 184/365 portion of such tax treated as imposed on him under section 164(d), must be included in gross income in B's income tax return for his fiscal year ending July 31, 1956, subject to the provisions of section 111.

(6) *Persons using an accrual method of accounting.* Where real property is sold and the seller or the purchaser computes his taxable income (for the taxable year during which the sale occurs) on an accrual method of accounting then, if the seller or the purchaser has

not made the election provided in section 461(c) (relating to the accrual of real property taxes), the portion of any real property tax which is treated as imposed on him and which may not be deducted by him for any taxable year by reason of his method of accounting shall be treated as having accrued on the date of sale. The provisions of this subparagraph may be illustrated as follows:

Example. In County X the real property tax becomes a lien on property and is assessed on November 30 for the current calendar year, which is also the real property tax year. There is no personal liability for the real property tax imposed by County X. A owns, on January 1, 1955, real property in County X. A uses an accrual method of accounting and has not made any election under section 461(c) to accrue ratably real property taxes. A sells real property on June 30, 1955. By reason of A's method of accounting, he could not deduct any part of the real property tax for 1955 on the real property since he sold the real property prior to November 30, 1955, the accrual date. Under section 164(d)(1), 180/365 (January 1–June 29, 1955) of the real property tax for the 1955 real property tax year is treated as imposed on A, and under section 164(d)(2)(D) that portion is treated as having accrued on June 30, 1955, and may be deducted by A for his taxable year in which such date falls. B, the purchaser from A, who uses an accrual method of accounting, has likewise not made an election under section 461(c) to accrue real property taxes ratably. Under section 164(d)(1), 185/365 of the real property taxes may be accrued by B on November 30, 1955, and deducted for his taxable year in which such date falls.

(7) *Cross references.* For determination of amount realized on a sale of real property, see section 1001(b) and the regulations thereunder. For determination of basis of real property acquired by purchase, see section 1012 and the regulations thereunder.

(8) *Effective dates.* Section 164(d) applies to taxable years ending after December 31, 1953, but only in the case of sales made after December 31, 1953. However, section 164(d) does not apply to any real property tax to the extent that such tax was allowable as a deduction under the Internal Revenue Code of 1939 to the seller for any taxable year which ended before January 1, 1954.

§ 1.164–7 Taxes of shareholder paid by corporation.

Banks and other corporations paying taxes assessed against their shareholders on account of their ownership of the shares of stock issued by such corporations without reimbursement from such shareholders may deduct the amount of taxes so paid. In such cases no deduction shall be allowed to the shareholders for such taxes. The amount so paid should not be included in the gross income of the shareholder.

§ 1.164–8 Payments for municipal services in atomic energy communities.

(a) *General.* For taxable years beginning after December 31, 1957, amounts paid or accrued by any owner of real property within any community (as defined in section 21b of the Atomic Energy Community Act of 1955 (42 U.S.C. 2304)) to compensate the Atomic Energy Commission for municipal-type services (or any agent or contractor authorized by the Atomic Energy Commission to charge for such services) shall be treated as State real property taxes paid or accrued for purposes of section 164. Such amounts shall be deductible as taxes to the extent provided in section 164, §§ 1.164–1 through 1.164–7, and this section. See paragraph (b) of this section for definition of the term ''Atomic Energy Commission''; paragraph (c) of this section for the definition of the term ''municipal-type services''; and paragraph (d) of this section for the definition of the term ''owner''.

(b) *Atomic Energy Commission.* For purposes of paragraph (a) of this section, the term ''Atomic Energy Commission'' shall mean—

(1) The Atomic Energy Commission, and

(2) Any other agency of the United States Government to which the duties and responsibilities of providing municipal-type services are delegated under the authority of section 101 of the Atomic Energy Community Act of 1955 (42 U.S.C. 2313).

(c) *Municipal-type services.* For purposes of paragraph (a) of this section, the term ''municipal-type services'' includes services usually rendered by a municipality and usually paid for by taxes. Examples of municipal-type services are police protection, fire protection, public recreational facilities, public libraries, public schools, public health, public welfare, and the maintenance of roads and streets. The term shall include sewage and refuse disposal which are maintained out of revenues derived from a general charge for municipal-type services; however, the term shall not include sewage and refuse disposal if a separate charge for such services is made. Charges assessed against local benefits of a kind tending to increase the value of the property assessed are not charges for municipal-type services. See section 164(c)(1) and §1.164–4.

(d) *Owner*. For purposes of paragraph (a) of this section, the term ''owner'' includes a person who holds the real property under a leasehold of 40 or more years from the Atomic Energy Commission (or any agency of the United States Government to which the duties and responsibilities of leasing real property are delegated under section 101 of the Atomic Energy Community Act of 1955), and a person who has entered into a contract to purchase under section 61 of the Atomic Energy Community Act of 1955 (42 U.S.C. 2361). An assignee (either immediate or more remote) of a lessee referred to in the preceding sentence will also qualify as an owner for purposes of paragraph (a) of this section.

(e) *Nonapplication of section 164(d)*. Section 164(d) and §1.164–6, relating to apportionment of taxes on real property between seller and purchaser, do not apply to a sale by the United States or any of its agencies of real property to which section 164(f) and this section apply. Thus, amounts paid or accrued which qualify under paragraph (a) of this section will continue to be deductible as taxes to the extent provided in this section, even in the taxable year in which the owner actually purchases the real property from the United States or any of its agencies. However, the provisions of section 164(d) and §1.164–6 shall apply to a sale of real property to which section 164(f) and this section apply, if the seller is other than the United States or any of its agencies.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6789, 29 FR 18147, Dec. 22, 1964]

§ 1.165–1 Losses.

(a) *Allowance of deduction*. Section 165(a) provides that, in computing taxable income under section 63, any loss actually sustained during the taxable year and not made good by insurance or some other form of compensation shall be allowed as a deduction subject to any provision of the internal revenue laws which prohibits or limits the amount of the deduction. This deduction for losses sustained shall be taken in accordance with section 165 and the regulations thereunder. For the disallowance of deductions for worthless securities issued by a political party, see §1.271–1.

(b) *Nature of loss allowable*. To be allowable as a deduction under section 165(a), a loss must be evidenced by closed and completed transactions, fixed by identifiable events, and, except as otherwise provided in section 165(h) and §1.165–11, relating to disaster losses, actually sustained during the taxable year. Only a bona fide loss is allowable. Substance and not mere form shall govern in determining a deductible loss.

(c) *Amount deductible*. (1) The amount of loss allowable as a deduction under section 165(a) shall not exceed the amount prescribed by §1.1011–1 as the adjusted basis for determining the loss from the sale or other disposition of the property involved. In the case of each such deduction claimed, therefore, the basis of the property must be properly adjusted as prescribed by §1.1011–1 for such items as expenditures, receipts, or losses, properly chargeable to capital account, and for such items as depreciation, obsolescence, amortization, and depletion, in order to determine the amount of loss allowable as a deduction. To determine the allowable loss in the case of property acquired before March 1, 1913, see also paragraph (b) of §1.1053–1.

(2) The amount of loss recognized upon the sale or exchange of property shall be determined for purposes of section 165(a) in accordance with §1.1002–1.

(3) A loss from the sale or exchange of a capital asset shall be allowed as a deduction under section 165(a) but only to the extent allowed in section 1211 (relating to limitation on capital losses) and section 1212 (relating to capital loss carrybacks and carryovers), and in the regulations under those sections.

(4) In determining the amount of loss actually sustained for purposes of section 165(a), proper adjustment shall be made for any salvage value and for any insurance or other compensation received.

(d) *Year of deduction.* (1) A loss shall be allowed as a deduction under section 165(a) only for the taxable year in which the loss is sustained. For this purpose, a loss shall be treated as sustained during the taxable year in which the loss occurs as evidenced by closed and completed transactions and as fixed by identifiable events occurring in such taxable year. For provisions relating to situations where a loss attributable to a disaster will be treated as sustained in the taxable year immediately preceding the taxable year in which the disaster actually occurred, see section 165(h) and §1.165–11.

(2)(i) If a casualty or other event occurs which may result in a loss and, in the year of such casualty or event, there exists a claim for reimbursement with respect to which there is a reasonable prospect of recovery, no portion of the loss with respect to which reimbursement may be received is sustained, for purposes of section 165, until it can be ascertained with reasonable certainty whether or not such reimbursement will be received. Whether a reasonable prospect of recovery exists with respect to a claim for reimbursement of a loss is a question of fact to be determined upon an examination of all facts and circumstances. Whether or not such reimbursement will be received may be ascertained with reasonable certainty, for example, by a settlement of the claim, by an adjudication of the claim, or by an abandonment of the claim. When a taxpayer claims that the taxable year in which a loss is sustained is fixed by his abandonment of the claim for reimbursement, he must be able to produce objective evidence of his having abandoned the claim, such as the execution of a release.

(ii) If in the year of the casualty or other event a portion of the loss is not covered by a claim for reimbursement with respect to which there is a reasonable prospect of recovery, then such portion of the loss is sustained during the taxable year in which the casualty or other event occurs. For example, if property having an adjusted basis of $10,000 is completely destroyed by fire in 1961, and if the taxpayer's only claim for reimbursement consists of an insurance claim for $8,000 which is settled in 1962, the taxpayer sustains a loss of $2,000 in 1961. However, if the taxpayer's automobile is completely destroyed in 1961 as a result of the negligence of another person and there exists a reasonable prospect of recovery on a claim for the full value of the automobile against such person, the taxpayer does not sustain any loss until the taxable year in which the claim is adjudicated or otherwise settled. If the automobile had an adjusted basis of $5,000 and the taxpayer secures a judgment of $4,000 in 1962, $1,000 is deductible for the taxable year 1962. If in 1963 it becomes reasonably certain that only $3,500 can ever be collected on such judgment, $500 is deductible for the taxable year 1963.

(iii) If the taxpayer deducted a loss in accordance with the provisions of this paragraph and in a subsequent taxable year receives reimbursement for such loss, he does not recompute the tax for the taxable year in which the deduction was taken but includes the amount of such reimbursement in his gross income for the taxable year in which received, subject to the provisions of section 111, relating to recovery of amounts previously deducted.

(3) Any loss arising from theft shall be treated as sustained during the taxable year in which the taxpayer discovers the loss (see §1.165–8, relating to theft losses). However, if in the year of discovery there exists a claim for reimbursement with respect to which there is a reasonable prospect of recovery, no portion of the loss with respect to which reimbursement may be received is sustained, for purposes of section 165, until the taxable year in which it can

be ascertained with reasonable certainty whether or not such reimbursement will be received.

(4) The rules of this paragraph are applicable with respect to a casualty or other event which may result in a loss and which occurs after January 16, 1960. If the casualty or other event occurs on or before such date, a taxpayer may treat any loss resulting therefrom in accordance with the rules then applicable, or, if he so desires, in accordance with the provisions of this paragraph; but no provision of this paragraph shall be construed to permit a deduction of the same loss or any part thereof in more than one taxable year or to extend the period of limitations within which a claim for credit or refund may be filed under section 6511.

(e) *Limitation on losses of individuals.* In the case of an individual, the deduction for losses granted by section 165(a) shall, subject to the provisions of section 165(c) and paragraph (a) of this section, be limited to:

(1) Losses incurred in a trade or business;

(2) Losses incurred in any transaction entered into for profit, though not connected with a trade or business; and

(3) Losses of property not connected with a trade or business and not incurred in any transaction entered into for profit, if such losses arise from fire, storm, shipwreck, or other causalty, or from theft, and if the loss involved has not been allowed for estate tax purposes in the estate tax return. For additional provisions pertaining to the allowance of casualty and theft losses, see §§ 1.165–7 and 1.165–8, respectively.

For special rules relating to an election by a taxpayer to deduct disaster losses in the taxable year immediately preceding the taxable year in which the disaster occurred, see section 165(h) and § 1.165–11.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6735, 29 FR 6493, May 19, 1964; T.D. 6996, 34 FR 835, Jan. 18, 1969; T.D. 7301, 39 FR 963, Jan. 4, 1974; T.D. 7522, 42 FR 63411, Dec. 16, 1977]

§ 1.165–2 Obsolescence of nondepreciable property.

(a) *Allowance of deduction.* A loss incurred in a business or in a transaction entered into for profit and arising from the sudden termination of the usefulness in such business or transaction of any nondepreciable property, in a case where such business or transaction is discontinued or where such property is permanently discarded from use therein, shall be allowed as a deduction under section 165(a) for the taxable year in which the loss is actually sustained. For this purpose, the taxable year in which the loss is sustained is not necessarily the taxable year in which the overt act of abandonment, or the loss of title to the property, occurs.

(b) *Exceptions.* This section does not apply to losses sustained upon the sale or exchange of property, losses sustained upon the obsolescence or worthlessness of depreciable property, casualty losses, or losses reflected in inventories required to be taken under section 471. The limitations contained in sections 1211 and 1212 upon losses from the sale or exchange of capital assets do not apply to losses allowable under this section.

(c) *Cross references.* [Reserved] For further guidance, see § 1.165–2T(c).

(d) *Effective/applicability date.* [Reserved] For further guidance, see § 1.165–2T(d).

(e) *Expiration date.* [Reserved] For further guidance, see § 1.165–2T(e).

[T.D. 6500, 25 FR 11402, Nov. 26, 1960; 25 FR 14021, Dec. 21, 1960, as amended by T.D. 9564, 76 FR 81084, Dec. 27, 2011]

§ 1.165–2T Obsolescence of nondepreciable property (temporary).

(a) and (b) [Reserved] For further guidance, see § 1.165–2(a) and (b).

(c) *Cross references.* For the allowance under section 165(a) of losses arising from the permanent withdrawal of depreciable property from use in the trade or business or in the production of income, see § 1.167(a)–8T, § 1.168(i)–1T, or § 1.168(i)–8T, as applicable. For provisions respecting the obsolescence of depreciable property for which depreciation is determined under section 167 (but not under section 168, section 1400I, section 1400L(c), section 168 prior to its amendment by the Tax Reform Act of 1986 (100 Stat. 2121), or under an additional first year depreciation deduction provision of the Internal Revenue Code (for example, section 168(k) through (n), 1400L(b), or 1400N(d))), see §1.167(a)–9. For the allowance of casualty losses, see §1.165–7.

(d) *Effective/applicability date*—(1) *In general*. This section applies to taxable years beginning on or after January 1, 2014. Section 1.165–2 as contained in 26 CFR part 1 edition revised as of April 1, 2011, applies to taxable years beginning before January 1, 2014.

(2) *Optional early application*. A taxpayer may choose to apply this section to taxable years beginning on or after January 1, 2012.

(e) *Expiration date*. The applicability of this section expires on December 23, 2014.

[T.D. 9564, 76 FR 81084, Dec. 27, 2011, as amended at 77 FR 74584, Dec. 17, 2012]

§ 1.165–3 Demolition of buildings.

(a) *Intent to demolish formed at time of purchase*. (1) Except as provided in subparagraph (2) of this paragraph, the following rule shall apply when, in the course of a trade or business or in a transaction entered into for profit, real property is purchased with the intention of demolishing either immediately or subsequently the buildings situated thereon: No deduction shall be allowed under section 165(a) on account of the demolition of the old buildings even though any demolition originally planned is subsequently deferred or abandoned. The entire basis of the property so purchased shall, notwithstanding the provisions of §1.167(a)–5, be allocated to the land only. Such basis shall be increased by the net cost of demolition or decreased by the net proceeds from demolition.

(2)(i) If the property is purchased with the intention of demolishing the buildings and the buildings are used in a trade or business or held for the production of income before their demolition, a portion of the basis of the property may be allocated to such buildings and depreciated over the period during which they are so used or held. The fact that the taxpayer intends to demolish the buildings shall be taken into account in making the apportionment of basis between the land and buildings under §1.167(a)–5. In any event, the portion of the purchase price which may be allocated to the buildings shall not exceed the present value of the right to receive rentals from the buildings over the period of their intended use. The present value of such right shall be determined at the time that the buildings are first used in the trade or business or first held for the production of income. If the taxpayer does not rent the buildings, but uses them in his own trade or business or in the production of his income, the present value of such right shall be determined by reference to the rentals which could be realized during such period of intended use. The fact that the taxpayer intends to rent or use the buildings for a limited period before their demolition shall also be taken into account in computing the useful life in accordance with paragraph (b) of §1.167(a)–1.

(ii) Any portion of the purchase price which is allocated to the buildings in accordance with this subparagraph shall not be included in the basis of the land computed under subparagraph (1) of this paragraph, and any portion of the basis of the buildings which has not been recovered through depreciation or otherwise at the time of the demolition of the buildings is allowable as a deduction under section 165.

(iii) The application of this subparagraph may be illustrated by the following example:

Example. In January 1958, A purchased land and a building for $60,000 with the intention of demolishing the building. In the following April, A concludes that he will be unable to commence the construction of a proposed new building for a period of more than 3 years. Accordingly, on June 1, 1958, he leased the building for a period of 3 years at an annual rental of $1,200. A intends to demolish the building upon expiration of the lease. A may allocate a portion of the $60,000 basis of the property to the building to be depreciated over the 3-year period. That portion is equal to the present value of the right to receive $3,600 (3 times $1,200). Assuming that the present value of that right determined as of June 1, 1958, is $2,850, A may allocate that amount to the building and, if A files his return on the basis of a taxable year ending May 31, 1959, A may take a depreciation deduction with respect to such building of $950 for such taxable year. The basis of the land to A as determined under subparagraph (1) of this paragraph is reduced by $2,850. If on June 1, 1960, A ceases to rent the building and demolishes it, the balance of the undepreciated portion allocated to the buildings, $950, may be deducted from gross income under section 165.

(3) The basis of any building acquired in replacement of the old buildings shall not include any part of the basis of the property originally purchased even though such part was, at the time of purchase, allocated to the buildings to be demolished for purposes of determining allowable depreciation for the period before demolition.

(b) *Intent to demolish formed subsequent to the time of acquisition.* (1) Except as provided in subparagraph (2) of this paragraph, the loss incurred in a trade or business or in a transaction entered into for profit and arising from a demolition of old buildings shall be allowed as a deduction under section 165(a) if the demolition occurs as a result of a plan formed subsequent to the acquisition of the buildings demolished. The amount of the loss shall be the adjusted basis of the buildings demolished increased by the net cost of demolition or decreased by the net proceeds from demolition. See paragraph (c) of § 1.165–1 relating to amount deductible under section 165. The basis of any building acquired in replacement of the old buildings shall not include any part of the basis of the property demolished.

(2) If a lessor or lessee of real property demolishes the buildings situated thereon pursuant to a lease or an agreement which resulted in a lease, under which either the lessor was required or the lessee was required or permitted to demolish such buildings, no deduction shall be allowed to the lessor under section 165(a) on account of the demolition of the old buildings. However, the adjusted basis of the demolished buildings, increased by the net cost of demolition or decreased by the net proceeds from demolition, shall be considered as a part of the cost of the lease to be amortized over the remaining term thereof.

(c) *Evidence of intention.* (1) Whether real property has been purchased with the intention of demolishing the buildings thereon or whether the demolition of the buildings occurs as a result of a plan formed subsequent to their acquisition is a question of fact, and the answer depends upon an examination of all the surrounding facts and circumstances. The answer to the question does not depend solely upon the statements of the taxpayer at the time he acquired the property or demolished the buildings, but such statements, if made, are relevant and will be considered. Certain other relevant facts and circumstances that exist in some cases and the inferences that might reasonably be drawn from them are described in subparagraphs (2) and (3) of this paragraph. The question as to the taxpayer's intention is not answered by any inference that is drawn from any one fact or circumstance but can be answered only by a consideration of all relevant facts and circumstances and the reasonable inferences to be drawn therefrom.

(2) An intention at the time of acquisition to demolish may be suggested by:

(i) A short delay between the date of acquisition and the date of demolition;

(ii) Evidence of prohibitive remodeling costs determined at the time of acquisition;

(iii) Existence of municipal regulations at the time of acquisition which would prohibit the continued use of the buildings for profit purposes;

(iv) Unsuitability of the buildings for the taxpayer's trade or business at the time of acquisition; or

(v) Inability at the time of acquisition to realize a reasonable income from the buildings.

(3) The fact that the demolition occurred pursuant to a plan formed subsequent to the acquisition of the property may be suggested by:

(i) Substantial improvement of the buildings immediately after their acquisition;

(ii) Prolonged use of the buildings for business purposes after their acquisition;

(iii) Suitability of the buildings for investment purposes at the time of acquisition;

(iv) Substantial change in economic or business conditions after the date of acquisition;

(v) Loss of useful value occurring after the date of acquisition;

(vi) Substantial damage to the buildings occurring after their acquisition;

(vii) Discovery of latent structural defects in the buildings after their acquisition;

(viii) Decline in the taxpayer's business after the date of acquisition;

(ix) Condemnation of the property by municipal authorities after the date of acquisition; or

(x) Inability after acquisition to obtain building material necessary for the improvement of the property.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 74474, 41 FR 55710, Dec. 22, 1976]

§ 1.165–4 Decline in value of stock.

(a) *Deduction disallowed.* No deduction shall be allowed under section 165(a) solely on account of a decline in the value of stock owned by the taxpayer when the decline is due to a fluctuation in the market price of the stock or to other similar cause. A mere shrinkage in the value of stock owned by the taxpayer, even though extensive, does not give rise to a deduction under section 165(a) if the stock has any recognizable value on the date claimed as the date of loss. No loss for a decline in the value of stock owned by the taxpayer shall be allowed as a deduction under section 165(a) except insofar as the loss is recognized under § 1.1002–1 upon the sale or exchange of the stock and except as otherwise provided in § 1.165–5 with respect to stock which becomes worthless during the taxable year.

(b) *Stock owned by banks.* (1) In the regulation of banks and certain other corporations, Federal and State authorities may require that stock owned by such organizations be charged off as worthless or written down to a nominal value. If, in any such case, this requirement is premised upon the worthlessness of the stock, the charging off or writing down will be considered prima facie evidence of worthlessness for purposes of section 165(a); but, if the charging off or writing down is due to a fluctuation in the market price of the stock or if no reasonable attempt to determine the worthlessness of the stock has been made, then no deduction shall be allowed under section 165(a) for the amount so charged off or written down.

(2) This paragraph shall not be construed, however, to permit a deduction under section 165(a) unless the stock owned by the bank or other corporation actually becomes worthless in the taxable year. Such a taxpayer owning stock which becomes worthless during the taxable year is not precluded from deducting the loss under section 165(a) merely because, in obedience to the specific orders or general policy of such supervisory authorities, the value of the stock is written down to a nominal amount instead of being charged off completely.

(c) *Application to inventories.* This section does not apply to a decline in the value of corporate stock reflected in inventories required to be taken by a dealer in securities under section 471. See § 1.471–5.

(d) *Definition.* As used in this section, the term ''stock'' means a share of stock in a corporation or a right to subscribe for, or to receive, a share of stock in a corporation.

§ 1.165–5 Worthless securities.

(a) *Definition of security.* As used in section 165(g) and this section, the term ''security'' means:

(1) A share of stock in a corporation;

(2) A right to subscribe for, or to receive, a share of stock in a corporation; or

(3) A bond, debenture, note, or certificate, or other evidence of indebtedness to pay a fixed or determinable sum of money, which has been issued with interest coupons or in registered form by a domestic or foreign corporation or by any government or political subdivision thereof.

(b) *Ordinary loss.* If any security which is not a capital asset becomes wholly worthless during the taxable year, the loss resulting therefrom may be deducted under section 165(a) as an ordinary loss.

(c) *Capital loss.* If any security which is a capital asset becomes wholly worthless at any time during the taxable year, the loss resulting therefrom may be deducted under section 165(a) but only as though it were a loss from a sale or exchange, on the last day of the taxable year, of a capital asset. See section 165(g)(1). The amount so allowed as a deduction shall be subject to the limitations upon capital losses described in paragraph (c)(3) of § 1.165–1.

(d) *Loss on worthless securities of an affiliated corporation*—(1) *Deductible as an ordinary loss.* If a taxpayer which is a domestic corporation owns any security of a domestic or foreign corporation which is affiliated with the taxpayer within the meaning of subparagraph (2) of this paragraph and such security becomes wholly worthless during the taxable year, the loss resulting therefrom may be deducted under section 165(a) as an ordinary loss in accordance with paragraph (b) of this section. The fact that the security is in fact a capital asset of the taxpayer is immaterial for this purpose, since section 165(g)(3) provides that such security shall be treated as though it were not a capital asset for the purposes of section 165(g)(1). A debt which becomes wholly worthless during the taxable year shall be as an ordinary loss in accordance with the provisions of this subparagraph, to the extent that such debt is a security within the meaning of paragraph (a)(3) of this section.

(2) *Affiliated corporation defined.* For purposes of this paragraph, a corporation shall be treated as affiliated with the taxpayer owning the security if—

(i)(*a*) In the case of a taxable year beginning on or after January 1, 1970, the taxpayer owns directly—

(*1*) Stock possessing at least 80 percent of the voting power of all classes of such corporation's stock, and

(*2*) At least 80 percent of each class of such corporation's nonvoting stock excluding for purposes of this subdivision (i)(*a*) nonvoting stock which is limited and preferred as to dividends (see section 1504(a)), or

(*b*) In the case of a taxable year beginning before January 1, 1970, the taxpayer owns directly at least 95 percent of each class of the stock of such corporation;

(ii) None of the stock of such corporation was acquired by the taxpayer solely for the purpose of converting a capital loss sustained by reason of the worthlessness of any such stock into an ordinary loss under section 165(g)(3), and

(iii) More than 90 percent of the aggregate of the gross receipts of such corporation for all the taxable years during which it has been in existence has been from sources other than royalties, rents (except rents derived from rental of properties to employees of such corporation in the ordinary course of its operating business), dividends, interest (except interest received on the deferred purchase price of operating assets sold), annuities, and gains from sales or exchanges of stocks and securities. For this purpose, the term ''gross receipts'' means total receipts determined without any deduction for cost of goods sold, and gross receipts from sales or exchanges of stocks and securities shall be taken into account only to the extent of gains from such sales or exchanges.

(e) *Bonds issued by an insolvent corporation.* A bond of an insolvent corporation secured only by a mortgage from which nothing is realized for the bondholders on foreclosure shall be regarded as having become worthless not later than the year of the foreclosure sale, and no deduction in respect of the loss shall be allowed under section 165(a) in computing a bondholder's taxable income for a subsequent year. See also paragraph (d) of §1.165–1.

(f) *Decline in market value.* A taxpayer possessing a security to which this section relates shall not be allowed any deduction under section 165(a) on account of mere market fluctuation in the value of such security. See also §1.165–4.

(g) *Application to inventories.* This section does not apply to any loss upon the worthlessness of any security reflected in inventories required to be taken by a dealer in securities under section 471. See §1.471–5.

(h) *Special rules for banks.* For special rules applicable under this section to worthless securities of a bank, including securities issued by an affiliated bank, see §1.582–1.

(i) *Abandonment of securities*—(1) *In general.* For purposes of section 165 and this section, a security that becomes wholly worthless includes a security described in paragraph (a) of this section that is abandoned and otherwise satisfies the requirements for a deductible loss under section 165. If the abandoned security is a capital asset and is not described in section 165(g)(3) and paragraph (d) of this section (concerning worthless securities of certain affiliated corporations), the resulting loss is treated as a loss from the sale or exchange, on the last day of the taxable year, of a capital asset. See section 165(g)(1) and paragraph (c) of this section. To abandon a security, a taxpayer must permanently surrender and relinquish all rights in the security and receive no consideration in exchange for the security. For purposes of this section, all the facts and circumstances determine whether the transaction is properly characterized as an abandonment or other type of transaction, such as an actual sale or exchange, contribution to capital, dividend, or gift.

(2) *Effective/applicability date.* This paragraph (i) applies to any abandonment of stock or other securities after March 12, 2008.

(j) *Examples.* The provisions of this section may be illustrated by the following examples:

Example 1. (i) X Corporation, a domestic manufacturing corporation which makes its return on the basis of the calendar year, owns 100 percent of each class of the stock of Y Corporation; and, in addition, 19 percent of the common stock (the only class of stock) of Z Corporation, which it acquired in 1948. Y Corporation, a domestic manufacturing corporation which makes its return on the basis of the calendar year, owns 81 percent of the common stock of Z Corporation, which it acquired in 1946. It is established that the stock of Z Corporation, which has from its inception derived all of its gross receipts from manufacturing operations, became worthless during 1971.

(ii) Since the stock of Z Corporation which is owned by X Corporation is a capital asset and since X Corporation does not directly own at least 80 percent of the stock of Z Corporation, any loss sustained by X Corporation upon the worthlessness of such stock shall be deducted under section 165(g)(1) and paragraph (c) of this section as a loss from a sale or exchange on December 31, 1971, of a capital asset. The loss so sustained by X Corporation shall be considered a long-term capital loss under the provisions of section 1222(4), since the stock was held by that corporation for more than 6 months.

(iii) Since Z Corporation is considered to be affiliated with Y Corporation under the provisions of paragraph (d)(2) of this section, any loss sustained by Y Corporation upon the worthlessness of the stock of Z Corporation shall be deducted in 1971 under section 165(g)(3) and paragraph (d)(1) of this section as an ordinary loss.

Example 2. (i) On January 1, 1971, X Corporation, a domestic manufacturing corporation which makes its return on the basis of the calendar year, owns 60 percent of each class of the stock of Y Corporation, a foreign corporation, which it acquired in 1950. Y Corporation has, from the date of its incorporation, derived all of its gross receipts from manufacturing operations. It is established that the stock of Y Corporation became worthless on June 30, 1971. On August 1, 1971, X Corporation acquires the balance of the stock of Y Corporation for the purpose of obtaining the benefit of section 165(g)(3) with respect to the loss it has sustained on the worthlessness of the stock of Y Corporation.

(ii) Since the stock of Y Corporation which is owned by X Corporation is a capital asset and since Y Corporation is not to be treated as affiliated with X Corporation under the provisions of paragraph (d)(2) of this section, notwithstanding the fact that, at the close of 1971, X Corporation owns 100 percent of each class of stock of Y Corporation, any loss sustained by X Corporation upon the worthlessness of such stock shall be deducted under the provisions of section 165(g)(1) and paragraph (c) of this section as a loss from a sale or exchange on December 31, 1971, of a capital asset.

Example 3. (i) X Corporation, a domestic manufacturing corporation which makes its return on the basis of the calendar year, owns 80 percent of each class of the stock of Y Corporation, which from its inception has derived all of its gross receipts from manufacturing operations. As one of its capital assets, X Corporation owns $100,000 in registered bonds issued by Y Corporation payable at maturity on December 31, 1974. It is established that these bonds became worthless during 1971.

(ii) Since Y Corporation is considered to be affiliated with X Corporation under the provisions of paragraph (d)(2) of this section, any loss sustained by X Corporation upon the worthlessness of these bonds may be deducted in 1971 under section 165(g)(3) and paragraph (d)(1) of this section as an ordinary loss. The loss may not be deducted under section 166 as a bad debt. See section 166(e).

[T.D. 6500, 25 FR 11402, Nov. 26, 1960; 25 FR 14021, Dec. 31, 1960, as amended by T.D. 7224, 37 FR 25928, Dec. 6, 1972; T.D. 9386, 73 FR 13124, Mar. 12, 2008]

§ 1.165–6 Farming losses.

(a) *Allowance of losses.* (1) Except as otherwise provided in this section, any loss incurred in the operation of a farm as a trade or business shall be allowed as a deduction under section 165(a) or as a net operating loss deduction in accordance with the provisions of section 172. See § 1.172–1.

(2) If the taxpayer owns and operates a farm for profit in addition to being

engaged in another trade or business, but sustains a loss from the operation of the farming business, then the amount of loss sustained in the operation of the farm may be deducted from gross income, if any, from all other sources.

(3) Loss incurred in the operation of a farm for recreation or pleasure shall not be allowed as a deduction from gross income. See §1.162–12.

(b) *Loss from shrinkage.* If, in the course of the business of farming, farm products are held for a favorable market, no deduction shall be allowed under section 165(a) in respect of such products merely because of shrinkage in weight, decline in value, or deterioration in storage.

(c) *Loss of prospective crop.* The total loss by frost, storm, flood, or fire of a prospective crop being grown in the business of farming shall not be allowed as a deduction under section 165(a).

(d) *Loss of livestock*—(1) *Raised stock.* A taxpayer engaged in the business of raising and selling livestock, such as cattle, sheep, or horses, may not deduct as a loss under section 165(a) the value of animals that perish from among those which were raised on the farm.

(2) *Purchased stock.* The loss sustained upon the death by disease, exposure, or injury of any livestock purchased and used in the trade or business of farming shall be allowed as a deduction under section 165(a). See, also, paragraph (e) of this section.

(e) *Loss due to compliance with orders of governmental authority.* The loss sustained upon the destruction by order of the United States, a State, or any other governmental authority, of any livestock, or other property, purchased and used in the trade or business of farming shall be allowed as a deduction under section 165(a).

(f) *Amount deductible*—(1) *Expenses of operation.* The cost of any feed, pasture, or care which is allowed under section 162 as an expense of operating a farm for profit shall not be included as a part of the cost of livestock for purposes of determining the amount of loss deductible under section 165(a) and this section. For the deduction of farming expenses, see §1.162–12.

(2) *Losses reflected in inventories.* If inventories are taken into account in determining the income from the trade or business of farming, no deduction shall be allowed under this section for losses sustained during the taxable year upon livestock or other products, whether purchased for resale or produced on the farm, to the extent such losses are reflected in the inventory on hand at the close of the taxable year. Nothing in this section shall be construed to disallow the deduction of any loss reflected in the inventories of the taxpayer. For provisions relating to inventories of farmers, see section 471 and the regulations thereunder.

(3) *Other limitations.* For other provisions relating to the amount deductible under this section, see paragraph (c) of §1.165–1, relating to the amount deductible under section 165(a); §1.165–7, relating to casualty losses; and §1.1231–1, relating to gains and losses from the sale or exchange of certain property used in the trade or business.

(g) *Other provisions applicable to farmers.* For other provisions relating to farmers, see §1.61–4, relating to gross income of farmers; paragraph (b) of §1.167(a)–6, relating to depreciation in the case of farmers; and §1.175–1, relating to soil and water conservation expenditures.

§ 1.165–7 Casualty losses.

(a) *In general*—(1) *Allowance of deduction.* Except as otherwise provided in paragraphs (b)(4) and (c) of this section, any loss arising from fire, storm, shipwreck, or other casualty is allowable as a deduction under section 165(a) for the taxable year in which the loss is sustained. However, see §1.165–6, relating to farming losses, and §1.165–11, relating to an election by a taxpayer to deduct disaster losses in the taxable year immediately preceding the taxable year in which the disaster occurred. The manner of determining the amount of a casualty loss allowable as a deduction in computing taxable income under section 63 is the same whether the loss has been incurred in a trade or business or in any transaction entered into for profit, or whether it has been a loss of property not connected with a trade or business and not incurred in any transaction entered into for profit. The amount of a casualty loss shall be determined in accordance with paragraph (b) of this section. For other rules relating to the treatment of deductible casualty losses, see §1.1231–1, relating to the involuntary conversion of property.

(2) *Method of valuation.* (i) In determining the amount of loss deductible under this section, the fair market value of the property immediately before and immediately after the casualty shall generally be ascertained by competent appraisal. This appraisal must recognize the effects of any general market decline affecting undamaged as well as damaged property which may occur simultaneously with the casualty, in order that any deduction under this section shall be limited to the actual loss resulting from damage to the property.

(ii) The cost of repairs to the property damaged is acceptable as evidence of the loss of value if the taxpayer shows that (*a*) the repairs are necessary to restore the property to its condition immediately before the casualty, (*b*) the amount spent for such repairs is not excessive, (*c*) the repairs do not care for more than the damage suffered, and (*d*) the value of the property after the repairs does not as a result of the repairs exceed the value of the property immediately before the casualty.

(3) *Damage to automobiles.* An automobile owned by the taxpayer, whether used for business purposes or maintained for recreation or pleasure, may be the subject of a casualty loss, including those losses specifically referred to in subparagraph (1) of this paragraph. In addition, a casualty loss occurs when an automobile owned by the taxpayer is damaged and when:

(i) The damage results from the faulty driving of the taxpayer or other person operating the automobile but is not due to the willful act or willful negligence of the taxpayer or of one acting in his behalf or

(ii) The damage results from the faulty driving of the operator of the vehicle with which the automobile of the taxpayer collides.

(4) *Application to inventories.* This section does not apply to a casualty loss reflected in the inventories of the taxpayer. For provisions relating to inventories, see section 471 and the regulations thereunder.

(5) *Property converted from personal use.* In the case of property which originally was not used in the trade or business or for income-producing purposes and which is thereafter converted to either of such uses, the fair market value of the property on the date of conversion, if less than the adjusted basis of the property at such time, shall be used, after making proper adjustments in respect of basis, as the basis for determining the amount of loss under paragraph (b)(1) of this section. See paragraph (b) of §1.165–9, and §1.167(g)–1.

(6) *Theft losses.* A loss which arises from theft is not considered a casualty loss for purposes of this section. See §1.165–8, relating to theft losses.

(b) *Amount deductible*—(1) *General rule.* In the case of any casualty loss whether or not incurred in a trade or business or in any transaction entered into for profit, the amount of loss to be taken into account for purposes of section 165(a) shall be the lesser of either—

(i) The amount which is equal to the fair market value of the property immediately before the casualty reduced by the fair market value of the property immediately after the casualty; or

(ii) The amount of the adjusted basis prescribed in §1.1011–1 for determining the loss from the sale or other disposition of the property involved.

However, if property used in a trade or business or held for the production of income is totally destroyed by casualty, and if the fair market value of such property immediately before the casualty is less than the adjusted basis of such property, the amount of the adjusted basis of such property shall be treated as the amount of the loss for purposes of section 165(a).

(2) *Aggregation of property for computing loss.* (i) A loss incurred in a trade or business or in any transaction entered into for profit shall be determined under subparagraph (1) of this paragraph by reference to the single, identifiable property damaged or destroyed. Thus, for example, in determining the fair market value of the property before and after the casualty

in a case where damage by casualty has occurred to a building and ornamental or fruit trees used in a trade or business, the decrease in value shall be measured by taking the building and trees into account separately, and not together as an integral part of the realty, and separate losses shall be determined for such building and trees.

(ii) In determining a casualty loss involving real property and improvements thereon not used in a trade or business or in any transaction entered into for profit, the improvements (such as buildings and ornamental trees and shrubbery) to the property damaged or destroyed shall be considered an integral part of the property, for purposes of subparagraph (1) of this paragraph, and no separate basis need be apportioned to such improvements.

(3) *Examples.* The application of this paragraph may be illustrated by the following examples:

Example 1. In 1956 B purchases for $3,600 an automobile which he uses for nonbusiness purposes. In 1959 the automobile is damaged in an accidental collision with another automobile. The fair market value of B's automobile is $2,000 immediately before the collision and $1,500 immediately after the collision. B receives insurance proceeds of $300 to cover the loss. The amount of the deduction allowable under section 165(a) for the taxable year 1959 is $200, computed as follows:

Value of automobile immediately before casualty	$2,000
Less: Value of automobile immediately after casualty	1,500
Value of property actually destroyed	500
Loss to be taken into account for purposes of section 165(a): Lesser amount of property actually destroyed ($500) or adjusted basis of property ($3,600)	500
Less: Insurance received	300
Deduction allowable	200

Example 2. In 1958 A purchases land containing an office building for the lump sum of $90,000. The purchase price is allocated between the land ($18,000) and the building ($72,000) for purposes of determining basis. After the purchase A planted trees and ornamental shrubs on the grounds surrounding the building. In 1961 the land, building, trees, and shrubs are damaged by hurricane. At the time of the casualty the adjusted basis of the land is $18,000 and the adjusted basis of the building is $66,000. At that time the trees and shrubs have an adjusted basis of $1,200. The fair market value of the land and building immediately before the casualty is $18,000 and $70,000, respectively, and immediately after the casualty is $18,000 and $52,000, respectively. The fair market value of the trees and shrubs immediately before the casualty is $2,000 and immediately after the casualty is $400. In 1961 insurance of $5,000 is received to cover the loss to the building. A has no other gains or losses in 1961 subject to section 1231 and §1.1231–1. The amount of the deduction allowable under section 165(a) with respect to the building for the taxable year 1961 is $13,000, computed as follows:

Value of property immediately before casualty	$70,000
Less: Value of property immediately after casualty	52,000
Value of property actually destroyed	18,000
Less: Insurance received	5,000
Loss to be taken into account for purposes of section 165(a): Lesser amount of property actually destroyed ($18,000) or adjusted basis of property ($66,000)	18,000
Less: Insurance received	5,000
Deduction allowable	13,000

The amount of the deduction allowable under section 165(a) with respect to the trees and shrubs for the taxable year 1961 is $1,200, computed as follows:

Value of property immediately before casualty	$2,000
Less: Value of property immediately after casualty	$400
Value of property actually destroyed	1,600
Loss to be taken into account for purposes of section 165(a): Lesser amount of property actually destroyed ($1,600) or adjusted basis of property ($1,200)	1,200

Example 3. Assume the same facts as in example (2) except that A purchases land containing a house instead of an office building. The house is used as his private residence. Since the property is used for personal purposes, no allocation of the purchase price is necessary for the land and house. Likewise, no individual determination of the fair market values of the land, house, trees, and shrubs is necessary. The amount of the deduction allowable under section 165(a) with respect to the land, house, trees, and shrubs for the taxable year 1961 is $14,600, computed as follows:

Value of property immediately before casualty	$90,000
Less: Value of property immediately after casualty	70,400
Value of property actually destroyed	19,600
Loss to be taken into account for purposes of section 165(a): Lesser amount of property actually destroyed ($19,600) or adjusted basis of property ($91,200)	19,600
Less: Insurance received	5,000
Deduction allowable	14,600

(4) *Limitation on certain losses sustained by individuals after December 31, 1963.* (i) Pursuant to section 165(c)(3), the deduction allowable under section 165(a) in respect of a loss sustained—

(*a*) After December 31, 1963, in a taxable year ending after such date,

(*b*) In respect of property not used in a trade or business or for income producing purposes, and

(*c*) From a single casualty

shall be limited to that portion of the loss which is in excess of $100. The nondeductibility of the first $100 of loss applies to a loss sustained after December 31, 1963, without regard to when the casualty occurred. Thus, if property not used in a trade or business or for income producing purposes is damaged or destroyed by a casualty which occurred prior to January 1, 1964, and loss resulting therefrom is sustained after December 31, 1963, the $100 limitation applies.

(ii) The $100 limitation applies separately in respect of each casualty and applies to the entire loss sustained from each casualty. Thus, if as a result of a particular casualty occurring in 1964, a taxpayer sustains in 1964 a loss of $40 and in 1965 a loss of $250, no deduction is allowable for the loss sustained in 1964 and the loss sustained in 1965 must be reduced by $60 ($100−$40). The determination of whether damage to, or destruction of, property resulted from a single casualty or from two or more separate casualties will be made upon the basis of the particular facts of each case. However, events which are closely related in origin generally give rise to a single casualty. For example, if a storm damages a taxpayer's residence and his automobile parked in his driveway, any loss sustained results from a single casualty. Similarly, if a hurricane causes high waves, all wind and flood damage to a taxpayer's property caused by the hurricane and the waves results from a single casualty.

(iii) Except as otherwise provided in this subdivision, the $100 limitation applies separately to each individual taxpayer who sustains a loss even though the property damaged or destroyed is owned by two or more individuals. Thus, if a house occupied by two sisters and jointly owned by them is damaged or destroyed, the $100 limitation applies separately to each sister in respect of any loss sustained by her. However, for purposes of applying the $100 limitation, a husband and wife who file a joint return for the first taxable year in which the loss is allowable as a deduction are treated as one individual taxpayer. Accordingly, if property jointly owned by a husband and wife, or property separately owned by the husband or by the wife, is damaged or destroyed by a single casualty in 1964, and a loss is sustained in that year by either or both the husband or wife, only one $100 limitation applies if a joint return is filed for 1964. If, however, the husband and wife file separate returns for 1964, the $100 limitation applies separately in respect of any loss sustained by the husband and in respect of any loss sustained by the wife. Where losses from a single casualty are sustained in two or more separate tax years, the husband and wife shall, for purposes of applying the $100 limitation to such losses, be treated as one individual for all such years if they file a joint return for the first year in which a loss is sustained from the casualty; they shall be treated as separate individuals for all such years if they file separate returns for the first such year. If a joint return is filed in the first loss year but separate returns are filed in a subsequent year, any unused portion of the $100 limitation shall be allocated equally between the husband and wife in the latter year.

(iv) If a loss is sustained in respect of property used partially for business and partially for nonbusiness purposes, the $100 limitation applies only to that portion of the loss properly attributable to the nonbusiness use. For example, if a taxpayer sustains a $1,000 loss in respect of an automobile which he uses 60 percent for business and 40 percent for nonbusiness, the loss is allocated 60 percent to business use and 40 percent to nonbusiness use. The $100 limitation applies to the portion of the loss allocable to the nonbusiness loss.

(c) *Loss sustained by an estate.* A casualty loss of property not connected with a trade or business and not incurred in any transaction entered into for profit which is sustained during the settlement of an estate shall be allowed as a deduction under sections 165(a) and 641(b) in computing the taxable income of the estate if the loss has not been allowed under section 2054 in computing the taxable estate of the decedent and if the statement has been filed in accordance with § 1.642(g)–1. See section 165(c)(3).

(d) *Loss treated as though attributable to a trade or business.* For the rule treating a casualty loss not connected with a trade or business as though it were a deduction attributable to a trade or business for purposes of computing a net operating loss, see paragraph (a)(3)(iii) of § 1.172–3.

(e) *Effective date.* The rules of this section are applicable to any taxable year beginning after January 16, 1960. If, for any taxable year beginning on or before such date, a taxpayer computed the amount of any casualty loss in accordance with the rules then applicable, such taxpayer is not required to change the amount of the casualty loss allowable for any such prior taxable year. On the other hand, the taxpayer may, if he so desires, amend his income tax return for such year to compute the amount of a casualty loss in accordance with the provisions of this section, but no provision in this section shall be construed as extending the period of limitations within which a claim for credit or refund may be filed under section 6511.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6712, 29 FR 3652, Mar. 24, 1964; T.D. 6786, 29 FR 18501, Dec. 29, 1964; T.D. 7522, 42 FR 63411, Dec. 16, 1977]

§ 1.165–8 Theft losses.

(a) *Allowance of deduction.* (1) Except as otherwise provided in paragraphs (b) and (c) of this section, any loss arising from theft is allowable as a deduction under section 165(a) for the taxable year in which the loss is sustained. See section 165(c)(3).

(2) A loss arising from theft shall be treated under section 165(a) as sustained during the taxable year in which the taxpayer discovers the loss. See section 165(e). Thus, a theft loss is not deductible under section 165(a) for the taxable year in which the theft actually occurs unless that is also the year in which the taxpayer discovers the loss. However, if in the year of discovery there exists a claim for reimbursement with respect to which there is a reasonable prospect of recovery, see paragraph (d) of § 1.165–1.

(3) The same theft loss shall not be taken into account both in computing a tax under chapter 1, relating to the income tax, or chapter 2, relating to additional income taxes, of the Internal Revenue Code of 1939 and in computing the income tax under the Internal Revenue Code of 1954. See section 7852(c), relating to items not to be twice deducted from income.

(b) *Loss sustained by an estate.* A theft loss of property not connected with a trade or business and not incurred in any transaction entered into for profit which is discovered during the settlement of an estate, even though the theft actually occurred during a taxable year of the decedent, shall be allowed as a deduction under sections 165(a) and 641(b) in computing the taxable income of the estate if the loss has not been allowed under section 2054 in computing the taxable estate of the decedent and if the statement has been filed in accordance with § 1.642(g)–1. See section 165(c)(3). For purposes of determining the year of deduction, see paragraph (a)(2) of this section.

(c) *Amount deductible.* The amount deductible under this section in respect of a theft loss shall be determined consistently with the manner prescribed in § 1.165–7 for determining the amount of casualty loss allowable as a deduction under section 165(a). In applying the provisions of paragraph (b) of § 1.165–7 for this purpose, the fair market value of the property immediately after the theft shall be considered to be zero. In the case of a loss sustained after December 31, 1963, in a taxable year ending after such date, in respect of property not used in a trade or business or for income producing purposes, the amount deductible shall be limited to that portion of the loss which is in excess of $100. For rules applicable in applying the $100 limitation, see paragraph (b)(4) of § 1.165–7. For other rules relating to the treatment of deductible theft losses, see § 1.1231–1, relating to the involuntary conversion of property.

(d) *Definition.* For purposes of this section the term ''theft'' shall be deemed to include, but shall not necessarily be limited to, larceny, embezzlement, and robbery.

(e) *Application to inventories.* This section does not apply to a theft loss reflected in the inventories of the taxpayer. For provisions relating to inventories, see section 471 and the regulations thereunder.

(f) *Example.* The application of this section may be illustrated by the following example:

Example. In 1955 B, who makes her return on the basis of the calendar year, purchases for personal use a diamond brooch costing $4,000. On November 30, 1961, at which time it has a fair market value of $3,500, the brooch is stolen; but B does not discover the loss until January 1962. The brooch was fully insured against theft. A controversy develops with the insurance company over its liability in respect of the loss. However, in 1962, B has a reasonable prospect of recovery of the fair market value of the brooch from the insurance company. The controversy is settled in March 1963, at which time B receives $2,000 in insurance proceeds to cover the loss from theft. No deduction for the loss is allowable for 1961 or 1962; but the amount of the deduction allowable under section 165(a) for the taxable year 1963 is $1,500, computed as follows:

Value of property immediately before theft	$3,500
Less: Value of property immediately after the theft	0
Balance	3,500
Loss to be taken into account for purposes of section 165(a): ($3,500 but not to exceed adjusted basis of $4,000 at time of theft)	$3,500
Less: Insurance received in 1963	2,000
Deduction allowable for 1963	1,500

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6786, 29 FR 18502, Dec. 29, 1964]

§ 1.165–9 Sale of residential property.

(a) *Losses not allowed.* A loss sustained on the sale of residential property purchased or constructed by the taxpayer for use as his personal residence and so used by him up to the time of the sale is not deductible under section 165(a).

(b) *Property converted from personal use.* (1) If property purchased or constructed by the taxpayer for use as his personal residence is, prior to its sale, rented or otherwise appropriated to income-producing purposes and is used for such purposes up to the time of its sale, a loss sustained on the sale of the property shall be allowed as a deduction under section 165(a).

(2) The loss allowed under this paragraph upon the sale of the property shall be the excess of the adjusted basis prescribed in §1.1011–1 for determining loss over the amount realized from the sale. For this purpose, the adjusted basis for determining loss shall be the lesser of either of the following amounts, adjusted as prescribed in §1.1011–1 for the period subsequent to the conversion of the property to income-producing purposes:

(i) The fair market value of the property at the time of conversion, or

(ii) The adjusted basis for loss, at the time of conversion, determined under §1.1011–1 but without reference to the fair market value.

(3) For rules relating to casualty losses of property converted from personal use, see paragraph (a)(5) of §1.165–7. To determine the basis for depreciation in the case of such property, see §1.167(g)–1. For limitations on the loss from the sale of a capital asset, see paragraph (c)(3) of §1.165–1.

(c) *Examples.* The application of paragraph (b) of this section may be illustrated by the following examples:

Example 1. Residential property is purchased by the taxpayer in 1943 for use as his personal residence at a cost of $25,000, of which $15,000 is allocable to the building. The taxpayer uses the property as his personal residence until January 1, 1952, at which time its fair market value is $22,000, of which $12,000 is allocable to the building. The taxpayer rents the property from January 1, 1952, until January 1, 1955, at which time it is sold for $16,000. On January 1, 1952, the building has an estimated useful life of 20 years. It is assumed that the building has no estimated salvage value and that there are no adjustments in respect of basis other than depreciation, which is computed on the straight-line method. The loss to be taken into account for purposes of section 165(a) for the taxable year 1955 is $4,200, computed as follows:

Basis of property at time of conversion for purposes of this section (that is, the lesser of $25,000 cost or $22,000 fair market value)	$22,000
Less: Depreciation allowable from January 1, 1952, to January 1, 1955 (3 years at 5 percent based on $12,000, the value of the building at time of conversion, as prescribed by §1.167(g)–1)	1,800
Adjusted basis prescribed in §1.1011–1 for determining loss on sale of the property	20,200

Less: Amount realized on sale	16,000
Loss to be taken into account for purposes of section 165(a)	4,200

In this example the value of the building at the time of conversion is used as the basis for computing depreciation. See example (2) of this paragraph wherein the adjusted basis of the building is required to be used for such purpose.

Example 2. Residential property is purchased by the taxpayer in 1940 for use as his personal residence at a cost of $23,000, of which $10,000 is allocable to the building. The taxpayer uses the property as his personal residence until January 1, 1953, at which time its fair market value is $20,000, of which $12,000 is allocable to the building. The taxpayer rents the property from January 1, 1953, until January 1, 1957, at which time it is sold for $17,000. On January 1, 1953, the building has an estimated useful life of 20 years. It is assumed that the building has no estimated salvage value and that there are no adjustments in respect of basis other than depreciation, which is computed on the straight-line method. The loss to be taken into account for purposes of section 165(a) for the taxable year 1957 is $1,000, computed as follows:

Basis of property at time of conversion for purposes of this section (that is, the lesser of $23,000 cost or $20,000 fair market value)	$20,000
Less: Depreciation allowable from January 1, 1953, to January 1, 1957 (4 years at 5 percent based on $10,000, the cost of the building, as prescribed by § 1.167(g)–1	2,000
Adjusted basis prescribed in § 1.1011–1 for determining loss on sale of the property	$18,000
Less: Amount realized on sale	17,000
Loss to be taken into account for purposes of section 165(a)	1,000

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6712, 29 FR 3652, Mar. 24, 1964]

§ 1.165–10 Wagering losses.

Losses sustained during the taxable year on wagering transactions shall be allowed as a deduction but only to the extent of the gains during the taxable year from such transactions. In the case of a husband and wife making a joint return for the taxable year, the combined losses of the spouses from wagering transactions shall be allowed to the extent of the combined gains of the spouses from wagering transactions.

§ 1.165–11 Election in respect of losses attributable to a disaster.

(a) *In general.* Section 165(h) provides that a taxpayer who has sustained a disaster loss which is allowable as a deduction under section 165(a) may, under certain circumstances, elect to deduct such loss for the taxable year immediately preceding the taxable year in which the disaster actually occurred.

(b) *Loss subject to election.* The election provided by section 165(h) and paragraph (a) of this section applies only to a loss:

(1) Arising from a disaster resulting in a determination referred to in subparagraph (2) of this paragraph and occurring—

(i) After December 31, 1971, or

(ii) After December 31, 1961, and before January 1, 1972, and during the period following the close of a particular taxable year of the taxpayer and on or before the due date for filing the income tax return for that taxable year (determined without regard to any extension of time granted the taxpayer for filing such return);

(2) Occurring in an area subsequently determined by the President of the United States to warrant assistance by the Federal Government under the Disaster Relief Act of 1974; and

(3) Constituting a loss otherwise allowable as a deduction for the year in which the loss occurred under section 165(a) and the provisions of §§ 1.165–1 through 1.165–10 which are applicable to such losses.

(c) *Amount of loss to which election applies.* The amount of the loss to which section 165(h) and this section apply shall be the amount of the loss sustained during the period specified in paragraph (b)(1) of this section computed in accordance with the provisions of section 165 and those provisions of §§ 1.165–1 through 1.165–10 which are applicable to such losses. However, for purposes of making such computation, the period specified in paragraph (b)(1) of this section shall be deemed to be a taxable year.

(d) *Scope and effect of election.* An election made pursuant to section 165(h) and this section in respect of a loss arising from a particular disaster shall apply to the entire loss sustained by the taxpayer from such disaster during the period specified in paragraph (b)(1) of this section in the area specified in paragraph (b)(2) of this section. If such an election is made, the disaster to which the election relates will be deemed to have occurred in the taxable year immediately preceding the taxable year in which the disaster actually occurred, and the loss to which the election applies will be deemed to have been sustained in such preceding taxable year.

(e) *Time and manner of making election.* An election to claim a deduction with respect to a disaster loss described in paragraph (b) of this section for the taxable year immediately preceding the taxable year in which the disaster actually occurred must be made by filing a return, an amended return, or a claim for refund clearly showing that the election provided by section 165(h) has been made. In general, the return or claim should specify the date or dates of the disaster which gave rise to the loss, and the city, town, county, and State in which the property which was damaged or destroyed was located at the time of the disaster. An election in respect of a loss arising from a particular disaster occurring after December 31, 1971, must be made on or before the later of (1) the due date for filing the income tax return (determined without regard to any extension of time granted the taxpayer for filing such return) for the taxable year in which the disaster actually occurred, or (2) the due date of filing the income tax return (determined with regard to any extension of time granted the taxpayer for filing such return) for the taxable year immediately preceding the taxable year in which the disaster actually occurred. Such election shall be irrevocable after the later of (1) 90 days after the date on which the election was made, or (2) March 6, 1973. No revocation of such election shall be effective unless the amount of any credit or refund which resulted from such election is paid to the Internal Revenue Service within the revocation period described in the preceding sentence. However, in the case of a revocation made before receipt by the taxpayer of a refund claimed pursuant to such election, the revocation shall be effective if the refund is repaid within 30 calendar days after such receipt. An election in respect of a loss arising from a particular disaster occurring after December 31, 1961, and before January 1, 1972, must be made on or before the later of (1) the 15th day of the third month following the month in which falls the date prescribed for the filing of the income tax return (determined without regard to any extension of time granted the taxpayer for filing such return) for the taxable year immediately preceding the taxable year in which the disaster actually occurred, or (2) the due date for filing the income tax return (determined with regard to any extension of time granted the taxpayer for filing such return) for the taxable year immediately preceding the taxable year in which the disaster actually occurred. Such election shall be irrevocable after the date by which it must be made.

[T.D. 6735, 29 FR 6493, May 19, 1964, as amended by T.D. 7224, 37 FR 25928, Dec. 6, 1972; T.D. 7522, 42 FR 63411, Dec. 16, 1977]

§ 1.165–12 Denial of deduction for losses on registration-required obligations not in registered form.

(a) *In general.* Except as provided in paragraph (c) of this section, nothing in section 165(a) and the regulations thereunder, or in any other provision of law, shall be construed to provide a deduction for any loss sustained on any registration-required obligation held after December 31, 1982, unless the obligation is in registered form or the issuance of the obligation was subject to tax under section 4701. The term ''registration-required obligation'' has the meaning given to that term in section 163(f)(2), except that clause (iv) of subparagraph (A) thereof shall not apply. Therefore, although an obligation that is not in registered form is described in §1.163–5(c)(1), the holder of such an obligation shall not be allowed a deduction for any loss sustained on such obligation unless paragraph (c) of this section applies. The term ''holder'' means the person that would be denied a loss deduction under section 165(j)(1) or denied capital gain treatment under section 1287(a). For purposes of this section, the term *United States* means the United States and its possessions within the meaning of § 1.163–5(c)(2)(iv).

(b) *Registered form*—(1) *Obligations issued after September 21, 1984.* With respect to any obligation originally issued after September 21, 1984, the term ''registered form'' has the meaning given that term in section 103(j)(3) and the regulations thereunder. Therefore, an obligation that would otherwise be in registered form is not considered to be in registered form if it can be transferred at that time or at any time until its maturity by any means not described in § 5f.103–1(c). An obligation that, as of a particular time, is not considered to be in registered form because it can be transferred by any means not described in § 5f.103–1(c) is considered to be in registered form at all times during the period beginning with a later time and ending with the maturity of the obligation in which the obligation can be transferred only by a means described in § 5f.103–1(c).

(2) *Obligations issued after December 31, 1982 and on or before September 21, 1984.* With respect to any obligation originally issued after December 31, 1982 and on or before September 21, 1984 or an obligation originally issued after September 21, 1984 pursuant to the exercise of a warrant or the conversion of a convertible obligation, which warrant or obligation (including conversion privilege) was issued after December 31, 1982 and on or before September 21, 1984, that obligation will be considered in registered form if it satisfied § 5f.163–1 or the proposed regulations provided in § 1.163–5(c) and published in the FEDERAL REGISTER on September 2, 1983 (48 FR 39953).

(c) *Registration-required obligations not in registered form which are not subject to section 165(j)(1).* Notwithstanding the fact that an obligation is a registration-required obligation that is not in registered form, the holder will not be subject to section 165(j)(1) if the holder meets the conditions of any one of the following subparagraphs (1), (2), (3), or (4) of this paragraph (c).

(1) *Persons permitted to hold in connection with the conduct of a trade or business.* (i) The holder is an underwriter, broker, dealer, bank, or other financial institution (defined in paragraph (c)(1)(iv)) that holds such obligation in connection with its trade or business conducted outside the United States; or the holder is a broker-dealer (registered under Federal or State law or exempted from registration by the provisions of such law because it is a bank) that holds such obligation for sale to customers in the ordinary course of its trade or business.

(ii) The holder must offer to sell, sell and deliver the obligation in bearer form only outside of the United States except that a holder that is a registered broker-dealer as described in paragraph (c)(1)(i) of this section may offer to sell and sell the obligation in bearer form inside the United States to a financial institution as defined in paragraph (c)(1)(iv) of this section for its own account or for the account of another financial institution or of an exempt organization as defined in section 501(c)(3).

(iii) The holder may deliver an obligation in bearer form that is offered or sold inside the United States only if the holder delivers it to a financial institution that is purchasing for its own account, or for the account of another financial institution or of an exempt organization, and the financial institution or organization that purchases the obligation for its own account or for whose account the obligation is purchased represents that it will comply with the requirements of section 165(j)(3) (A), (B), or (C). Absent actual knowledge that the representation is false, the holder may rely on a written statement provided by the financial institution or exempt organization, including a statement that is delivered in electronic form. The holder may deliver a registration-required obligation in bearer form that is offered and sold outside the United States to a person other than a financial institution only if the holder has evidence in its records that such person is not a U.S. citizen or resident and does not have actual knowledge that such evidence is false. Such evidence may include a written statement by that person, including a statement that is delivered electronically. For purposes of this paragraph (c), the term *deliver* includes a transfer of an obligation evidenced by a book entry including a book entry notation by a clearing organization evidencing transfer of the obligation from one member of the organization to another member. For purposes of this paragraph (c), the term *deliver* does not include a transfer of an obligation to the issuer or its agent for cancellation or extinguishment. The record-retention provisions in §1.1441–1(e)(4)(iii) shall apply to any statement that a holder receives pursuant to this paragraph (c)(1)(iii).

(iv) For purposes of paragraph (c) of this section, the term ''financial institution'' means a person which itself is, or more than 50 percent of the total combined voting power of all classes of whose stock entitled to vote is owned by a person which is—

(A) Engaged in the conduct of a banking, financing, or similar business within the meaning of section 954(c)(3)(B) as in effect before the Tax Reform Act of 1986, and the regulations thereunder;

(B) Engaged in business as a broker or dealer in securities;

(C) An insurance company;

(D) A person that provides pensions or other similar benefits to retired employees;

(E) Primarily engaged in the business of rendering investment advice;

(F) A regulated investment company or other mutual fund; or

(G) A finance corporation a substantial part of the business of which consists of making loans (including the acquisition of obligations under a lease which is entered into primarily as a financing transaction), acquiring accounts receivable, notes or installment obligations arising out of the sale of tangible personal property or the performing of services, or servicing debt obligations.

(2) *Persons permitted to hold obligations for their own investment account.* The holder is a financial institution holding the obligation for its own investment account that satisfies the conditions set forth in subdivisions (i), (ii), (iii), and (iv) of his paragraph (c) (2).

(i) The holder reports on its Federal income tax return for the taxable year any interest payments received (including original issue discount includable in gross income for such taxable year) with respect to such obligation and gain or loss on the sale or other disposition of such obligation;

(ii) The holder indicates on its Federal income tax return that income, gain or loss described in paragraph (c)(2)(i) is attributable to registration-required obligations held in bearer form for its own account;

(iii) The holder of a bearer obligation that resells the obligation inside the United States resells the obligation only to another financial institution for its own account or for the account of another financial institution or exempt organization; and

(iv) The holder delivers such obligation in bearer form to any other person in accordance with paragraph (c)(1) (ii) and (iii) of this section.

(3) *Persons permitted to hold through financial institutions.* The holder is any person that purchases and holds a registration-required obligation in bearer form through a financial institution with which the holder maintains a customer, custodial or nominee relationship and such institution agrees to satisfy, and does in fact satisfy, the conditions set forth in subdivisions (i), (ii), (iii), (iv) and (v) of this paragraph (c)(3).

(i) The financial institution makes a return of information to the Internal Revenue Service with respect to any interest payments received. The financial institution must report original issue discount includable in the holder's gross income for the taxable year on any obligation so held, but only if the obligation appears in an Internal Revenue Service publication of obligations issued at an original issue discount and only in an amount determined in accordance with information contained in that publication. An information return for any interest payment shall be made on a Form 1099 for the calendar year. It shall indicate the aggregate amount of the payment received, the name, address and taxpayer identification number of the holder, and such other information as is required by the form. No return of information is required under this subdivision if the financial institution reports payments under section 6041 or 6049.

(ii) The financial institution makes a return of information on Form 1099B with respect to any disposition by the holder of such obligation. The return shall show the name, address, and taxpayer identification number of the holder of the obligation, Committee on Uniform Security Information Procedures (CUSIP), gross proceeds, sale date, and such other information as may be required by the form. No return of information is required under this subdivision if such financial institution reports with respect to the disposition under section 6045.

(iii) In the case of a bearer obligation offered for resale or resold in the United States, the financial institution may resell the obligation only to another financial institution for its own account or for the account of an exempt organization.

(iv) The financial institution covenants with the holder that the financial institution will deliver the obligation in bearer form in accordance with the requirements set forth in paragraph (c)(1) (ii) and (iii).

(v) The financial institution delivers the obligation in bearer form in accordance with paragraph (c)(1) (ii) and (iv) as if the financial institution delivering the obligation were the holder referred to in such paragraph.

(4) *Conversion of obligations into registered form.* The holder is not a person described in paragraph (c) (1), (2), or (3) of this section, and within thirty days of the date when the seller or other transferor is reasonably able to make the bearer obligation available to the holder, the holder surrenders the obligation to a transfer agent or the issuer for conversion of the obligation into registered form. If such obligation is not registered within such 30 day period, the holder shall be subject to sections 165(j) and 1287(a).

(d) *Effective date.* These regulations apply generally to obligations issued after January 20, 1987. However, a taxpayer may choose to apply the rules of §1.165–12 with respect to an obligation issued after December 31, 1982 and on or before January 20, 1987, which obligation is held after January 20, 1987.

[T.D. 8110, 51 FR 45459, Dec. 19, 1986, as amended by T.D. 8734, 62 FR 53416, Oct. 14, 1997]

§ 1.165–13T Questions and answers relating to the treatment of losses on certain straddle transactions entered into before the effective date of the Economic Recovery Tax Act of 1981, under section 108 of the Tax Reform Act of 1984 (temporary).

The following questions and answers concern the treatment of losses on certain straddle transactions entered into before the effective date of the Economic Recovery Tax Act of 1981, under the Tax Reform Act of 1984 (98 Stat. 494).

Q–1 What is the scope of section 108 of the Tax Reform Act of 1984 (Act)?

A–1 Section 108 of the Act provides that in the case of any disposition of one or more positions, which were entered into before 1982 and form part of a straddle, and to which the provisions of title V of The Economic Recovery Act of 1981 (ERTA) do not apply, any loss from such disposition shall be allowed for the taxable year of the disposition if such position is part of a transaction entered into for profit. For purposes of section 108 of the Act, the term ''straddle'' has the meaning given to such term by section 1092(c) of the Internal Revenue Code of 1954 as in effect on the day after the date of enactment of ERTA; including a straddle all the positions of which are regulated futures contracts (as defined in Q&A–6 of this section). Straddles in certain listed stock options were not covered by ERTA and are not affected by this provision.

Q–2 What transactions are considered entered into for profit?

A–2 A transaction is considered entered into for profit if the transaction is entered into for profit within the meaning of section 165(c)(2) of the Code. In this respect, section 108 of the Act restates existing law applicable to straddle transactions. All the circumstances surrounding the transaction, including the magnitude and timing for entry into, and disposition of, the positions comprising the transaction are relevant in making the determination whether a transaction is considered entered into for profit. Moreover, in order for section 108 of the Act to apply, the transaction must have sufficient substance to be recognized for Federal income tax purposes.

Thus, for example, since a ''sham'' transaction would not be recognized for tax purposes, section 108 of the Act would not apply to such a transaction.

Q–3 If a loss is disallowed in a taxable year (year 1) because the transaction was not entered into for profit, is the entire gain from the straddle occurring in a later taxable year taxed?

A–3 No. Under section 108(c) of the Act the taxpayer is allowed to offset the gain in the subsequent taxable year by the amount of loss (including expenses) disallowed in year 1.

Q–4 In what manner does the for-profit test of Q&A–2 apply to losses from straddle transactions sustained by commodities dealers and persons regularly engaged in investing in regulated futures contracts?

A–4 In general, for a loss to be allowable with respect to positions that form part of a straddle, the for-profit test of Q&A–2 must be satisfied. However, certain positions (see Q&A–6) held by a commodities dealer or person regularly engaged in investing in regulated futures contracts are rebuttably presumed to be part of a transaction entered into for profit. Thus, the for profit test is applied to commodities dealers and persons regularly engaged in investing in regulated futures contracts in light of the factors relating to the applicability and rebuttal of the profit presumption, including, for example, the nature and extent of the taxpayer's trading activities.

Q–5 Under what circumstances is the presumption considered rebutted?

A–5 All the facts and circumstances of each case are to be considered in determining if the presumption is rebutted. The following factors are significant in making this determination: (1) The level of transaction costs; (2) the extent to which the transaction results from trading patterns different from the taxpayer's regular patterns; and (3) the extent of straddle transactions having tax results disproportionate to economic consequences. Factors other than the ones described above may be taken into account in making the determination. Moreover, a determination is not to be made solely on the basis of the number of factors indicating that the presumption is rebutted.

Q–6 Does a commodities dealer or person regularly engaged in investing in regulated futures contracts qualify for the profit presumption for all transactions?

A–6 No. The presumption is only applicable to regulated futures contract transactions in property that is the subject of the person's regular trading activity. For example, a commodities dealer who regularly trades only in agricultural futures will not qualify for the presumption for a silver futures straddle transaction. For purposes of this section, the term ''regulated futures contracts'' has the meaning given to such term by section 1256(b) of the Code as in effect before the enactment of the Tax Reform Act of 1984.

Q–7 Who qualifies as a commodities dealer or as a person regularly engaged in investing in regulated futures contracts for purposes of the profit presumption?

A–7 For purposes of this section, the term ''commodities dealer'' has the meaning given to such term by section 1402(i)(2)(B) of the Code. Section 1402(i)(2)(B) defines a commodities dealer as a person who is actively engaged in trading section 1256 contracts (which includes regulated futures contracts as defined in Q&A–6) and is registered with a domestic board of trade which is designated as a contract market by the Commodity Futures Trading Commission. To determine if a person is regularly engaged in investing in regulated futures contracts all the facts and circumstances should be considered including, but not limited to, the following factors: (1) Regularity of trading at all times throughout the year; (2) the level of transaction costs; (3) substantial volume and economic consequences of trading at all times throughout the year; (4) percentage of time dedicated to commodity trading activities as compared to other activities; and (5) the person's knowledge of the regulated futures contract market.

Q–8 If a commodities dealer or a person regularly engaged in investing in regulated futures contracts participates in a syndicate, as defined in section 1256(e)(3)(B) of the Code, does the rebuttable presumption of ''entered into for profit'' apply to the transactions entered into through the syndicate?

A–8 No. A participant in a syndicate does not qualify for the rebuttable presumption of ''entered into for profit'' with respect to transactions entered into by or for the syndicate. A syndicate is defined in section 1256(e)(3)(B) of the Code as any partnership or other entity (other than a corporation which is not an S corporation) if more than 35 percent of the losses of such entity during the taxable year are allocable to limited partners or limited entrepreneurs (within the meaning of section 464(e)(2)).

Q–9 Will the Service continue to make the closed and completed transaction argument set forth in Rev. Rul. 77–185, 1977–1 C.B. 48, with respect to transactions covered by section 108 of the Act?

A–9 No. The closed and completed transaction argument will not be made regarding transactions subject to section 108 of the Act. In general, losses in such transactions will be allowed for the taxable year of disposition if the transaction is not viewed as a sham and satisfies the ''entered into for profit'' test described in Q&A–2. Nevertheless, for certain positions covered by section 108 of the Act, various Code sections may apply without regard to whether such position constitutes a straddle to disallow or limit the loss otherwise allowable in the year of the disposition. For example, dispositions of certain positions held by a partnership which resulted in a loss to a partner may be limited or disallowed under section 465 of 704(d).

[T.D. 7968, 49 FR 33445, Aug. 23, 1984]

§ 1.166–1 Bad debts.

(a) *Allowance of deduction.* Section 166 provides that, in computing taxable income under section 63, a deduction shall be allowed in respect of bad debts owed to the taxpayer. For this purpose, bad debts shall, subject to the provisions of section 166 and the regulations thereunder, be taken into account either as—

(1) A deduction in respect of debts which become worthless in whole or in part; or as

(2) A deduction for a reasonable addition to a reserve for bad debts.

(b) *Manner of selecting method.* (1) A taxpayer filing a return of income for the first taxable year for which he is entitled to a bad debt deduction may select either of the two methods prescribed by paragraph (a) of this section for treating bad debts, but such selection is subject to the approval of the district director upon examination of the return. If the method so selected is approved, it shall be used in returns for all subsequent taxable years unless the Commissioner grants permission to use the other method. A statement of facts substantiating any deduction claimed under section 166 on account of bad debts shall accompany each return of income.

(2) Taxpayers who have properly selected one of the two methods for treating bad debts under provisions of prior law corresponding to section 166 shall continue to use that method for all subsequent taxable years unless the Commissioner grants permission to use the other method.

(3)(i) For taxable years beginning after December 31, 1959, application for permission to change the method of treating bad debts shall be made in accordance with section 446(e) and paragraph (e)(3) of § 1.446–1.

(ii) For taxable years beginning before January 1, 1960, application for permission to change the method of treating bad debts shall be made at least 30 days before the close of the taxable year for which the change is effective.

(4) Nothwithstanding paragraphs (b) (1), (2), and (3) of this section, a dealer in property currently employing the accrual method of accounting and currently maintaining a reserve for bad debts under section 166(c) (which may have included guaranteed debt obligations described in section 166(f)(1)(A)) may establish a reserve for section 166(f)(1)(A) guaranteed debt obligations for a taxable year ending after October 21, 1965 under section 166(f) and § 1.166–10 by filing on or before April 17, 1986 an amended return indicating that such a reserve has been established. The establishment of such a reserve will not be considered a change in method of accounting for purposes of

section 446(e). However, an election by a taxpayer to establish a reserve for bad debts under section 166(c) shall be treated as a change in method of accounting. See also §1.166–4, relating to reserve for bad debts, and §1.166–10, relating to reserve for guaranteed debt obligations.

(c) *Bona fide debt required.* Only a bona fide debt qualifies for purposes of section 166. A bona fide debt is a debt which arises from a debtor-creditor relationship based upon a valid and enforceable obligation to pay a fixed or determinable sum of money. A debt arising out of the receivables of an accrual method taxpayer is deemed to be an enforceable obligation for purposes of the preceding sentence to the extent that the income such debt represents have been included in the return of income for the year for which the deduction as a bad debt is claimed or for a prior taxable year. For example, a debt arising out of gambling receivables that are unenforceable under state or local law, which an accrual method taxpayer includes in income under section 61, is an enforceable obligation for purposes of this pargarph. A gift or contribution to capital shall not be considered a debt for purposes of section 166. The fact that a bad debt its not due at the time of deduction shall not of itself prevent is allowance under section 166. For the disallowance of deductions for bad debts owed by a political party, see §1.271–1.

(d) *Amount deductible*—(1) *General rule.* Except in the case of a deduction for a reasonable addition to a reserve for bad debts, the basis for determining the amount of deduction under section 166 in respect of a bad debt shall be the same as the adjusted basis prescribed by §1.1011–1 for determining the loss from the sale or other disposition of property. To determine the allowable deduction in the case of obligations acquired before March 1, 1913, see also paragraph (b) of §1.1053–1.

(2) *Specific cases.* Subject to any provision of section 166 and the regulations thereunder which provides to the contrary, the following amounts are deductible as bad debts:

(i) *Notes or accounts receivable.* (*a*) If, in computing taxable income, a taxpayer values his notes or accounts receivable at their fair market value when received, the amount deductible as a bad debt under section 166 in respect of such receivables shall be limited to such fair market value even though it is less than their face value.

(*b*) A purchaser of accounts receivable which become worthless during the taxable year shall be entitled under section 166 to a deduction which is based upon the price he paid for such receivables but not upon their face value.

(ii) *Bankruptcy claim.* Only the difference between the amount received in distribution of the assets of a bankrupt and the amount of the claim may be deducted under section 166 as a bad debt.

(iii) *Claim against decedent's estate.* The excess of the amount of the claim over the amount received by a creditor of a decedent in distribution of the assets of the decedent's estate may be considered a worthless debt under section 166.

(e) *Prior inclusion in income required.* Worthless debts arising from unpaid wages, salaries, fees, rents, and similar items of taxable income shall not be allowed as a deduction under section 166 unless the income such items represent has been included in the return of income for the year for which the deduction as a bad debt is claimed or for a prior taxable year.

(f) *Recovery of bad debts.* Any amount attributable to the recovery during the taxable year of a bad debt, or of a part of a bad debt, which was allowed as a deduction from gross income in a prior taxable year shall be included in gross income for the taxable year of recovery, except to the extent that the recovery is excluded from gross income under the provisions of §1.111–1, relating to the recovery of certain items previously deducted or credited. This paragraph shall not apply, however, to a bad debt which was previously charged against a reserve by a taxpayer on the reserve method of treating bad debts.

(g) *Worthless securities.* (1) Section 166 and the regulations thereunder do not apply to a debt which is evidenced by a bond, debenture, note, or certificate, or other evidence of indebtedness, issued by a corporation or by a government or political subdivision thereof, with interest coupons or in registered form. See section 166(e). For provisions allowing the deduction of a loss resulting from the worthlessness of such a debt, see § 1.165–5.

(2) The provisions of subparagraph (1) of this paragraph do not apply to any loss sustained by a bank and resulting from the worthlessness of a security described in section 165(g)(2)(C). See paragraph (a) of § 1.582–1.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6996, 34 FR 835, Jan. 18, 1969; T.D. 7902, 48 FR 33260, July 21, 1983; T.D. 8071, 51 FR 2479, Jan. 17, 1986]

§ 1.166–2 Evidence of worthlessness.

(a) *General rule.* In determining whether a debt is worthless in whole or in part the district director will consider all pertinent evidence, including the value of the collateral, if any, securing the debt and the financial condition of the debtor.

(b) *Legal action not required.* Where the surrounding circumstances indicate that a debt is worthless and uncollectible and that legal action to enforce payment would in all probability not result in the satisfaction of execution on a judgment, a showing of these facts will be sufficient evidence of the worthlessness of the debt for purposes of the deduction under section 166.

(c) *Bankruptcy*—(1) *General rule.* Bankruptcy is generally an indication of the worthlessness of at least a part of an unsecured and unpreferred debt.

(2) *Year of deduction.* In bankruptcy cases a debt may become worthless before settlement in some instances; and in others, only when a settlement in bankruptcy has been reached. In either case, the mere fact that bankruptcy proceedings instituted against the debtor are terminated in a later year, thereby confirming the conclusion that the debt is worthless, shall not authorize the shifting of the deduction under section 166 to such later year.

(d) *Banks and other regulated corporations*—(1) *Worthlessness presumed in year of charge-off.* If a bank or other corporation which is subject to supervision by Federal authorities, or by State authorities maintaining substantially equivalent standards, charges off a debt in whole or in part, either—

(i) In obedience to the specific orders of such authorities, or

(ii) In accordance with established policies of such authorities, and, upon their first audit of the bank or other corporation subsequent to the charge-off, such authorities confirm in writing that the charge-off would have been subject to such specific orders if the audit had been made on the date of the charge-off,

then the debt shall, to the extent charged off during the taxable year, be conclusively presumed to have become worthless, or worthless only in part, as the case may be, during such taxable year. But no such debt shall be so conclusively presumed to be worthless, or worthless only in part, as the case may be, if the amount so charged off is not claimed as a deduction by the taxpayer at the time of filing the return for the taxable year in which the charge-off takes place.

(2) *Evidence of worthlessness in later taxable year.* If such a bank or other corporation does not claim a deduction for such a totally or partially worthless debt in its return for the taxable year in which the charge-off takes place, but claims the deduction for a later taxable year, then the charge-off in the prior taxable year shall be deemed to have been involuntary and the deduction under section 166 shall be allowed for the taxable year for which claimed, provided that the taxpayer produces sufficient evidence to show that—

(i) The debt became wholly worthless in the later taxable year, or became recoverable only in part subsequent to the taxable year of the involuntary charge-off, as the case may be; and,

(ii) To the extent that the deduction claimed in the later taxable year for a debt partially worthless was not involuntarily charged off in prior taxable years, it was charged off in the later taxable year.

(3) *Conformity election*—(i) *Eligibility for election.* In lieu of applying paragraphs (d)(1) and (2) of this section, a bank (as defined in paragraph (d)(4)(i) of this section) that is subject to supervision by Federal authorities, or by

state authorities maintaining substantially equivalent standards, may elect under this paragraph (d)(3) to use a method of accounting that establishes a conclusive presumption of worthlessness for debts, provided that the bank meets the express determination requirement of paragraph (d)(3)(iii)(D) of this section for the taxable year of the election.

(ii) *Conclusive presumption*—(A) *In general*. If a bank satisfies the express determination requirement of paragraph (d)(3)(iii)(D) of this section and elects to use the method of accounting under this paragraph (d)(3)—

(*1*) Debts charged off, in whole or in part, for regulatory purposes during a taxable year are conclusively presumed to have become worthless, or worthless only in part, as the case may be, during that year, but only if the charge-off results from a specific order of the bank's supervisory authority or corresponds to the bank's classification of the debt, in whole or in part, as a loss asset, as described in paragraph (d)(3)(ii)(C) of this section; and

(*2*) A bad debt deduction for a debt that is subject to regulatory loss classification standards is allowed for a taxable year only to the extent that the debt is conclusively presumed to have become worthless under paragraph (d)(3)(ii)(A)(*1*) of this section during that year.

(B) *Charge-off should have been made in earlier year*. The conclusive presumption that a debt is worthless in the year that it is charged off for regulatory purposes applies even if the bank's supervisory authority determines in a subsequent year that the charge-off should have been made in an earlier year. A pattern of charge-offs in the wrong year, however, may result in revocation of the bank's election by the Commissioner pursuant to paragraph (d)(3)(iv)(D) of this section.

(C) *Loss asset defined*. A debt is classified as a loss asset by a bank if the bank assigns the debt to a class that corresponds to a loss asset classification under the standards set forth in the ''Uniform Agreement on the Classification of Assets and Securities Held by Banks'' (See Attachment to Comptroller of the Currency Banking Circular No. 127, Rev. 4–26–91, Comptroller of the Currency, Communications Department, Washington, DC 20219) or similar guidance issued by the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve, or the Farm Credit Administration; or for institutions under the supervision of the Office of Thrift Supervision, 12 CFR 563.160(b)(3).

(iii) *Election*—(A) *In general*. An election under this paragraph (d)(3) is to be made on bank-by-bank basis and constitutes either the adoption of or a change in method of accounting, depending on the particular bank's facts. A change in method of accounting that results from the making of an election under this paragraph (d)(3) has the effects described in paragraph (d)(3)(iii)(B) of this section.

(B) *Effect of change in method of accounting*. A change in method of accounting resulting from an election under this paragraph (d)(3) does not require or permit an adjustment under section 481(a). Under this cut-off approach—

(*1*) There is no change in the §1.1011–1 adjusted basis of the bank's existing debts (as determined under the bank's former method of accounting for bad debts) as a result of the change in method of accounting;

(*2*) With respect to debts that are subject to regulatory loss classification standards and are held by the bank at the beginning of the year of change (to the extent that they have not been charged off for regulatory purposes), and with respect to debts subject to regulatory loss classification standards that are originated or acquired subsequent to the beginning of the year of change, bad debt deductions in the year of change and thereafter are determined under the method of accounting for bad debts prescribed by this paragraph (d)(3);

(*3*) With respect to debts that are not subject to regulatory loss classification standards or that have been totally charged off prior to the year of change, bad debt deductions are determined under the general rules of section 166; and

(*4*) If there was any partial charge-off of a debt in a prechange year, any portion of which was not claimed as a deduction, the deduction reflecting that partial charge-off must be taken in the first year in which there is any further charge-off of the debt for regulatory purposes.

(C) *Procedures*—(*1*) *In general.* A new bank adopts the method of accounting under this paragraph (d)(3) for any taxable year ending on or after December 31, 1991 (and for all subsequent taxable years) when it adopts its overall method of accounting for bad debts, by attaching a statement to this effect to its income tax return for that year. Any other bank makes an election for any taxable year ending on or after December 31, 1991 (and for all subsequent taxable years) by filing a completed Form 3115 (Application for Change in Accounting Method) in accordance with the rules of paragraph (d)(3)(iii)(C)(*2*) or (*3*) of this section. The statement or Form 3115 must include the name, address, and taxpayer identification number of the electing bank and contain a declaration that the express determination requirement of paragraph (d)(3)(iii)(D) of this section is satisfied for the taxable year of the election. When a Form 3115 is used, the declaration must be made in the space provided on the form for ''Other changes in method of accounting.'' The words ''ELECTION UNDER §1.166–2(d)(3)'' must be typed or legibly printed at the top of the statement or page 1 of the Form 3115.

(*2*) *First election.* The first time a bank makes this election, the statement or Form 3115 must be attached to the bank's timely filed return (taking into account extensions of time to file) for the first taxable year covered by the election. The consent of the Commissioner to make a change in method of accounting under this paragraph (d)(3) is granted, pursuant to section 446(e), to any bank that makes the election in accordance with this paragraph (d)(3)(iii)(C), provided the bank has not made a prior election under this paragraph (d)(3).

(*3*) *Subsequent elections.* The advance consent of the Commissioner is required to make any election under this paragraph (d)(3) after a previous election has been revoked pursuant to paragraph (d)(3)(iv) of this section. This consent must be requested under the procedures, terms, and conditions prescribed under the authority of section 446(e) and §1.446–1(e) for requesting a change in method of accounting.

(D) *Express determination requirement.* In connection with its most recent examination involving the bank's loan review process, the bank's supervisory authority must have made an express determination (in accordance with any applicable administrative procedure prescribed hereunder) that the bank maintains and applies loan loss classification standards that are consistent with the regulatory standards of that supervisory authority. For purposes of this paragraph (d)(3)(iii)(D), the supervisory authority of a bank is the *appropriate Federal banking agency* for the bank, as that term is defined in 12 U.S.C. 1813(q), or, in the case of an institution in the Farm Credit System, the Farm Credit Administration.

(E) *Transition period election.* For taxable years ending before completion of the first examination of the bank by its supervisory authority (as defined in paragraph (d)(3)(iii)(D) of this section) that is after October 1, 1992, and that involves the bank's loan review process, the statement or Form 3115 filed by the bank must include a declaration that the bank maintains and applies loan loss classification standards that are consistent with the regulatory standards of that supervisory authority. A bank that makes this declaration is deemed to satisfy the express determination requirement of paragraph (d)(3)(iii)(D) of this section for those years, even though an express determination has not yet been made.

(iv) *Revocation of Election*—(A) *In general.* Revocation of an election under this paragraph (d)(3) constitutes a change in method of accounting that has the effects described in paragraph (d)(3)(iv)(B) of this section. If an election under this paragraph (d)(3) has been revoked, a bank may make a subsequent election only under the provisions of paragraph (d)(3)(iii)(C)(*3*) of this section.

(B) *Effect of change in method of accounting.* A change in method of accounting resulting from revocation of an election under this paragraph (d)(3) does not require or permit an adjustment under section 481(a). Under this cut-off approach—

(*1*) There is no change in the §1.1011–1 adjusted basis of the bank's existing debts (as determined under this paragraph (d)(3) method or any other former method of accounting used by the bank with respect to its bad debts) as a result of the change in method of accounting; and

(*2*) Bad debt deductions in the year of change and thereafter with respect to all debts held by the bank, whether in existence at the beginning of the year of change or subsequently originated or acquired, are determined under the new method of accounting.

(C) *Automatic revocation*—(*1*) *In general*—A bank's election under this paragraph (d)(3) is revoked automatically if, in connection with any examination involving the bank's loan review process by the bank's supervisory authority as defined in paragraph (d)(3)(iii)(D) of this section, the bank does not obtain the express determination required by that paragraph.

(*2*) *Year of revocation*. If a bank makes the conformity election under the transition rules of paragraph (d)(3)(iii)(E) of this section and does not obtain the express determination in connection with the first examination involving the bank's loan review process that is after October 1, 1992, the election is revoked as of the beginning of the taxable year of the election or, if later, the earliest taxable year for which tax may be assessed. In other cases in which a bank does not obtain an express determination in connection with an examination of its loan review process, the election is revoked as of the beginning of the taxable year that includes the date as of which the supervisory authority conducts the examination even if the examination is completed in the following taxable year.

(*3*) *Consent granted*. Under the Commissioner's authority in section 446(e) and §1.446–1(e), the bank is directed to and is granted consent to change from this paragraph (3)(1) method as of the year of revocation (year of change) prescribed by paragraph (d)(3)(iv)(C)(*2*) of this section.

(*4*) *Requirements*. A bank changing its method of accounting under the automatic revocation rules of this paragraph (d)(3)(iv)(C) must attach a completed Form 3115 to its income tax return for the year of revocation prescribed by paragraph (d)(3)(iv)(C)(*2*) of this section. The words ''REVOCATION OF §1.166–2(d)(3) ELECTION'' must be typed or legibly printed at the top of page 1 of the Form 3115. If the year of revocation is a year for which the bank has already filed its income tax return, the bank must file an amended return for that year reflecting its change in method of accounting and must attach the completed Form 3115 to that amended return. The bank also must file amended returns reflecting the new method of accounting for all subsequent taxable years for which returns have been filed and tax may be assessed.

(D) *Revocation by Commissioner*. An election under this paragraph (d)(3) may be revoked by the Commissioner as of the beginning of any taxable year for which a bank fails to follow the method of accounting prescribed by this paragraph. In addition, the Commissioner may revoke an election as of the beginning of any taxable year for which the Commissioner determines that a bank has taken charge-offs and deductions that, under all facts and circumstances existing at the time, were substantially in excess of those warranted by the exercise of reasonable business judgment in applying the regulatory standards of the bank's supervisory authority as defined in paragraph (d)(3)(III)(D) of this section.

(E) *Voluntary revocation*. A bank may apply for revocation of its election made under this paragraph (d)(3) by timely filing a completed Form 3115 for the appropriate year and obtaining the consent of the Commissioner in accordance with section 446(e) and §1.446–1(e) (including any applicable administrative procedures prescribed thereunder). The words ''REVOCATION OF §1.166–2(d)(3) ELECTION'' must be typed or legibly printed at the top of page 1 of the Form 3115. If any bank has had its election automatically revoked pursuant to paragraph (d)(3)(iv)(C) of this section and has not changed its method of accounting in accordance with the requirements of that paragraph, the Commissioner will require that any voluntary change in method of accounting under this paragraph (d)(3)(iv)(E) be implemented retroactively pursuant to the same amended return terms and conditions as are prescribed by paragraph (d)(3)(iv)(C) of this section.

(4) *Definitions.* For purposes of this paragraph (d)—

(i) *Bank.* The term *bank* has the meaning assigned to it by section 581. The term *bank* also includes any corporation that would be a bank within the meaning of section 581 except for the fact that it is a foreign corporation, but this paragraph (d) applies only with respect to loans the interest on which is effectively connected with the conduct of a banking business within the United States. In addition, the term *bank* includes a Farm Credit System institution that is subject to supervision by the Farm Credit Administration.

(ii) *Charge-off.* For banks regulated by the Office of Thrift Supervision, the term *charge-off* includes the establishment of specific allowances for loan losses in the amount of 100 percent of the portion of the debt classified as loss.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960; 25 FR 14021, Dec. 31, 1960, as amended by T.D. 7254, 38 FR 2418, Jan. 26, 1973; T.D. 8396, 57 FR 6294, Feb. 24, 1992; T.D. 8441, 57 FR 45569, Oct. 2, 1992; T.D. 8492, 58 FR 53658, Oct. 18, 1993]

§ 1.166–3 Partial or total worthlessness.

(a) *Partial worthlessness*—(1) *Applicable to specific debts only.* A deduction under section 166(a)(2) on account of partially worthless debts shall be allowed with respect to specific debts only.

(2) *Charge-off required.* (i) If, from all the surrounding and attending circumstances, the district director is satisfied that a debt is partially worthless, the amount which has become worthless shall be allowed as a deduction under section 166(a)(2) but only to the extent charged off during the taxable year.

(ii) If a taxpayer claims a deduction for a part of a debt for the taxable year within which that part of the debt is charged off and the deduction is disallowed for that taxable year, then, in a case where the debt becomes partially worthless after the close of that taxable year, a deduction under section 166(a)(2) shall be allowed for a subsequent taxable year but not in excess of the amount charged off in the prior taxable year plus any amount charged off in the subsequent taxable year. In such instance, the charge-off in the prior taxable year shall, if consistently maintained as such, be sufficient to that extent to meet the charge-off requirement of section 166(a)(2) with respect to the subsequent taxable year.

(iii) Before a taxpayer may deduct a debt in part, he must be able to demonstrate to the satisfaction of the district director the amount thereof which is worthless and the part thereof which has been charged off.

(3) *Significantly modified debt*—(i) *Deemed charge-off.* If a significant modification of a debt instrument (within the meaning of §1.1001–3) during a taxable year results in the recognition of gain by a taxpayer under §1.1001–1(a), and if the requirements of paragraph (a)(3)(ii) of this section are met, there is a deemed charge-off of the debt during that taxable year in the amount specified in paragraph (a)(3)(iii) of this section.

(ii) *Requirements for deemed charge-off.* A debt is deemed to have been charged off only if—

(A) The taxpayer (or, in the case of a debt that constitutes transferred basis property within the meaning of section 7701(a)(43), a transferor taxpayer) has claimed a deduction for partial worthlessness of the debt in any prior taxable year; and

(B) Each prior charge-off and deduction for partial worthlessness satisfied the requirements of paragraphs (a) (1) and (2) of this section.

(iii) *Amount of deemed charge-off.* The amount of the deemed charge-off, if any, is the amount by which the tax basis of the debt exceeds the greater of the fair market value of the debt or the amount of the debt recorded on the taxpayer's books and records reduced as appropriate for a specific allowance for loan losses. The amount of the deemed charge-off, however, may not exceed the amount of recognized gain described in paragraph (a)(3)(i) of this section.

(iv) *Effective date.* This paragraph (a)(3) applies to significant modifications of debt instruments occurring on or after September 23, 1996.

(b) *Total worthlessness.* If a debt becomes wholly worthless during the taxable year, the amount thereof which has not been allowed as a deduction from gross income for any prior taxable year shall be allowed as a deduction for the current taxable year.

[T.D. 6500, 25 FR 11402, Nov. 29, 1960, as amended by T.D. 8763, 63 FR 4396, Jan. 29, 1998]

§ 1.166–4 Reserve for bad debts.

(a) *Allowance of deduction.* A taxpayer who has established the reserve method of treating bad debts and has maintained proper reserve accounts for bad debts or who, in accordance with paragraph (b) of § 1.166–1, adopts the reserve method of treating bad debts may deduct from gross income a reasonable addition to a reserve for bad debts in lieu of deducting specific bad debt items. This paragraph applies both to bad debts owed to the taxpayer and to bad debts arising out of section 166(f)(1)(A) guaranteed debt obligations. If a reserve is maintained for bad debts arising out of section 166(f)(1)(A) guaranteed debt obligations, then a separate reserve must also be maintained for all other debt obligations of the taxpayer in the same trade or business, if any. A taxpayer may not maintain a reserve for bad debts arising out of section 166(f)(1)(A) guaranteed debt obligations if with respect to direct debt obligations in the same trade or business the taxpayer takes deductions when the debts become worthless in whole or in part rather than maintaining a reserve for such obligations. See § 1.166–10 for rules concerning section 166(f)(1)(A) guaranteed debt obligations.

(b) *Reasonableness of addition to reserve*—(1) *Relevant factors.* What constitutes a reasonable addition to a reserve for bad debts shall be determined in the light of the facts existing at the close of the taxable year of the proposed addition. The reasonableness of the addition will vary as between classes of business and with conditions of business prosperity. It will depend primarily upon the total amount of debts outstanding as of the close of the taxable year, including those arising currently as well as those arising in prior taxable years, and the total amount of the existing reserve.

(2) *Correction of errors in prior estimates.* In the event that subsequent realizations upon outstanding debts prove to be more or less than estimated at the time of the creation of the existing reserve, the amount of the excess or inadequacy in the existing reserve shall be reflected in the determination of the reasonable addition necessary in the current taxable year.

(c) *Statement required.* A taxpayer using the reserve method shall file with his return a statement showing—

(1) The volume of his charge sales or other business transactions for the taxable year and the percentage of the reserve to such amount;

(2) The total amount of notes and accounts receivable at the beginning and close of the taxable year;

(3) The amount of the debts which have become wholly or partially worthless and have been charged against the reserve account; and

(4) The computation of the addition to the reserve for bad debts.

(d) *Special rules applicable to financial institutions.* (1) For special rules for the addition to the bad debt reserves of certain banks, see §§ 1.585–1 through 1.585–3.

(2) For special rules for the addition to the bad debt reserves of small business investment companies and business development corporations, see §§ 1.586–1 and 1.586–2.

(3) For special rules for the addition to the bad debts reserves of certain mutual savings banks, domestic building and loan associations, and cooperative banks, see §§ 1.593–1 through 1.593–11.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6728, 29 FR 5855, May 5, 1964; T.D. 7444, 41 FR 53481, Dec. 7, 1976; T.D. 8071, 51 FR 2479, Jan. 17, 1986]

§ 1.166–5 Nonbusiness debts.

(a) *Allowance of deduction as capital loss.* (1) The loss resulting from any nonbusiness debt's becoming partially or wholly worthless within the taxable year shall not be allowed as a deduction under either section 166(a) or section 166(c) in determining the taxable income of a taxpayer other than a corporation. See section 166(d)(1)(A).

(2) If, in the case of a taxpayer other than a corporation, a nonbusiness debt becomes wholly worthless within the taxable year, the loss resulting therefrom shall be treated as a loss from the sale or exchange, during the taxable year, of a capital asset held for not more than 1 year (6 months for taxable years beginning before 1977; 9 months for taxable years beginning in 1977). Such a loss is subject to the limitations provided in section 1211, relating to the limitation on capital losses, and section 1212, relating to the capital loss carryover, and in the regulations under those sections. A loss on a nonbusiness debt shall be treated as sustained only if and when the debt has become totally worthless, and no deduction shall be allowed for a nonbusiness debt which is recoverable in part during the taxable year.

(b) *Nonbusiness debt defined.* For purposes of section 166 and this section, a nonbusiness debt is any debt other than—

(1) A debt which is created, or acquired, in the course of a trade or business of the taxpayer, determined without regard to the relationship of the debt to a trade or business of the taxpayer at the time when the debt becomes worthless; or

(2) A debt the loss from the worthlessness of which is incurred in the taxpayer's trade or business.

The question whether a debt is a nonbusiness debt is a question of fact in each particular case. The determination of whether the loss on a debt's becoming worthless has been incurred in a trade or business of the taxpayer shall, for this purpose, be made in substantially the same manner for determining whether a loss has been incurred in a trade or business for purposes of section 165(c)(1). For purposes of subparagraph (2) of this paragraph, the character of the debt is to be determined by the relation which the loss resulting from the debt's becoming worthless bears to the trade or business of the taxpayer. If that relation is a proximate one in the conduct of the trade or business in which the taxpayer is engaged at the time the debt becomes worthless, the debt comes within the exception provided by that subparagraph. The use to which the borrowed funds are put by the debtor is of no consequence in making a determination under this paragraph. For purposes of section 166 and this section, a nonbusiness debt does not include a debt described in section 165(g)(2)(C). See § 1.165–5, relating to losses on worthless securities.

(c) *Guaranty of obligations.* For provisions treating a loss sustained by a guarantor of obligations as a loss resulting from the worthlessness of a debt, see §§ 1.166–8 and 1.166–9.

(d) *Examples.* The application of this section may be illustrated by the following examples involving a case where A, an individual who is engaged in the grocery business and who makes his return on the basis of the calendar year, extends credit to B in 1955 on an open account:

Example 1. In 1956 A sells the business but retains the claim against B. The claim becomes worthless in A's hands in 1957. A's loss is not controlled by the nonbusiness debt provisions, since the original consideration has been advanced by A in his trade or business.

Example 2. In 1956 A sells the business to C but sells the claim against B to the taxpayer, D. The claim becomes worthless in D's hands in 1957. During 1956 and 1957, D is not engaged in any trade or business. D's loss is controlled by the nonbusiness debt provisions even though the original consideration has been advanced by A in his trade or business, since the debt has not been created or acquired in connection with a trade or business of D and since in 1957 D is not engaged in a trade or business incident to the conduct of which a loss from the worthlessness of such claim is a proximate result.

Example 3. In 1956 A dies, leaving the business, including the accounts receivable, to his son, C, the taxpayer. The claim against B becomes worthless in C's hands in 1957. C's loss is not controlled by the nonbusiness debt provisions. While C does not advance any consideration for the claim, or create or acquire it in connection with his trade or business, the loss is sustained as a proximate incident to the conduct of the trade or business in which he is engaged at the time the debt becomes worthless.

Example 4. In 1956 A dies, leaving the business to his son, C, but leaving the claim against B to his son, D, the taxpayer. The claim against B becomes worthless in D's hands in 1957. During 1956 and 1957, D is not engaged in any trade or business. D's loss is controlled by the nonbusiness debt provisions even though the original consideration has been advanced by A in his trade or business, since the debt has not been created or acquired in connection with a trade or business of D and since in 1957 D is not engaged in a trade or business incident to the conduct of which a loss from the worthlessness of such claim is a proximate result.

Example 5. In 1956 A dies; and, while his executor, C, is carrying on the business, the claim against B becomes worthless in 1957. The loss sustained by A's estate is not controlled by the nonbusiness debt provisions. While C does not advance any consideration for the claim on behalf of the estate, or create or acquire it in connection with a trade or business in which the estate is engaged, the loss is sustained as a proximate incident to the conduct of the trade or business in which the estate is engaged at the time the debt becomes worthless.

Example 6. In 1956, A, in liquidating the business, attempts to collect the claim against B but finds that it has become worthless. A's loss is not controlled by the nonbusiness debt provisions, since the original consideration has been advanced by A in his trade or business and since a loss incurred in liquidating a trade or business is a proximate incident to the conduct thereof.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 7657, 44 FR 68464, Nov. 29, 1979; T.D. 7728, 45 FR 72650, Nov. 3, 1980]

§ 1.166–6 Sale of mortgaged or pledged property.

(a) *Deficiency deductible as bad debt*—(1) *Principal amount.* If mortgaged or pledged property is lawfully sold (whether to the creditor or another purchaser) for less than the amount of the debt, and the portion of the indebtedness remaining unsatisfied after the sale is wholly or partially uncollectible, the mortgagee or pledgee may deduct such amount under section 166(a) (to the extent that it constitutes capital or represents an item the income from which has been returned by him) as a bad debt for the taxable year in which it becomes wholly worthless or is charged off as partially worthless. See § 1.166–3.

(2) *Accrued interest.* Accrued interest may be included as part of the deduction allowable under this paragraph, but only if it has previously been returned as income.

(b) *Realization of gain or loss*—(1) *Determination of amount.* If, in the case of a sale described in paragraph (a) of this section, the creditor buys in the mortgaged or pledged property, loss or gain is also realized, measured by the difference between the amount of those obligations of the debtor which are applied to the purchase or bid price of the property (to the extent that such obligations constitute capital or represent an item the income from which has been returned by the creditor) and the fair market value of the property.

(2) *Fair market value defined.* The fair market value of the property for this purpose shall, in the absence of clear and convincing proof to the contrary, be presumed to be the amount for which it is bid in by the taxpayer.

(c) *Basis of property purchased.* If the creditor subsequently sells the property so acquired, the basis for determining gain or loss upon the subsequent sale is the fair market value of the property at the date of its acquisition by the creditor.

(d) *Special rules applicable to certain banking organizations.* For special rules relating to the treatment of mortgaged or pledged property by certain mutual savings banks, domestic building and loan associations, and cooperative banks, see section 595 and the regulations thereunder.

(e) *Special rules applicable to certain reacquisitions of real property.* Notwithstanding this section, special rules apply for taxable years beginning after September 2, 1964 (and for certain taxable years beginning after December 31, 1957), to the gain or loss on certain reacquisitions of real property, to indebtedness remaining unsatisfied as a result of such reacquisitions, and to the basis of the reacquired real property. See §§ 1.1038–1 through 1.1038–3.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6814, 30 FR 4472, Apr. 7, 1965, T.D. 6916, 32 FR 5923, Apr. 13, 1967]

§ 1.166–7 Worthless bonds issued by an individual.

(a) *Allowance of deduction.* A bond or other similar obligation issued by an individual, if it becomes worthless in whole or in part, is subject to the bad debt provisions of section 166. The loss from the worthlessness of any such bond or obligation is deductible in accordance with section 166(a), unless such bond or obligation is a nonbusiness debt as defined in section 166(d)(2). If the bond or obligation is a nonbusiness debt, it is subject to section 166(d) and §1.166–5.

(b) *Decline in market value.* A taxpayer possessing debts evidenced by bonds or other similar obligations issued by an individual shall not be allowed any deduction under section 166 on account of mere market fluctuation in the value of such obligations.

(c) *Worthless bonds issued by corporation.* For provisions allowing the deduction under section 165(a) of the loss sustained upon the worthlessness of any bond or similar obligation issued by a corporation or a government, see §1.165–5.

(d) *Application to inventories.* This section does not apply to any loss upon the worthlessness of any bond or similar obligation reflected in inventories required to be taken by a dealer in securities under section 471. See §1.471–5.

§1.166–8 Losses of guarantors, endorsers, and indemnitors incurred on agreements made before January 1, 1976.

(a) *Noncorporate obligations*—(1) *Deductible as bad debt.* A payment during the taxable year by a taxpayer other than a corporation in discharge of part or all of his obligation as a guarantor, endorser, or indemnitor of an obligation issued by a person other than a corporation shall, for purposes of section 166 and the regulations thereunder, be treated as a debt's becoming worthless within the taxable year, if—

(i) The proceeds of the obligation so issued have been used in the trade or business of the borrower, and

(ii) The borrower's obligation to the person to whom the taxpayer's payment is made is worthless at the time of payment except for the existence of the guaranty, endorsement, or indemnity, whether or not such obligation has in fact become worthless within the taxable year in which payment is made.

(2) *Nonbusiness debt rule not applicable.* If a payment is treated as a loss in accordance with the provisions of subparagraph (1) of this paragraph, section 166(d), relating to the special rule for losses sustained on the worthlessness of a nonbusiness debt, shall not apply. Accordingly, in each instance the loss shall be deducted under section 166(a)(1) as a wholly worthless debt even though there has been a discharge of only a part of the taxpayer's obligation. Thus, if the taxpayer makes a payment during the taxable year in discharge of only part of his obligation as a guarantor, endorser, or indemnitor, he may treat such payment under section 166(a)(1) as a debt's becoming wholly worthless within the taxable year, provided that he can establish that such part of the borrower's obligation to the person to whom the taxpayer's payment is made is worthless at the time of payment and the conditions of subparagraph (1) of this paragraph have otherwise been satisfied.

(3) *Other applicable provisions.* Other provisions of the internal revenue laws relating to bad debts, such as section 111, relating to the recovery of bad debts, shall be deemed to apply to any payment which, under the provisions of this paragraph, is treated as a bad debt. If the requirements of section 166(f) are not met, any loss sustained by a guarantor, endorser, or indemnitor upon the worthlessness of the debtor's obligation shall be treated under the provisions of law applicable thereto. See, for example, paragraph (b) of this section.

(b) *Corporate obligations.* The loss sustained during the taxable year by a taxpayer other than a corporation in discharge of all of his obligation as a guarantor of an obligation issued by a corporation shall be treated, in accordance with section 166(d) and the regulations thereunder, as a loss sustained on the worthlessness of a nonbusiness debt if the debt created in the guarantor's favor as a result of the payment does not come within the exceptions prescribed by section 166(d)(2) (A) or (B). See paragraph (a)(2) of §1.166–5.

(c) *Examples.* The application of this section may be illustrated by the following examples:

Example 1. During 1955, A, an individual who makes his return on the basis of the calendar year, guarantees payment of an obligation of B, an individual, to the X Bank, the proceeds of the obligation being used in B's business. B defaults on his obligation in 1956.

A makes payment to the X Bank during 1957 in discharge of his entire obligation as a guarantor, the obligation of B to the X Bank being wholly worthless. For his taxable year 1957, A is entitled to a deduction under section 166(a)(1) as a result of his payment during that year.

Example 2. During 1955, A, an individual who makes his return on the basis of the calendar year, guarantees payment of an obligation of B, an individual, to the X Bank, the proceeds of the obligation being used in B's business. In 1956, B pays a part of his obligation to the X Bank but defaults on the remaining part. In 1957, A makes payment to the X Bank, in discharge of part of his obligation as a guarantor, of the remaining unpaid part of B's obligation to the bank, such part of B's obligation then being worthless. For his taxable year 1957, A is entitled to a deduction under section 166(a) (1) as a result of his payment of the remaining unpaid part of B's obligation.

Example 3. During 1955, A, an individual who makes his return on the basis of the calendar year, guarantees payment of an obligation of B, an individual, to the X Bank, the proceeds of the obligation being used for B's personal use. B defaults on his obligation in 1956. A makes payment to the X Bank during 1957 in discharge of his entire obligation as a guarantor, the obligation of B to X Bank being wholly worthless. A may not apply the benefit of section 166(f) to his loss, since the proceeds of B's obligation have not been used in B's trade or business.

Example 4. During 1955, A, an individual who makes his return on the basis of the calendar year, guarantees payment of an obligation of Y Corporation to the X Bank, the proceeds of the obligation being used in Y Corporation's business. Y Corporation defaults on its obligation in 1956. A makes payment to the X Bank during 1957 in discharge of his entire obligation as a guarantor, the obligation of Y Corporation to the X Bank being wholly worthless. At no time during 1955 or 1957 is A engaged in a trade or business. For his taxable year 1957, A is entitled to deduct a capital loss in accordance with the provisions of section 166(d) and paragraph (a) (2) of §1.166–5. He may not apply the benefit of section 166(f) to his loss, since his payment is in discharge of an obligation issued by a corporation.

(d) *Effective date.* This section applies only to losses, regardless of the taxable year in which incurred, on agreements made before January 1, 1976.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 7657, 44 FR 68464, Nov. 29, 1979]

§ 1.166–9 Losses of guarantors, endorsers, and indemnitors incurred, on agreements made after December 31, 1975, in taxable years beginning after such date.

(a) *Payment treated as worthless business debt.* This paragraph applies to taxpayers who, after December 31, 1975, enter into an agreement in the course of their trade or business to act as (or in a manner essentially equivalent to) a guarantor, endorser, or indemnitor of (or other secondary obligor upon) a debt obligation. Subject to the provisions of paragraphs (c), (d), and (e) of this section, a payment of principal or interest made during a taxable year beginning after December 31, 1975, by the taxpayer in discharge of part or all of the taxpayer's obligation as a guarantor, endorser, or indemnitor is treated as a business debt becoming worthless in the taxable year in which the payment is made or in the taxable year described in paragraph (e)(2) of this section. Neither section 163 (relating to interest) nor section 165 (relating to losses) shall apply with respect to such a payment.

(b) *Payment treated as worthless nonbusiness debt.* This paragraph applies to taxpayers (other than corporations) who, after December 31, 1975, enter into a transaction for profit, but not in the course of their trade or business, to act as (or in a manner essentially equivalent to) a guarantor, endorser, or indemnitor of (or other secondary obligor upon) a debt obligation. Subject to the provisions of paragraphs (c), (d), and (e) of this section, a payment of principal or interest made during a taxable year beginning after December 31, 1975, by the taxpayer in discharge of part or all of the taxpayer's obligation as a guarantor, endorser, or indemnitor is treated as a worthless nonbusiness debt in the taxable year in which the payment is made or in the taxable year described in paragraph (e)(2) of this section. Neither section 163 nor section 165 shall apply with respect to such a payment.

(c) *Obligations issued by corporations.* No treatment as a worthless debt is allowed with respect to a payment made by the taxpayer in discharge of part or all of the taxpayer's obligation as a guarantor, endorser, or indemnitor of an obligation issued by a corporation if, on the basis of the facts and circumstances at the time the obligation was entered into, the payment constitutes a contribution to capital by a shareholder. The rule of this paragraph (c) applies to payments whenever made (see paragraph (f) of this section).

(d) *Certain payments treated as worthless debts.* A payment in discharge of part or all of taxpayer's agreement to act as guarantor, endorser, or indemnitor of an obligation is to be treated as a worthless debt only if—

(1) The agreement was entered into in the course of the taxpayer's trade or business or a transaction for profit;

(2) There was an enforceable legal duty upon the taxpayer to make the payment (except that legal action need not have been brought against the taxpayer); and

(3) The agreement was entered into before the obligation became worthless (or partially worthless in the case of an agreement entered into in the course of the taxpayer's trade or business). See §§ 1.166–2 and 1.166–3 for rules on worthless and partially worthless debts. For purposes of this paragraph (d)(3), an agreement is considered as entered into before the obligation became worthless (or partially worthless) if there was a reasonable expectation on the part of the taxpayer at the time the agreement was entered into that the taxpayer would not be called upon to pay the debt (subject to such agreement) without full reimbursement from the issuer of the obligation.

(e) *Special rules*—(1) *Reasonable consideration required.* Treatment as a worthless debt of a payment made by a taxpayer in discharge of part or all of the taxpayer's agreement to act as a guarantor, endorser, or indemnitor of an obligation is allowed only if the taxpayer demonstrates that reasonable consideration was received for entering into the agreement. For purposes of this paragraph (e)(1), reasonable consideration is not limited to direct consideration in the form of cash or property. Thus, where a taxpayer can demonstrate that the agreement was given without direct consideration in the form of cash or property but in accordance with normal business practice or for a good faith business purpose, worthless debt treatment is allowed with respect to a payment in discharge of part or all of the agreement if the conditions of this section are met. However, consideration received from a taxpayer's spouse or any individual listed in section 152(a) must be direct consideration in the form of cash or property.

(2) *Right of subrogation.* With respect to a payment made by a taxpayer in discharge of part or all of the taxpayer's agreement to act as a guarantor, endorser, or indemnitor where the agreement provides for a right of subrogation or other similar right against the issuer, treatment as a worthless debt is not allowed until the taxable year in which the right of subrogation or other similar right becomes totally worthless (or partially worthless in the case of an agreement which arose in the course of the taxpayer's trade or business).

(3) *Other applicable provisions.* Unless inconsistent with this section, other Internal Revenue laws concerning worthless debts, such as section 111 relating to the recovery of bad debts, apply to any payment which, under the provisions of this section, is treated as giving rise to a worthless debt.

(4) *Taxpayer defined.* For purposes of this section, except as otherwise provided, the term ''taxpayer'' means any taxpayer and includes individuals, corporations, partnerships, trusts and estates.

(f) *Effective date.* This section applies to losses incurred on agreements made after December 31, 1975, in taxable years beginning after such date. However, paragraph (c) of this section also applies to payments, regardless of the taxable year in which made, under agreements made before January 1, 1976.

[T.D. 7657, 44 FR 68465, Nov. 29, 1979, as amended by T.D. 7920, 48 FR 50712, Nov. 3, 1983]

§ 1.166–10 Reserve for guaranteed debt obligations.

(a) *Definitions.* The following provisions apply for purposes of this section and section 166(f):

(1) *Dealer in property.* A dealer in property is a person who regularly sells

property in the ordinary course of the person's trade or business.

(2) *Guaranteed debt obligation.* A guaranteed debt obligation is a legal duty of one person as a guarantor, endorser or indemnitor of a second person to pay a third person. It does not include duties based solely on moral or good public relations considerations that are not legally binding. A guaranteed debt obligation typically arises where a seller receives in payment for property or services the debt obligation of a purchaser and sells that obligation to a third party with recourse. However, a guaranteed debt obligation also may arise out of a sale in respect of which there is no direct debtor-creditor relationship between the debtor purchaser and the seller. For example, it arises where a purchaser borrows money from a third party to make payment to the seller and the seller guarantees the payment of the purchaser's debt. Generally, debt obligations which are sold without recourse do not result in any obligation of the seller as a guarantor, endorser, or indemnitor. However, there are certain without-recourse transactions which may give rise to a seller's liability as a guarantor or indemnitor. For example, such a liability may arise where a holder of a debt obligation holds money or other property of a seller which the holder may apply, without seeking permission of the seller, against any uncollectible debt obligations transferred to the holder by the seller without recourse, or where the seller is under a legal obligation to reacquire the real or tangible personal property from the holder of the debt obligation who repossessed property in satisfaction of the debt obligations.

(3) *Real or tangible personal property.* Real or tangible personal property generally does not include other forms of property, such as securities. However, if the sale of other property is related to the sale of actual real or tangible personal property, the other property will be considered to be real or tangible personal property. In order for the sale of other property to be related, it must be—

(i) Incidental to the sale of the actual real or tangible personal property; and

(ii) Made under an agreement, entered into at the same time as the sale of actual real or tangible personal property, between the dealer in that property and the customer with respect to that property.

The other property may be charged for as a part of, or in addition to, the sales price of the actual real or tangible personal property. If the value of the other property is not greater than 20 percent of the total sales price, including the value of all related services other than financing services, the sale of the other property is related to the sale of actual real or tangible personal property.

(4) *Related services.* In the case of a sale of both property and services a determination must be made as to whether the services are related to the property. Related services include only those services which are—

(i) Incidental to the sale of the real or tangible personal property; and

(ii) To be performed under an agreement, entered into at the same time as the sale of the property, between the dealer in property and the customer with respect to the property.

Delivery, financing installation. maintenance, repair, or instructional services generally qualify as related services. The services may be charged for as a part of, or in addition to, the sales price of the property. Where the value of all services other than financing services is not greater than 20 percent of the total of the sales price of the property, including the value of all the services other than financing services, all of the services are considered to be incidental to the sale of the property. Where the value of the services is greater than 20 percent, the determination as to whether a service is a related service in a particular case is to be made on the basis of all relevant facts and circumstances.

(5) *Examples.* The following examples apply to paragraph (a)(4) of this section:

Example 1. A. a dealer in television sets sells a television set to B, his customer. If at the time of the sale A, for a separate charge which is added to the sales price of the set and which is not greater than 20 percent of the total sales price, provides a 3-year service contract on only that television set, the service contract is a related service agreement. However, if A does not sell the service contract to B contemporaneously with the sale of the television set, as would be the case if the service agreement were entered into after the sale of the set were completed, or if the service contract includes services for a television set in addition to the one then sold by A to B, the service contract is not an agreement for a related service.

Example 2. C, an automobile dealer, at the time of the sale by C of an automobile to D, agrees to made available to D driving instructions furnished by the M driving school, the cost of which is included in the sale price of the automobile and is not greater than 20 percent of the total sales price. C also agrees to pay M for the driving instructions furnished to D. Since C's agreement with D to make available driving instructions is incidental to the sale of the automobile, is made contemporaneously with the sale, and is charged for as part of the sales price of the automobile, it is an agreement for a related service. In contrast, however, because M's agreement with C is not an agreement between the dealer in property and the customer, M's agreement with C to provide driving instructions to C's customers is not an agreement for a related service.

(b) *Incorporation of section 166(c) rules.* A reserve for section 166(f)(1)(A) guaranteed debt obligations must be established and maintained under the rules applicable to the reserve for bad debts under section 166(c) (with the exception of the statement requirement under § 1.166–4 (c)). For example, the rules in § 1.166–4(b), relating to what constitutes a reasonable addition to a reserve for bad debts and to correction of errors in prior estimates, apply to a reserve for section 166(f)(1)(A) guaranteed debt obligations as well.

(c) *Special requirements.* Any reserve for section 166(f)(1)(A) guaranteed debt obligations must be established and maintained separately from any reserve for other debt obligations. In addition, a taxpayer who charges off direct debts when they become worthless in whole or in part rather than maintaining a reserve for such obligations may not maintain a reserve for section 166(f)(1)(A) guaranteed debt obligations in the same trade or business.

(d) *Requirement of statement.* A taxpayer who uses the reserve method of treating section 166(f)(1)(A) guaranteed debt obligations must attach to his return for each taxable year, returns for which are filed after April 17, 1986, and for each trade or business for which the reserve is maintained a statement showing—

(1) The total amount of these obligations at the beginning of the taxable year;

(2) The total amount of these obligations incurred during the taxable year;

(3) The amount of the initial balance of the suspense account, if any, established with respect to these obligations;

(4) The balance of the suspense account, if any, at the beginning of the taxable year,

(5) The adjustment, if any, to that account;

(6) The adjusted balance, if any, at the close of the taxable year;

(7) The reconciliation of the beginning and closing balances of the reserve for these obligations and the computation of the addition to the reserve; and

(8) The taxable year for which the reserve for these obligations was established.

(e) *Computation of opening balance*—(1) *In general.* The opening balance of a reserve for section 166(f)(1)(A) guaranteed debt obligations established for the first taxable year for which a taxpayer maintains such a reserve shall be determined as if the taxpayer had maintained such a reserve for the taxable years preceding that taxable year. The amount of the opening balance may be determined under the following formula:

$$OB = CG \times \frac{SNL}{SG}$$

where—

OB = the opening balance at the beginning of the first taxable year

CG = the amount of these obligations at the close of the last preceding taxable year

SG = the sum of the amounts of these obligations at the close of the five preceding taxable years

SNL the sum of the amounts of net losses arising from these obligations for the five preceding taxable years

(2) *Example.* The following example applies to paragraph (e)(1) of this section.

Example. For 1977, A, a dealer in automobiles who uses the calendar year as the taxable year, adopts in accordance with this section the reserve method of treating section 166(f)(1)(A) guaranteed debt obligations. A's first year in business as an automobile dealer is 1973. For 1972, 1973, 1974, 1975, and 1976, A's records disclose the following information with respect to these obligations:

Year	Obligations outstanding at close of year	Gross losses from these obligations	Recoveries from these obligations	Net losses from these obligations
1972	$0	$0	$0	$0
1973	780,000	9,700	1,000	8,700
1974	795,000	8,900	1,050	7,850
1975	850,000	8,850	850	8,000
1976	820,000	8,300	1,400	7,900
Total	3,245,000	36,750	4,300	32,450

The opening balance for 1977 of A's reserve for these obligations is $8,200, determined as follows:

$$\$8{,}200 = \$820{,}000 \times \frac{\$32{,}450}{\$3{,}245{,}000}$$

(3) *More appropriate balance.* A taxpayer may select a balance other than the one produced under paragraph (e)(1) of this section if it is more appropriate, based upon the taxpayer's actual experience, and in the event the taxpayer's return is examined, if the balance is approved by the district director.

(4) *No losses in the five preceding taxable years.* If a taxpayer is in the taxpayer's first taxable year of a particular trade or business, or if the taxpayer has no losses arising from section 166(f)(1)(A) guaranteed debt obligations in a particular trade or business for any other reason in the five preceding taxable years, then the taxpayer's opening balance is zero for that particular trade or business.

(5) *Where reserve method was used before October 22, 1965.* If for a taxable year ending before October 22, 1965, the taxpayer maintained a reserve for bad debts under section 166(c) which included guaranteed debt obligations described in section 166(f)(1)(A), and if the taxpayer is allowed a deduction referred to in paragraph (g)(2) of this section on account of those obligations, the amount of the opening balance of the reserve for section 166(f)(1)(A) guaranteed debt obligations for the taxpayer's first taxable year ending after October 21, 1965, shall be an amount equal to that portion of the section 166(c) reserve at the close of the last taxable year which is attributable to those debt obligations. The amount of the balance of the section 166(c) reserve for the taxable year shall be reduced by the amount of the opening balance of the reserve for those guaranteed debt obligations.

(f) *Suspense account*—(1) *Zero opening balance cases.* No suspense account shall be maintained if the opening balance of the reserve for section 166(f)(1)(A) guaranteed debt obligations under section 166(f)(3) is zero

(2) *Example.* The following example applies to section 166(f)(4)(B), relating to adjustments to the suspense account:

Example. In 1977, A, an individual who operates an appliance store and uses the calendar year as the taxable year, adopts the reserve method of treating section 166(f)(1)(A) guaranteed debt obligations. The initial balance of A's suspense account is $8,200. At the close of 1977, 1978, 1979, and 1980, the balance of A's reserve for these obligations is $8,400, $8,250, $8,150, and $8,175, respectively, after making the addition to the reserve for each year. The adjustments under section 166(f)(4)(B) to the suspense account at the close of each of the years involved are as follows:

(1) Taxable year	1977	1978	1979	1980
(2) Closing reserve account balance	$8,400	$8,250	$8,150	$8,175
(3) Opening suspense account balance	8,200	8,200	8,200	8,150
(4) Line (2) less line (3)	200	50	(50	25
(5) Adjustment to suspense account balance	0	0	(50	25
(6) Closing suspense account balance (line 3 plus line 5)	8,200	8,200	8,150	8,175

(g) *Effective date*—(1) *In general.* This section is generally effective for taxable years ending after October 21, 1965.

(2) *Transitional rule.* Section 2(b) of the Act of November 2, 1966 (Pub. L. 89–722, 80 Stat. 1151) allows additions to section 166(c) bad debt reserves in earlier taxable years on account of section 166(f)(1)(A) guaranteed debt obligations to be deducted for those earlier taxable years. Paragraphs (c), (d), (e), and (f) of this section do not apply in determining whether a deduction is allowed under section 2(b) of the Act. See Rev. Rul. 68–313 (1968–1C.B. 75) for rules relating to that deduction.

[T.D. 8071, 51 FR 2479, Jan. 17, 1986; 51 FR 9787, Mar. 21, 1986]

§ 1.167(a)–1 Depreciation in general.

(a) *Reasonable allowance.* Section 167(a) provides that a reasonable allowance for the exhaustion, wear and tear, and obsolescence of property used in the trade or business or of property held by the taxpayer for the production of income shall be allowed as a depreciation deduction. The allowance is that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan (not necessarily at a uniform rate), so that the aggregate of the amounts set aside, plus the salvage value, will, at the end of the estimated useful life of the depreciable property, equal the cost or other basis of the property as provided in section 167(g) and §1.167(g)–1. An asset shall not be depreciated below a reasonable salvage value under any method of computing depreciation. However, see section 167(f) and §1.167(f)–1 for rules which permit a reduction in the amount of salvage value to be taken into account for certain personal property acquired after October 16, 1962. See also paragraph (c) of this section for definition of salvage. The allowance shall not reflect amounts representing a mere reduction in market value. See section 179 and §1.179–1 for a further description of the term ''reasonable allowance.''

(b) *Useful life.* For the purpose of section 167 the estimated useful life of an asset is not necessarily the useful life inherent in the asset but is the period over which the asset may reasonably be expected to be useful to the taxpayer in his trade or business or in the production of his income. This period shall be determined by reference to his experience with similar property taking into account present conditions and probable future developments. Some of the factors to be considered in determining this period are (1) wear and tear and decay or decline from natural causes, (2) the normal progress of the art, economic changes, inventions, and current developments within the industry and the taxpayer's trade or business, (3) the climatic and other local conditions peculiar to the taxpayer's trade or business, and (4) the taxpayer's policy as to repairs, renewals, and replacements. Salvage value is not a factor for the purpose of determining useful life. If the taxpayer's experience is inadequate, the general experience in the industry may be used until such time as the taxpayer's own experience forms an adequate basis for making the determination. The estimated remaining useful life may be subject to modification by reason of conditions known to exist at the end of the taxable year and shall be redetermined when necessary regardless of the method of computing depreciation. However, estimated remaining useful life shall be redetermined only when the change in the useful life is significant and there is a clear and convincing basis for the redetermination. For rules covering agreements with respect to useful life, see section 167(d) and §1.167(d)–1. If a taxpayer claims an investment credit with respect to an asset for a taxable year preceding the taxable year in which the asset is considered as placed in service under §1.167(a)–10(b) or §1.167(a)–11(e), the useful life of the asset under this paragraph shall be the same useful life assigned to the asset under §1.46–3(e).

(c) *Salvage.* (1) Salvage value is the amount (determined at the time of acquisition) which is estimated will be realizable upon sale or other disposition of an asset when it is no longer useful in the taxpayer's trade or business or in the production of his income and is to be retired from service by the taxpayer. Salvage value shall not be changed at any time after the determination made at the time of acquisition merely because of changes in price levels. However, if there is a redetermination of useful life under the rules of paragraph (b) of this section, salvage value may be redetermined based upon facts known at the time of such redetermination of useful life. Salvage, when reduced by the cost of removal, is referred to as net salvage. The time at which an asset is retired from service may vary according to the policy of the taxpayer. If the taxpayer's policy is to dispose of assets which are still in good operating condition, the salvage value may represent a relatively large proportion of the original basis of the asset. However, if the taxpayer customarily uses an asset until its inherent useful life has been substantially exhausted, salvage value may represent no more than junk value. Salvage value must be taken into account in determining the depreciation deduction either by a reduction of the amount subject to depreciation or by a reduction in the rate of depreciation, but in no event shall an asset (or an account) be depreciated below a reasonable salvage value. See, however, paragraph (a) of §1.167(b)–2 for the treatment of salvage under the declining balance method, and §1.179–1 for the treatment of salvage in computing the additional first-year depreciation allowance. The taxpayer may use either salvage or net salvage in determining depreciation allowances but such practice must be consistently followed and the treatment of the costs of removal must be consistent with the practice adopted. For specific treatment of salvage value, see §§1.167(b)–1, 1.167(b)–2, and 1.167(b)–3. When an asset is retired or disposed of, appropriate adjustments shall be made in the asset and depreciation reserve accounts. For example, the amount of the salvage adjusted for the costs of removal may be credited to the depreciation reserve.

(2) For taxable years beginning after December 31, 1961, and ending after October 16, 1962, see section 167(f) and §1.167(f)–1 for rules applicable to the reduction of salvage value taken into account for certain personal property acquired after October 16, 1962.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6712, 29 FR 3653, Mar. 24, 1964; T.D. 7203, 37 FR 17133, Aug. 25, 1972]

§ 1.167(a)–2 Tangible property.

The depreciation allowance in the case of tangible property applies only to that part of the property which is subject to wear and tear, to decay or decline from natural causes, to exhaustion, and to obsolescence. The allowance does not apply to inventories or stock in trade, or to land apart from the improvements or physical development added to it. The allowance does not apply to natural resources which are subject to the allowance for depletion provided in section 611. No deduction for depreciation shall be allowed on automobiles or other vehicles used solely for pleasure, on a building used by the taxpayer solely as his residence, or on furniture or furnishings therein, personal effects, or clothing; but properties and costumes used exclusively in a business, such as a theatrical business, may be depreciated.

§ 1.167(a)–3 Intangibles.

(a) *In general.* If an intangible asset is known from experience or other factors to be of use in the business or in the production of income for only a limited period, the length of which can be estimated with reasonable accuracy, such an intangible asset may be the subject of a depreciation allowance. Examples are patents and copyrights. An intangible asset, the useful life of which is not limited, is not subject to the allowance for depreciation. No allowance will be permitted merely because, in the unsupported opinion of the taxpayer, the intangible asset has a limited useful life. No deduction for depreciation is allowable with respect to goodwill. For rules with respect to organizational expenditures, see section 248 and the regulations thereunder. For rules with respect to trademark and trade name expenditures, see section 177 and the regulations thereunder. See sections 197 and 167(f) and, to the extent applicable, §§1.197–2 and 1.167(a)–14 for amortization of goodwill and certain other intangibles acquired after August 10, 1993, or after July 25, 1991, if a valid retroactive election under §1.197–1T has been made.

(b) *Safe harbor amortization for certain intangible assets*—(1) *Useful life.* Solely for purposes of determining the depreciation allowance referred to in paragraph (a) of this section, a taxpayer may treat an intangible asset as having a useful life equal to 15 years unless—

(i) An amortization period or useful life for the intangible asset is specifically prescribed or prohibited by the Internal Revenue Code, the regulations thereunder (other than by this paragraph (b)), or other published guidance in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter);

(ii) The intangible asset is described in § 1.263(a)–4(c) (relating to intangibles acquired from another person) or § 1.263(a)–4(d)(2) (relating to created financial interests);

(iii) The intangible asset has a useful life the length of which can be estimated with reasonable accuracy; or

(iv) The intangible asset is described in § 1.263(a)–4(d)(8) (relating to certain benefits arising from the provision, production, or improvement of real property), in which case the taxpayer may treat the intangible asset as having a useful life equal to 25 years solely for purposes of determining the depreciation allowance referred to in paragraph (a) of this section.

(2) *Applicability to acquisitions of a trade or business, changes in the capital structure of a business entity, and certain other transactions.* The safe harbor useful life provided by paragraph (b)(1) of this section does not apply to an amount required to be capitalized by § 1.263(a)–5 (relating to amounts paid to facilitate an acquisition of a trade or business, a change in the capital structure of a business entity, and certain other transactions).

(3) *Depreciation method.* A taxpayer that determines its depreciation allowance for an intangible asset using the 15-year useful life prescribed by paragraph (b)(1) of this section (or the 25-year useful life in the case of an intangible asset described in § 1.263(a)–4(d)(8)) must determine the allowance by amortizing the basis of the intangible asset (as determined under section 167(c) and without regard to salvage value) ratably over the useful life beginning on the first day of the month in which the intangible asset is placed in service by the taxpayer. The intangible asset is not eligible for amortization in the month of disposition.

(4) *Effective date.* This paragraph (b) applies to intangible assets created on or after December 31, 2003.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960; 25 FR 14021, Dec. 21, 1960, as amended by T.D. 8867, 65 FR 3825, Jan. 25, 2000; T.D. 9107, 69 FR 444, Jan. 5, 2004]

§ 1.167(a)–4 Leased property.

(a) *In general.* [Reserved] For further guidance, see § 1.167(a)–4T(a).

(b) *Effective/applicability date.* [Reserved] For further guidance, see § 1.167(a)–4T(b).

[T.D. 9564, 76 FR 81085, Dec. 27, 2011]

§ 1.167(a)–4T Leased property (temporary).

(a) *In general.* Capital expenditures made by either a lessee or lessor for the erection of a building or for other permanent improvements on leased property are recovered by the lessee or lessor under the provisions of the Internal Revenue Code applicable to the cost recovery of the building or improvements, if subject to depreciation or amortization, without regard to the period of the lease. For example, if the building or improvement is property to which section 168 applies, the lessee or lessor determines the depreciation deduction for the building or improvement under section 168. *See* section 168(i)(8)(A). If the improvement is property to which section 167 or section 197 applies, the lessee or lessor determines the depreciation or amortization deduction for the improvement under section 167 or section 197, as applicable.

(b) *Effective/applicability date*—(1) *In general.* Except as provided in paragraphs (b)(2) and (b)(3) of this section, this section applies to taxable years beginning on or after January 1, 2014.

(2) *Application of this section to leasehold improvements placed in service after December 31, 1986, in taxable years beginning before January 1, 2014.* For leasehold improvements placed in service after December 31, 1986, in taxable years beginning before January 1, 2014, a taxpayer may—

(i) Apply the provisions of this section; or

(ii) Depreciate any leasehold improvement to which section 168 applies under the provisions of section 168 and depreciate or amortize any leasehold improvement to which section 168 does not apply under the provisions of the Internal Revenue Code that are applicable to the cost recovery of that leasehold improvement, without regard to the period of the lease.

(3) *Application of this section to leasehold improvements placed in service before January 1, 1987.* For leasehold improvements placed in service before January 1, 1987, see §1.167(a)–4 in effect prior to January 1, 2012 (§1.167(a)–4 as contained in 26 CFR part 1 edition revised as of April 1, 2011).

(4) *Change in method of accounting.* Except as provided in §1.446–1(e)(2)(ii)(*d*)(*3*)(*i*), a change to comply with this section for depreciable assets placed in service in a taxable year ending on or after December 30, 2003, is a change in method of accounting to which the provisions of section 446(e) and the regulations under section 446(e) apply. Except as provided in §1.446–1(e)(2)(ii)(*d*)(*3*)(*i*), a taxpayer also may treat a change to comply with this section for depreciable assets placed in service in a taxable year ending before December 30, 2003, as a change in method of accounting to which the provisions of section 446(e) and the regulations under section 446(e) apply.

(5) *Expiration date.* The applicability of this section expires on December 23, 2014.

[T.D. 9564, 76 FR 81085, Dec. 27, 2011, as amended at 77 FR 74584, Dec. 17, 2012]

§ 1.167(a)–5 Apportionment of basis.

In the case of the acquisition on or after March 1, 1913, of a combination of depreciable and nondepreciable property for a lump sum, as for example, buildings and land, the basis for depreciation cannot exceed an amount which bears the same proportion to the lump sum as the value of the depreciable property at the time of acquisition bears to the value of the entire property at that time. In the case of property which is subject to both the allowance for depreciation and amortization, depreciation is allowable only with respect to the portion of the depreciable property which is not subject to the allowance for amortization and may be taken concurrently with the allowance for amortization. After the close of the amortization period or after amortization deductions have been discontinued with respect to any such property, the unrecovered cost or other basis of the depreciable portion of such property will be subject to depreciation. For adjustments to basis, see section 1016 and other applicable provisions of law. For the adjustment to the basis of a structure in the case of a donation of a qualified conservation contribution under section 170(h), see §1.170A–14(h)(3)(iii).

[T.D. 6500, 25 FR 11402, Nov. 26, 1960; 25 FR 14021, Dec. 21, 1960, as amended by T.D. 8069, 51 FR 1498, Jan. 14, 1986]

§ 1.167(a)–5T Application of section 1060 to section 167 (temporary).

In the case of an acquisition of a combination of depreciable and nondepreciable property for a lump sum in an applicable asset acquisition to which section 1060 applies, the basis for depreciation of the depreciable property cannot exceed the amount of consideration allocated to that property under section 1060 and §1.1060–1T.

[T.D. 8215, 53 FR 27043, July 18, 1988]

§ 1.167(a)–6 Depreciation in special cases.

(a) *Depreciation of patents or copyrights.* The cost or other basis of a patent or copyright shall be depreciated over its remaining useful life. Its cost to the patentee includes the various Government fees, cost of drawings, models, attorneys' fees, and similar expenditures. For rules applicable to research and experimental expenditures, see sections 174 and 1016 and the regulations thereunder. If a patent or copyright becomes valueless in any year before its expiration the unrecovered cost or other basis may be deducted in that year. See §1.167(a)–14(c)(4) for depreciation of a separately acquired interest in a patent or copyright described in section 167(f)(2) acquired after January 25, 2000. See §1.197–2 for amortization of interests in patents and copyrights that constitute amortizable section 197 intangibles.

(b) *Depreciation in case of farmers.* A reasonable allowance for depreciation may be claimed on farm buildings (except a dwelling occupied by the owner), farm machinery, and other physical property but not including land. Livestock acquired for work, breeding, or dairy purposes may be depreciated unless included in an inventory used to determine profits in accordance with section 61 and the regulations thereunder. Such depreciation should be determined with reference to the cost or other basis, salvage value, and the estimated useful life of the livestock. See also section 162 and the regulations thereunder relating to trade or business expenses, section 165 and the regulations thereunder relating to losses of farmers, and section 175 and the regulations thereunder relating to soil or water conservation expenditures.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960; 25 FR 14021, Dec. 21, 1960, as amended by T.D. 8867, 65 FR 3825, Jan. 25, 2000]

§ 1.167(a)–7 Accounting for depreciable property.

(a) Depreciable property may be accounted for by treating each individual item as an account, or by combining two or more assets in a single account. Assets may be grouped in an account in a variety of ways. For example, assets similar in kind with approximately the same useful lives may be grouped together. Such an account is commonly known as a group account. Another appropriate grouping might consist of assets segregated according to use without regard to useful life, for example, machinery and equipment, furniture and fixtures, or transportation equipment. Such an account is commonly known as a classified account. A broader grouping, where assets are included in the same account regardless of their character or useful lives, is commonly referred to as a composite account. For example, all the assets used in a business may be included in a single account. Group, classified, or composite accounts may be further broken down on the basis of location, dates of acquisition, cost, character, use, etc.

(b) When group, classified, or composite accounts are used with average useful lives and a normal retirement occurs, the full cost or other basis of the asset retired, unadjusted for depreciation or salvage, shall be removed from the asset account and shall be charged to the depreciation reserve. Amounts representing salvage ordinarily are credited to the depreciation reserve. Where an asset is disposed of for reasons other than normal retirement, the full cost or other basis of the asset shall be removed from the asset account, and the depreciation reserve shall be charged with the depreciation applicable to the retired asset. For rules with respect to losses on normal retirements, see § 1.167 (a)–8.

(c) A taxpayer may establish as many accounts for depreciable property as he desires. Depreciation allowances shall be computed separately for each account. Such depreciation preferably should be recorded in a depreciation reserve account; however, in appropriate cases it may be recorded directly in the asset account. Where depreciation reserves are maintained, a separate reserve account shall be maintained for each asset account. The regular books of account or permanent auxiliary records shall show for each account the basis of the property, including adjustments necessary to conform to the requirements of section 1016 and other provisions of law relating to adjustments to basis, and the depreciation allowances for tax purposes. In the event that reserves for book purposes do not correspond with reserves maintained for tax purposes, permanent auxiliary records shall be maintained with the regular books of accounts reconciling the differences in depreciation for tax and book purposes because of different methods of depreciation, bases, rates, salvage, or other factors. Depreciation schedules filed with the income tax return shall show the accumulated reserves computed in accordance with the allowances for income tax purposes.

(d) In classified or composite accounts, the average useful life and rate shall be redetermined whenever additions, retirements, or replacements substantially alter the relative proportion of types of assets in the accounts. See example (2) in paragraph (b) of § 1.167(b)–1 for method of determining the depreciation rate for a classified or composite account.

(e) *Applicability*. [Reserved] For further guidance, see § 1.167(a)–7T(e).

(f) *Effective/applicability date*. [Reserved] For further guidance, see §1.167(a)–7T(f).

(g) *Expiration date*. [Reserved] For further guidance, see §1.167(a)–7T(g).

[T.D. 6500, 25 FR 11402, Nov. 26, 1960; 25 FR 14021, Dec. 21, 1960, as amended by T.D. 9564, 76 FR 81085, Dec. 27, 2011]

§ 1.167(a)–7T Accounting for depreciable property (temporary).

(a) through (d) [Reserved] For further guidance, see §1.167(a)–7(a) through (d).

(e) *Applicability*. Paragraphs (a), (b), and (d) of this section apply to property for which depreciation is determined under section 167 (but not under section 168, section 1400I, section 1400L(c), section 168 prior to its amendment by the Tax Reform Act of 1986 (100 Stat. 2121), or under an additional first year depreciation deduction provision of the Internal Revenue Code (for example, section 168(k) through (n), 1400L(b), or 1400N(d))). Paragraph (c) of this section does not apply to general asset accounts as provided by section 168(i)(4) and §1.168(i)–1T.

(f) *Effective/applicability date*—(1) *In general*. This section applies to taxable years beginning on or after January 1, 2014. Section 1.167(a)–7 as contained in 26 CFR part 1 edition revised as of April 1, 2011, applies to taxable years beginning before January 1, 2014.

(2) *Optional early application*. A taxpayer may choose to apply this section to taxable years beginning on or after January 1, 2012.

(g) *Expiration date*. The applicability of this section expires on December 23, 2014.

[T.D. 9564, 76 FR 81085, Dec. 27, 2011, as amended at 77 FR 74584, Dec. 17, 2012]

§ 1.167(a)–8 Retirements.

(a) *Gains and losses on retirements*. For the purposes of this section the term ''retirement'' means the permanent withdrawal of depreciable property from use in the trade or business or in the production of income. The withdrawal may be made in one of several ways. For example, the withdrawal may be made by selling or exchanging the asset, or by actual abandonment. In addition, the asset may be withdrawn from such productive use without disposition as, for example, by being placed in a supplies or scrap account. The tax consequences of a retirement depend upon the form of the transaction, the reason therefor, the timing of the retirement, the estimated useful life used in computing depreciation, and whether the asset is accounted for in a separate or multiple asset account. Upon the retirement of assets, the rules in this section apply in determining whether gain or loss will be recognized, the amount of such gain or loss, and the basis for determining gain or loss:

(1) Where an asset is retired by sale at arm's length, recognition of gain or loss will be subject to the provisions of sections 1002, 1231, and other applicable provisions of law.

(2) Where an asset is retired by exchange, the recognition of gain or loss will be subject to the provisions of sections 1002, 1031, 1231, and other applicable provisions of law.

(3) Where an asset is permanently retired from use in the trade or business or in the production of income but is not disposed of by the taxpayer or physically abandoned (as, for example, when the asset is transferred to a supplies or scrap account), gain will not be recognized. In such a case loss will be recognized measured by the excess of the adjusted basis of the asset at the time of retirement over the estimated salvage value or over the fair market value at the time of such retirement if greater, but only if—

(i) The retirement is an abnormal retirement, or

(ii) The retirement is a normal retirement from a single asset account (but see paragraph (d) of this section for special rule for item accounts), or

(iii) The retirement is a normal retirement from a multiple asset account in which the depreciation rate was based on the maximum expected life of the longest lived asset contained in the account.

(4) Where an asset is retired by actual physical abandonment (as, for example, in the case of a building condemned as unfit for further occupancy or other use), loss will be recognized measured by the amount of the adjusted basis of the asset abandoned at the time of such abandonment. In order to qualify for the recognition of loss

from physical abandonment, the intent of the taxpayer must be irrevocably to discard the asset so that it will neither be used again by him nor retrieved by him for sale, exchange, or other disposition.

Experience with assets which have attained an exceptional or unusual age shall, with respect to similar assets, be disregarded in determining the maximum expected useful life of the longest lived asset in a multiple asset account. For example, if a manufacturer establishes a proper multiple asset account for 50 assets which are expected to have an average life of 30 years but which will remain useful to him for varying periods between 20 and 40 years, the maximum expected useful life will be 40 years, even though an occasional asset of this kind may last 60 years.

(b) *Definition of normal and abnormal retirements.* For the purpose of this section the determination of whether a retirement is normal or abnormal shall be made in the light of all the facts and circumstances. In general, a retirement shall be considered a normal retirement unless the taxpayer can show that the withdrawal of the asset was due to a cause not contemplated in setting the applicable depreciation rate. For example, a retirement is considered normal if made within the range of years taken into consideration in fixing the depreciation rate and if the asset has reached a condition at which, in the normal course of events, the taxpayer customarily retires similar assets from use in his business. On the other hand, a retirement may be abnormal if the asset is withdrawn at an earlier time or under other circumstances, as, for example, when the asset has been damaged by casualty or has lost its usefulness suddenly as the result of extraordinary obsolescence.

(c) *Basis of assets retired.* The basis of an asset at the time of retirement for computing gain or loss shall be its adjusted basis for determining gain or loss upon a sale or other disposition as determined in accordance with the provisions of section 1011 and the following rules:

(1) In the case of a normal retirement of an asset from a multiple asset account where the depreciation rate is based on average expected useful life, the term ''adjusted basis'' means the salvage value estimated in determining the depreciation deduction in accordance with the provisions in paragraph (c) of §1.167(a)–1.

(2) In the case of a normal retirement of an asset from a multiple asset account on which the depreciation rate was based on the maximum expected life of the longest lived asset in the account, the adjustment for depreciation allowed or allowable shall be made at the rate which would have been proper if the asset had been depreciated in a single asset account (under the method of depreciation used for the multiple asset account) using a rate based upon the maximum expected useful life of that asset, and

(3) In the case of an abnormal retirement from a multiple asset account the adjustment for depreciation allowed or allowable shall be made at the rate which would have been proper had the asset been depreciated in a single asset account (under the method of depreciation used for the multiple asset account) and using a rate based upon either the average expected useful life or the maximum expected useful life of the asset, depending upon the method of determining the rate of depreciation used in connection with the multiple asset account.

(d) *Special rule for item accounts.* (1) As indicated in paragraph (a)(3)(ii) and (iii) of this section, a loss is recognized upon the normal retirement of an asset from a single asset account but a loss on the normal retirement of an asset in a multiple asset account is not allowable where the depreciation rate is based upon the average useful life of the assets in the account. Where a taxpayer with more than one depreciable asset chooses to set up a separate account for each such asset and the depreciation rate is based on the average useful life of such assets (so that he uses the same life for each account), the question arises whether his depreciation deductions in substance are the equivalent of those which would result from the use of multiple asset accounts and, therefore, he should be subject to the rules governing losses on retirements of assets from multiple asset accounts. Where a taxpayer has only a few depreciable assets which he chooses to account for in single asset accounts, particularly where such assets cover a relatively narrow range of lives, it cannot be said in the usual case that the allowance of losses on retirements from such accounts clearly will distort income. This results from the fact that where a taxpayer has only a few depreciable assets it is usually not possible clearly to determine that the depreciation rate is based upon the average useful life of such assets. Accordingly, it cannot be said that the taxpayer is in effect clearly operating with a multiple asset account using an average life rate so that losses should not be allowed on normal retirements. Therefore, losses normally will be allowed upon retirement of assets from single asset accounts where the taxpayer has only a few depreciable assets. On the other hand, when a taxpayer who has only a few depreciable assets chooses to account for them in single asset accounts, using for each account a depreciation rate based on the average useful life of such assets, and the assets cover a wide range of lives, the likelihood that income will be distorted is greater than where the group of assets covers a relatively narrow range of lives. In those cases where the allowance of losses would distort income, the rules with respect to the allowance of losses on normal retirement shall be applied to such assets in the same manner as though the assets had been accounted for in multiple asset accounts using a rate based upon average expected useful life.

(2) Where a taxpayer has a large number of depreciable assets and depreciation is based on the average useful life of such assets, then, whether such assets are similar or dissimilar and regardless of whether they are accounted for in individual asset accounts or multiple asset accounts the allowance of losses on the normal retirement of such assets would distort income. Such distortion would result from the fact that the use of average useful life (and, accordingly, average rate) assumes that while some assets normally will be retired before the expiration of the average life, others normally will be retired after expiration of the average life. Accordingly, if instead of accounting for a large number of similar or dissimilar depreciable assets in multiple asset accounts, the taxpayer chooses to account separately for such assets, using a rate based upon the average life of such assets, the rules with respect to the allowances of losses on normal retirements will be applied to such assets in the same manner as though the assets were accounted for in multiple asset accounts using a rate based upon average expected useful life.

(3) Where a taxpayer who does not have a large number of depreciable assets (and who therefore is not subject to subparagraph (2) of this paragraph) chooses to set up a separate account for each such asset, and has sought to compute an average life for such assets on which to base his depreciation deductions (so that he uses the same life for each account), the allowance of losses on normal retirements from such accounts may in some situations substantially distort income. Such distortion would result from the fact that the use of average useful life (and, accordingly, average rate) assumes that while some assets normally will be retired before expiration of the average life, others normally will be retired after expiration of the average life. Accordingly, where a taxpayer chooses to account separately for such assets instead of accounting for them in multiple asset accounts, and the result is to substantially distort his income, the rules with respect to the allowance of losses on normal retirements shall be applied to such assets in the same manner as though the assets had been accounted for in multiple asset accounts using a rate based upon average expected useful life.

(4) Whenever a taxpayer is treated under this paragraph as though his assets were accounted for in a multiple asset account using an average life rate, and, therefore, he is denied a loss on retirements, the unrecovered cost less salvage of each asset which was accounted for separately may be amortized in accordance with the regulation stated in paragraph (e)(1)(ii) of this section.

(e) *Accounting treatment of asset retirements*. (1) In the case of a normal retirement where under the foregoing rules no loss is recognized and where the asset is retired without disposition or abandonment, (i) if the asset was contained in a multiple asset account, the full cost of such asset, reduced by estimated salvage, shall be charged to the depreciation reserve, or (ii) if the asset was accounted for separately, the unrecovered cost or other basis, less salvage, of the asset may be amortized through annual deductions from gross income in amounts equal to the unrecovered cost or other basis of such asset, divided by the average expected useful life (not the remaining useful life) applicable to the asset at the time of retirement. For example, if an asset is retired after six years of use and at the time of retirement depreciation was being claimed on the basis of an average expected useful life of ten years, the unrecovered cost or other basis less salvage would be amortized through equal annual deductions over a period of ten years from the time of retirement.

(2) Where multiple asset accounts are used and acquisitions and retirements are numerous, if a taxpayer, in order to avoid unnecessarily detailed accounting for individual retirements, consistently follows the practice of charging the reserve with the full cost or other basis of assets retired and of crediting it with all receipts from salvage, the practice may be continued so long as, in the opinion of the Commissioner, it clearly reflects income. Conversely, where the taxpayer customarily follows a practice of reporting all receipts from salvage as ordinary taxable income such practice may be continued so long as, in the opinion of the Commissioner, it clearly reflects income.

(f) *Cross reference*. For special rules in connection with the retirement of the last assets of a given year's acquisitions under the declining balance method, see example (2) in paragraph (b) of § 1.167 (b)–2.

(g) *Applicability*. [Reserved] For further guidance, see § 1.167(a)–8T(g).

(h) *Effective/applicability date*. [Reserved] For further guidance, see § 1.167(a)–8T(h).

(i) [Reserved] For further guidance, see § 1.167(a)–8T(i).

[T.D. 6500, 25 FR 11402, Nov. 26, 1960; 25 FR 14021, Dec. 21, 1960, as amended by T.D. 9564, 76 FR 81085, Dec. 27, 2011]

§ 1.167(a)–8T Retirements (temporary).

(a) through (f) [Reserved] For further guidance, see § 1.167(a)–8(a) through (f).

(g) *Applicability*. This section applies to property for which depreciation is determined under section 167 (but not under section 168, section 1400I, section 1400L(c), section 168 prior to its amendment by the Tax Reform Act of 1986 (100 Stat. 2121), or under an additional first year depreciation deduction provision of the Internal Revenue Code (for example, section 168(k) through (n), 1400L(b), or 1400N(d))).

(h) *Effective/applicability date*—(1) *In general*. This section applies to taxable years beginning on or after January 1, 2014. Section 1.167(a)–8 as contained in 26 CFR part 1 edition revised as of April 1, 2011, applies to taxable years beginning before January 1, 2014.

(2) *Optional early application*. A taxpayer may choose to apply this section to taxable years beginning on or after January 1, 2012.

(i) *Expiration date*. The applicability of this section expires on December 23, 2014.

[T.D. 9564, 76 FR 81085, Dec. 27, 2011, as amended at 77 FR 74584, Dec. 17, 2012]

§ 1.167(a)–9 Obsolescence.

The depreciation allowance includes an allowance for normal obsolescence which should be taken into account to the extent that the expected useful life of property will be shortened by reason thereof. Obsolescence may render an asset economically useless to the taxpayer regardless of its physical condition. Obsolescence is attributable to many causes, including technological improvements and reasonably foreseeable economic changes. Among these causes are normal progress of the arts and sciences, supersession or inadequacy brought about by developments in the industry, products, methods, markets, sources of supply, and other like changes, and legislative or regulatory action. In any case in which the taxpayer shows that the estimated useful life previously used should be shortened by reason of obsolescence greater than had been assumed in computing such estimated useful life, a change to a new and shorter estimated useful life computed in accordance with such showing will be permitted. No such change will be permitted merely because in the unsupported opinion of the taxpayer the property may become obsolete. For rules governing the allowance of a loss when the usefulness of depreciable property is suddenly terminated, see §1.167(a)–8. If the estimated useful life and the depreciation rates have been the subject of a previous agreement, see section 167(d) and §1.167(d)–1.

§1.167(a)–10 When depreciation deduction is allowable.

(a) A taxpayer should deduct the proper depreciation allowance each year and may not increase his depreciation allowances in later years by reason of his failure to deduct any depreciation allowance or of his action in deducting an allowance plainly inadequate under the known facts in prior years. The inadequacy of the depreciation allowance for property in prior years shall be determined on the basis of the allowable method of depreciation used by the taxpayer for such property or under the straight line method if no allowance has ever been claimed for such property. The preceding sentence shall not be construed as precluding application of any method provided in section 167(b) if taxpayer's failure to claim any allowance for depreciation was due solely to erroneously treating as a deductible expense an item properly chargeable to capital account. For rules relating to adjustments to basis, see section 1016 and the regulations thereunder.

(b) The period for depreciation of an asset shall begin when the asset is placed in service and shall end when the asset is retired from service. A proportionate part of one year's depreciation is allowable for that part of the first and last year during which the asset was in service. However, in the case of a multiple asset account, the amount of depreciation may be determined by using what is commonly described as an ''averaging convention'', that is, by using an assumed timing of additions and retirements. For example, it might be assumed that all additions and retirements to the asset account occur uniformly throughout the taxable year, in which case depreciation is computed on the average of the beginning and ending balances of the asset account for the taxable year. See example (3) under paragraph (b) of §1.167(b)–1. Among still other averaging conventions which may be used is the one under which it is assumed that all additions and retirements during the first half of a given year were made on the first day of that year and that all additions and retirements during the second half of the year were made on the first day of the following year. Thus, a full year's depreciation would be taken on additions in the first half of the year and no depreciation would be taken on additions in the second half. Moreover, under this convention, no depreciation would be taken on retirements in the first half of the year and a full year's depreciation would be taken on the retirements in the second half. An averaging convention, if used, must be consistently followed as to the account or accounts for which it is adopted, and must be applied to both additions and retirements. In any year in which an averaging convention substantially distorts the depreciation allowance for the taxable year, it may not be used.

§1.167(a)–11 Depreciation based on class lives and asset depreciation ranges for property placed in service after December 31, 1970.

(a) *In general*—(1) *Summary*. This section provides an asset depreciation range and class life system for determining the reasonable allowance for depreciation of designated classes of assets placed in service after December 31, 1970. The system is designed to minimize disputes between taxpayers and the Internal Revenue Service as to the useful life of property, and as to salvage value, repairs, and other matters. The system is optional with the taxpayer. The taxpayer has an annual election. Generally, an election for a taxable year must apply to all additions of eligible property during the taxable year of election, but does not apply to additions of eligible property in any other taxable year. The taxpayer's election, made with the return for the taxable year, may not be revoked or modified for any property included in the election. Generally, the taxpayer must establish vintage accounts for all eligible property included in the election, must determine the allowance for depreciation of such property in the taxable year of election, and in subsequent taxable years, on the basis of the asset depreciation period selected and must apply the first-year convention specified in the election to determine the allowance for depreciation of such property. This section also contains special provisions for the treatment of salvage value, retirements, and the costs of the repair, maintenance, rehabilitation or improvement of property. In general, a taxpayer may not apply any provision of this section unless he makes an election and thereby consents to, and agrees to apply, all the provisions of this section. A taxpayer who elects to apply this section does, however, have certain options as to the application of specified provisions of this section. A taxpayer may elect to apply this section for a taxable year only if for such taxable year he complies with the requirements of paragraph (f)(4) of this section.

(2) *Definitions.* For the meaning of certain terms used in this section, see paragraphs (b)(2) (''eligible property''), (b)(3) (''vintage account'' and ''vintage''), (b)(4) (''asset depreciation range'', ''asset guideline class'', ''asset guideline period'', and ''asset depreciation period''), (b)(5)(iii)(*c*) (''used property''), (b)(6)(i) (''public utility property''), (c)(1)(iv) (''original use''), (c)(1)(v) (''unadjusted basis'' and ''adjusted basis''), (c)(2)(ii) (''modified half-year convention''), (c)(2)(iii) (''half-year convention''), (d)(1)(i) (''gross salvage value''), (d)(1)(ii) (''salvage value''), (d)(2)(iii) (''repair allowance'', ''repair allowance percentage'', and ''repair allowance property''), (d)(2)(vi) (''excluded addition''), (d)(2)(vii) (''property improvement''), (d)(3)(ii) (''ordinary retirement'' and ''extraordinary retirement''), (d)(3)(vi) (''special basis vintage account''), and (e)(1) (''first placed in service'') of this section.

(b) *Reasonable allowance using asset depreciation ranges*—(1) *In general.* The allowance for depreciation of eligible property (as defined in subparagraph (2) of this paragraph) to which the taxpayer elects to apply this section shall be determined as provided in paragraph (c) of this section and shall constitute the reasonable allowance for depreciation of such property under section 167(a).

(2) *Definition of eligible property.* For purposes of this section, the term ''eligible property'' means tangible property which is subject to the allowance for depreciation provided by section 167(a) but only if—

(i) An asset guideline class and asset guideline period are in effect for such property for the taxable year of election (see subparagraph (4) of this paragraph);

(ii) The property is first placed in service (as described in paragraph (e)(1) of this section) by the taxpayer after December 31, 1970 (but see subparagraph (7) of this paragraph for special rule where there is a mere change in the form of conducting a trade or business); and

(iii) The property is either—

(*a*) Section 1245 property as defined in section 1245(a) (3), or

(*b*) Section 1250 property as defined in section 1250(c).

See, however, subparagraph (6) of this paragraph for special rule for certain public utility property as defined in section 167(l)(3)(A). Property which meets the requirements of this subparagraph is eligible property even if depreciation with respect to such property, determined in accordance with this section, is allocated to or otherwise required to be reflected in the cost of a capitalized item. The term ''eligible property'' includes any property which meets the requirements of this subparagraph, whether such property is new property, ''used property'' (as described in subparagraph (5)(iii)(*c*) of this paragraph), a ''property improvement'' (as described in paragraph (d)(2)(vii) of this section), or an ''excluded addition'' (as described in paragraph (d)(2)(vi) of this section). For the treatment of expenditures for the repair, maintenance, rehabilitation or improvement of certain property, see paragraph (d) (2) of this section.

(3) *Requirement of vintage accounts*—(i) *In general.* For purposes of this section, a ''vintage account'' is a closed-end depreciation account containing eligible property to which the taxpayer elects to apply this section, first placed in service by the taxpayer during the taxable year of election. The ''vintage'' of an account refers to the taxable year during which the eligible property in the account is first placed in service by the taxpayer. Such an account will consist of an asset, or a group of assets, within a single asset guideline class established pursuant to subparagraph (4) of this paragraph and may contain only eligible property. Each item of eligible property to which the taxpayer elects to apply this section, first placed in service by the taxpayer during the taxable year of election (determined without regard to a convention described in paragraph (c)(2) of this section) shall be placed in a vintage account of the taxable year of election. For rule regarding ''special basis vintage accounts'' for certain property improvements, see paragraph (d)(2)(viii) and (3)(vi) of this section. Any number of vintage accounts of a taxable year may be established. More than one account of the same vintage may be established for different assets of the same asset guideline class. See paragraph (d)(3)(xi) of this section for special rule for treatment of certain multiple asset and item accounts.

(ii) *Special rule.* Section 1245 property may not be placed in a vintage account with section 1250 property. Property the original use of which does not commence with the taxpayer may not be placed in a vintage account with property the original use of which commences with the taxpayer. Property described in section 167(f)(2) may not be placed in a vintage account with property not described in section 167(f)(2). Property described in section 179(d)(1) for which the taxpayer elects the allowance for the first taxable year in accordance with section 179(c) may not be placed in a vintage account with property not described in section 179(d)(1) or for which the taxpayer does not elect such allowance for the first taxable year. For special rule for property acquired in a transaction to which section 381(a) applies, see paragraph (e)(3)(i) of this section. For additional rules with respect to accounting for eligible property, see paragraph (e) of this section.

(4) *Asset depreciation ranges and periods*—(i) *Selection of asset depreciation period.* The taxpayers books and records must specify for each vintage account of the taxable year of election—

(*a*) In the case of vintage account for property in an asset guideline class for which no asset depreciation range is in effect for the taxable year, the asset depreciation period (which shall be equal to the asset guideline period for the assets in such account), or

(*b*) In the case of a vintage account for property in an asset guideline class for which an asset depreciation range is in effect for the taxable year, the asset depreciation period selected by the taxpayer from the asset depreciation range for the assets in such account.

Unless otherwise expressly provided in the establishment thereof, for purposes of this section, the term ''asset guideline class'' means a category of assets (including ''subsidiary assets'') for which a separate asset guideline period is in effect for the taxable year as provided in subdivision (ii) of this subparagraph. The ''asset depreciation range'' is a period of years which extends from 80 percent of the asset guideline period to 120 percent of such period, determined in each case by rounding any fractional part of a year to the nearer of the nearest whole or half year. Except as provided in paragraph (e)(3)(iv) of this section, in the case of an asset guideline class for which an asset depreciation range is in effect, any period within the asset depreciation range for the assets in a vintage account which is a whole number of years or a whole number of years plus a half year, may be selected. The term ''asset depreciation period'' means the period selected from the asset depreciation range, or if no asset depreciation range is in effect for the class, the asset guideline period. The ''asset guideline period'' is established in accordance with subdivision (ii) of this subparagraph and is the class life under section 167(m). See Revenue Procedure 72–10 for special rules for section 1250 property and property predominately used outside the United States. In general, an asset guideline period, but no asset depreciation range, is in effect for such property.

(ii) *Establishment of asset guideline classes and periods.* The asset guideline classes and the asset guideline periods, and the asset depreciation ranges determined from such periods, in effect for taxable years ending before the effective date of the first supplemental asset guideline classes, asset guideline periods, and asset depreciation ranges, established pursuant to this section are set forth in Revenue Procedure 72–10. Asset guideline classes and periods, and asset depreciation ranges, will from time to time be established, supplemented, and revised with express reference to this section, and will be published in the Internal Revenue Bulletin. The asset guideline classes, the asset guideline periods, and the asset depreciation ranges determined from such periods in effect as of the last day of a taxable year of election shall apply to all vintage accounts of such taxable year, except that neither the asset guideline period nor the lower limit of the asset depreciation range for any such account shall be longer than the asset guideline period or the lower limit of the asset depreciation range, as the case may be, for such account in effect as of the first day of the taxable year (or as of such later time in such year as an asset guideline class first established during such year becomes effective). Generally, the reasonable allowance for depreciation of property for any taxable year in a vintage account shall not be changed to reflect any supplement or revision of the asset guideline classes or periods, and asset depreciation ranges, for the taxable year in which the account is established, which occurs after the end of such taxable year. However, if expressly provided in such a supplement or revision, the taxpayer may, at his option in the manner specified therein, apply the revised or supplemented asset guideline classes or periods and asset depreciation ranges to such property for such taxable year and succeeding taxable years.

(iii) *Applicable guideline classes and periods in special situations.* (*a*) An electric or gas utility which would in accordance with Revenue Procedure 64–21 be entitled to use a composite guideline class basis for applying Revenue Procedure 62–21 may, solely with respect to property for which an asset depreciation range is in effect for the taxable year, elect to apply this section on the basis of a composite asset guideline class and asset guideline period determined by applying the provisions of Revenue Procedure 64–21 to such property. The asset depreciation range for such a composite asset guideline class shall be determined by reference to the composite asset guideline period at the beginning of the first taxable year to which the taxpayer elects to apply this section and shall not be changed until such time as major variations in the asset mix or the asset guideline classes or periods justify some other composite asset guideline period. Except as provided in paragraph (d)(2)(iii) of this section with respect to buildings and other structures, for the purposes of this section, all property in the composite asset guideline class shall be treated as included in a single asset guideline class. If the taxpayer elects to apply this subdivision, the election shall be made on the tax return filed for the first taxable year for which the taxpayer elects to apply this section. An election to apply this subdivision for any taxable year shall apply to all succeeding taxable years to which the taxpayer elects to apply this section, except to the extent the election to apply this subdivision is with the consent of the Commissioner terminated with respect to a succeeding taxable year and all taxable years thereafter.

(*b*) For purposes of this section, property shall be included in the asset guideline class for the activity in which the property is primarily used. See paragraph (e)(3)(iii) of this section for rule for leased property. Property shall be classified according to primary use even though the activity in which such property is primarily used is insubstantial in relation to all the taxpayer's activities. No change in the classification of property shall be made because of a change in primary use after the end of the taxable year in which property is first placed in service, including a change in use which results in section 1250 property becoming section 1245 property.

(*c*) An incorrect classification or characterization by the taxpayer of property for the purposes of this section (such as under (*b*) of this subdivision or under subparagraph (2) or (3)(ii) of this paragraph) shall not cause or permit a revocation of the election to apply this section for the taxable year in which such property was first placed in service. The classification or characterization of such property shall be corrected. All adjustments necessary to the correction shall be made, including adjustments of unadjusted basis, adjusted basis, salvage value, the reserve for depreciation of all vintage accounts affected, and the amount of depreciation allowable for all taxable years for which the period for assessment of tax prescribed in section 6501 has not expired. If because of incorrect classification or characterization property included in an election to apply this section was not placed in a vintage account and no asset depreciation period was selected for the property or the property was placed in a vintage account but an asset depreciation period was selected from an incorrect asset depreciation range, the taxpayer shall place the property in a vintage account and select an asset depreciation period for the account from the correct asset depreciation range.

(*d*) Generally, except as provided in subparagraph (5)(v)(*a*) of this paragraph, a taxpayer may not compute depreciation for eligible property first placed in service during the taxable year under a method of depreciation not described in section 167(b) (1), (2), or (3). (If the taxpayer computes depreciation with respect to such property under section 167(k), or amortizes such property, the property must be excluded from the election to apply this section.) (See subparagraph (5)(v)(*b*) of this paragraph.) However, if the taxpayer establishes to the satisfaction of the Commissioner that a method of depreciation not described in section 167(b) (1), (2), (3), or (k) was adopted for property in the asset guideline class on the basis of a good faith mistake as to the proper asset guideline class for the property, then, unless the requirements of subparagraph (5)(v)(*a*) of this paragraph are met, the taxpayer must terminate (as of the beginning of the taxable year) such method of depreciation with respect to all eligible property in the asset guideline class which was first placed in service during the taxable year. In such event, the taxpayer's election to apply this section shall include eligible property in the asset guideline class without regard to subparagraph (5)(v)(*a*) of this paragraph. The provisions of (*c*) of this subdivision shall apply to the correction in the classification of the property.

(*e*) If the provisions of section 167(j) apply to require a change in the method of depreciation with respect to an item of section 1250 property in a multiple asset vintage account, the asset shall be removed from the account and placed in a separate item vintage account. The unadjusted basis of the asset shall be removed from the unadjusted basis of the vintage account as of the first day of the taxable year in which the change in method of depreciation is required and the depreciation reserve established for the account shall be reduced by the depreciation allowable for the property computed in the manner prescribed in paragraph (c)(1)(v)(*b*) of this section for determination of the adjusted basis of property. See paragraph (d)(3)(vii)(*e*) of this section for treatment of salvage value when property is removed from a vintage account.

(iv) *Examples.* The principles of this subparagraph may be illustrated by the following examples:

Example 1. Corporation X purchases a bulldozer for the use in its construction business. The bulldozer is first placed in service in 1972. Since the bulldozer is tangible property for which an asset guideline class and period have been established, the bulldozer is eligible property. The bulldozer is in asset guideline class 15.1 of Revenue Procedure 72–10, and the asset depreciation range is 4–6 years.

Example 2. In 1972, corporation Y first places in service a factory building. Since the factory building is tangible property for which an asset guideline class and period have been established, it is eligible property.

The factory building is in asset guideline class 65.11 of Revenue Procedure 72–10. Since no asset depreciation range is in effect for the asset guideline class, the asset depreciation period is the asset guideline period of 45 years. (See subparagraph (5)(vi) of this paragraph for election to exclude certain section 1250 property during transition period.)

Example 3. In January of 1971, corporation Y, a calendar year taxpayer, pays or incurs $2,000 for the rehabilitation and improvement of machine A which was first placed in service in 1969. On January 1, 1971, corporation Y first placed in service machines B and C, each with an unadjusted basis of $10,000. Machines B and C are eligible property. Machine A would be eligible property but for the fact it was first placed in service prior to January 1, 1971 (that is, machine A is eligible property determined without regard to subparagraph (2)(ii) of this paragraph). Corporation Y elects to apply this section for the taxable year, and adopts the modified half-year convention described in paragraph (c)(2)(ii) of this section, but does not elect to apply the asset guideline class repair allowance described in paragraph (d)(2)(iii) of this section. Machines A, B, and C are in asset guideline class 24.4 under Revenue Procedure 72–10 for which the asset depreciation range is 8 to 12 years. The $2,000 expended on machine A substantially increases its capacity and is a capital expenditure under sections 162 and 263. The $2,000 is a property improvement (as defined in paragraph (d)(2)(vii)(*b*) of this section) which is eligible property. However, corporation Y by mistake treats the property improvement of $2,000 as a deductible repair. Also by mistake, corporation Y includes machine B in asset guideline class 24.3 under Revenue Procedure 72–10 for which the asset depreciation range is 5 to 7 years. Corporation Y establishes vintage accounts for 1971, and computes depreciation for 1971 and 1972 as follows:

	Dec. 31, 1972, reserve for depreciation	Dec. 31, 1972, adjusted basis
Vintage account for machine B, with an asset depreciation period of 5 years and an unadjusted basis of $10,000 for which corporation Y adopts the straight line method	$4,000	$6,000
Vintage account for machine C, with an asset depreciation period of 8 years and an unadjusted basis of $10,000 for which corporation Y adopts the straight line method	2,500	7,500

After audit in 1973 of corporation Y's taxable years 1971 and 1972, it is determined that the $2,000 paid in 1971 for the rehabilitation and improvement of machine A is a capital expenditure and that machine B is in asset guideline class 24.4. The incorrect classification is corrected. Corporation Y places machine B and the property improvement in a vintage account of 1971 and on its tax return filed for 1973 selects an asset depreciation period of 8 years for that account. Giving effect to the correction in classification of the property in accordance with subdivision (iii)(*c*) of this subparagraph, at the end of 1972 the unadjusted basis, reserve for depreciation, and adjusted basis of the vintage account for machine B and the property improvement with respect to machine A are $12,000, $3,000, and $9,000, respectively. Corporation Y's deduction of the $2,000 property improvement in 1971 as a repair expense under section 162 is disallowed. For 1971 and 1972 depreciation deductions are disallowed in the amount of $500 each year (that is, $750 excess annual depreciation on machine B minus $250 annual depreciation on the property improvement).

Example 4. (a) In 1971, Corporation X, a calendar year taxpayer, first places in service machines A through M, all of which are eligible property. All the machines except machine A are in asset guideline class 24.3 under Revenue Procedure 72–10. Machine A is in asset guideline class 24.4 under Revenue Procedure 72–10. Machine B has an unadjusted basis equal to 80 percent of the total unadjusted basis of machines B through M. By good faith mistake as to proper classification, corporation X includes both machine A and machine B in asset guideline class 24.4. Corporation X consistently uses the machine hour method of depreciation on all property in asset guideline class 24.4, and for 1971 computes depreciation for machines A and B under that method. Corporation X elects to apply this section for 1971 on the assumption that the election includes machines C through M which are in asset guideline class 24.3. In 1973, upon audit of corporation X's taxable years 1971 and 1972, it is determined that machine B is included in asset guideline class 24.3 and that since for 1971 corporation X computed depreciation on machine B under the machine hour method, in accordance with subparagraph (5)(v)(*a*) of this paragraph, all property in asset guideline class 24.3 (machines B through M) is excluded from corporation X's election to apply this section for 1971. Although corporation X has consistently used the machine hour method for asset guideline class 24.4, corporation X has not in the past used the machine hour method for machines of the type and function of machines C through M which are in asset guideline class 24.3. Both machine A and machine B are used in connection with the manufacture of wood products. There is reasonable basis for corporation X having assumed that machine B is in asset guideline class 24.4 along with machine

A to which it is similar. Corporation X establishes to the satisfaction of the Commissioner that it used the machine hour method for machine B on the basis of a good faith mistake as to the proper classification of the machine. Corporation X may, at its option (see subparagraph (5)(v) of this paragraph), terminate the machine hour method of depreciation for machine B as of the beginning of 1971, and in that event corporation X's election to apply this section for 1971 will apply to machines B through M without regard to subparagraph (5)(v)(*a*) of this paragraph. The adjustments provided in subdivision (iii)(*c*) of this subparagraph will be made as a result of the correction in classification of property. If corporation X does not terminate the machine hour method with respect to machine B, machines B through M must be excluded from the election to apply this section (see subparagraph (5)(v) of this paragraph).

(*b*) The facts are the same as in (*a*) of this example except that machine B has an unadjusted basis equal to only 65 percent of the total unadjusted basis of machines B through M.

In this case, corporation X must either terminate the machine hour method of depreciation with respect to asset B (since the provisions of subparagraph (5)(v) of this paragraph do not permit the exclusion of the property from the election to apply this section) or otherwise comply with the provisions of subparagraph (5)(v) of this paragraph. (See paragraph (c)(1)(iv) for limitation on methods which may be adopted for property included in the election to apply this section.)

(5) *Requirements of election*—(i) *In general.* Except as otherwise provided in paragraph (d)(2) of this section dealing with expenditures for the repair, maintenance, rehabilitation or improvement of certain property, no provision of this section shall apply to any property other than eligible property to which the taxpayer elects in accordance with this section, to apply this section. For the time and manner of election, and certain conditions to an election, see paragraph (f) of this section. Except as otherwise provided in subparagraph (4)(iii) of this paragraph, subdivision (v) of this subparagraph and in subparagraph (6)(iii) of this paragraph, a taxpayer's election to apply this section may not be revoked or modified after the last day prescribed for filing the election. Thus, for example, after such day, a taxpayer may not cease to apply this section to property included in the election, establish different vintage accounts for the taxable year of election, select a different period from the asset depreciation range for any such account, or adopt a different first-year convention for any such account.

(ii) *Property required to be included in election.* Except as otherwise provided in subdivision (iii) of this subparagraph dealing with certain ''used property'', in subdivision (iv) of this subparagraph dealing with ''section 38 property'', in subdivision (v) of this subparagraph dealing with property subject to special depreciation or amortization, in subdivision (vi) of this subparagraph dealing with certain section 1250 property, in subdivision (vii) of this subparagraph dealing with certain subsidiary assets, and in paragraph (e)(3) (i) and (iv) of this section dealing with transactions to which section 381(a) applies, if the taxpayer elects to apply this section to any eligible property first placed in service by the taxpayer during the taxable year of election, the election shall apply to all such eligible property, whether placed in service in a trade or business or held for production of income.

(iii) *Special 10 percent used property rule.* (*a*) If (*1*) the unadjusted basis of eligible used section 1245 property (as defined in (*c*) of this subdivision) first placed in service by the taxpayer during the taxable year of election, for which no specific used property asset guideline class (as defined in (*c*) of this subdivision) is in effect for the taxable year, exceeds (*2*) 10 percent of the unadjusted basis of all eligible section 1245 property first placed in service during the taxable year of election, the taxpayer may exclude all (but not less than all) the property described in (*a*)(*1*) of this subdivision from the election to apply this section.

(*b*) If (*1*) the unadjusted basis of eligible used section 1250 property first placed in service by the taxpayer during the taxable year of election, for which no specific used property asset guideline class is in effect for the taxable year, exceeds (*2*) 10 percent of the unadjusted basis of all eligible section 1250 property first placed in service during the taxable year of election, the taxpayer may exclude all (but not less than all) the property described in (*b*)(*1*) of this subdivision from the election to apply this section.

(*c*) For the purposes of this section, the term ''used property'' means property the original use of which does not commence with the taxpayer. Solely for the purpose of determining whether the 10 percent rule of this subdivision is satisfied, (*1*) eligible used property first placed in service during the taxable year and excluded from the election to apply this section pursuant to subdivision (v)(*a*) of this subparagraph and (*2*) eligible property acquired during the taxable year in a transaction to which section 381(a) applies, shall all be treated as used property regardless of whether such property would be treated as new property under section 167(c) and the regulations thereunder. The term ''specific used property asset guideline class'' means a class established in accordance with subparagraph (4) of this paragraph solely for used property primarily used in connection with the activity to which the class relates.

(iv) *Property subject to investment tax credit.* The taxpayer may exclude from an election to apply this section all, or less than all, units of eligible property first placed in service during the taxable year which is—

(*a*) ''Section 38 property'' as defined in section 48(a) which meets the requirements of section 49 and which is not property described in section 50, or

(*b*) Property to which section 47(a)(5)(B) applies which would be section 38 property but for section 49 and which is placed in service to replace section 38 property (other than property described in section 50) disposed of prior to August 15, 1971.

(v) *Property subject to special method of depreciation or authorization.* (*a*) In the case of eligible property first placed in service in a taxable year of election (and not otherwise properly excluded from an election to apply this section) the taxpayer may not compute depreciation for any of such property in the asset guideline class under a method not described in section 167(b) (1), (2), (3), or (k) unless he (*1*) computes depreciation under a method or methods not so described for eligible property first placed in service in the taxable year in the asset guideline class with an unadjusted basis at least equal to 75 percent of the unadjusted basis of all eligible property first placed in service in the taxable year in the asset guideline class and (*2*) agrees to continue to depreciate such property under such method or methods until the consent of the Commissioner is obtained to a change in method. The consent of the Commissioner must be obtained by filing Form 3115 with the Commissioner of Internal Revenue, Washington, D.C. 20224, within the first 180 days of the taxable year for which the change is desired. If for the taxable year of election the taxpayer computes depreciation under any method not described in section 167(b) (1), (2), (3), or (k) for any eligible property (other than property otherwise properly excluded from an election to apply this section) first placed in service during the taxable year, an election to apply this section for the taxable year shall not include such property or any other eligible property in the same asset guideline class as such property. With respect to a taxable year beginning before January 1, 1973, if the taxpayer has adopted a method of depreciation which is not permitted under this subdivision, the taxpayer may under this section adopt a method of depreciation permitted under this subdivision or otherwise comply with the provisions of this subdivision.

(*b*) An election to apply this section shall not include eligible property for which, for the taxable year of election, the taxpayer computes depreciation under section 167(k), or computes amortization under section 169, 184, 185, 187, 188, or paragraph (b) of §1.162–11. If the taxpayer has elected to apply this section to eligible property described in section 167(k), 169, 184, 185, or 187 and the taxpayer thereafter computes depreciation or amortization for such property for any taxable year in accordance with section 167(k), 169, 184, 185, or 187, then the election to apply this section to such property shall terminate as of the beginning of the taxable year for which depreciation or amortization is computed under such section. Application of this section to the property for any period prior to the termination date will not be affected by the termination. The unadjusted basis of the property shall be removed as of the termination date from the unadjusted basis of the vintage account. The depreciation reserve established for the account shall be reduced by the depreciation allowable for the property, computed in the manner prescribed in paragraph (c)(1)(v)(*b*) of this section for determination of the adjusted basis of the property. See paragraph (d)(3)(vii)(*e*) of this section for treatment of salvage value when property is removed from a vintage account.

(vi) *Certain section 1250 property.* (*a*) The taxpayer may exclude from an election to apply this section all, or less than all, items of eligible section 1250 property first placed in service during the taxable year of election provided that—

(*1*) The item is first placed in service before the earlier of the effective date of the first supplemental asset guideline class including such property established in accordance with subparagraph (4)(ii) of this paragraph, or January 1, 1974, and

(*2*) The taxpayer establishes that a useful life shorter than the asset guideline period in effect on January 1, 1971, for such item of property is justified for such taxable year.

A useful life shorter than the asset guideline period in effect on January 1, 1971, will be considered justified only if such life is justified in accordance with the provisions of Revenue Procedure 62–21 (including all modifications, amendments or supplements thereto as of January 1, 1971), determined without application of the minimal adjustment rule in section 4, part II, of Revenue Procedure 65–13. If an item of section 1250 property is excluded from an election to apply this section pursuant to this subdivision, any elevator or escalator which is a part of such item shall also be excluded from the election.

(*b*) If the taxpayer excludes an item of section 1250 property from an election to apply this section in accordance with this subdivision, the useful life justified under Revenue Procedure 62–21 in accordance with this subdivision for the taxable year of exclusion will be treated as justified for such item of section 1250 property for the taxable year of the exclusion and all subsequent taxable years.

(vii) *Subsidiary assets.* The taxpayer may exclude from an election to apply this section all (but not less than all) subsidiary assets first placed in service during the taxable year of election in an asset guideline class, provided that—

(*a*) The unadjusted basis of eligible subsidiary assets first placed in service during the taxable year in the class is as much as 3 percent of the unadjusted basis of all eligible property first placed in service during the taxable year in the class, and

(*b*) Such subsidiary assets are first placed in service by the taxpayer before the earlier of (*1*) the effective date of the first supplemental asset guideline class including such subsidiary assets established in accordance with subparagraph (4)(ii) of this paragraph, or (*2*) January 1, 1974.

For purposes of this subdivision the term ''subsidiary assets'' includes jigs, dies, molds, returnable containers, glassware, silverware, textile mill cam assemblies, and other equipment included in group 1, class 5, of Revenue Procedure 62–21. which is usually and property accounted for separately from other property and under a method of depreciation not expressed in terms of years.

(6) *Special rule for certain public utility property*—(i) *Requirement of normalization in certain cases.* Under section 167(1), in the case of public utility property (as defined in section 167(1)(3)(A)), if the taxpayer—

(*a*) Is entitled to use a method of depreciation other than a ''subsection (1) method'' of depreciation (as defined in section 167(1)(3)(F)) only if it uses the ''normalization method of accounting'' (as defined in section 167(1)(3)(G)) with respect to such property, or

(*b*) Is entitled for the taxable year to use only a ''subsection (1) method'' of depreciation, such property shall be eligible property (as defined in subparagraph (2) of this paragraph) only if the taxpayer normalizes the tax deferral resulting from the election to apply this section.

(ii) *Normalization.* The taxpayer will be considered to normalize the tax deferral resulting from the election to apply this section only if it computes its tax expense for purposes of establishing its cost of service for ratemaking purposes and for reflecting operating results in its regulated books of account using a period for depreciation no less than the lesser of—

(*a*) 100 percent of the asset guideline period in effect in accordance with subparagraph (4)(ii) of this paragraph for the first taxable year to which this section applies, or

(*b*) The period for computing its depreciation expense for ratemaking purposes and for reflecting operating results in its regulated books of account, and makes adjustments to a reserve to reflect the deferral of taxes resulting from the election to apply this section. A determination whether the taxpayer is considered to normalize (within the meaning of the preceding sentence) the tax deferral resulting from the election to apply this section shall be made in a manner consistent with the principles for determining whether a taxpayer is using the ''normalization method of accounting'' (within the meaning of section 167(1)(3)(G)). [Removed] See § 1.167(1)–1(h).

(iii) *Failure to normalize.* If a taxpayer, which has elected to apply this section to any eligible public utility property and is required under subdivision (i) of this subparagraph to normalize the tax deferral resulting from the election to apply this section to such property, fails to normalize such tax deferral, the election to apply this section to such property shall terminate as of the beginning of the taxable year for which the taxpayer fails to normalize such tax deferral. Application of this section to such property for any period prior to the termination date will not be affected by the termination. The unadjusted basis of the property shall be removed as of the termination date from the unadjusted basis of the vintage account. The depreciation reserve established for the account shall be reduced by the depreciation allowable for the property, computed in the manner prescribed in paragraph (c)(1)(v)(*b*) of this section for determination of the adjusted basis of the property. See paragraph (d)(3)(vii)(*e*) of this section for treatment of salvage value when property is removed from a vintage account.

(iv) *Examples.* The principles of this subparagraph may be illustrated by the following examples:

Example 1. Corporation A is a gas pipeline company, subject to the jurisdiction of the Federal Power Commission, which is entitled under section 167(1) to use a method of depreciation other than a ''subsection (1) method'' of depreciation (as defined in section 167(1) (3) (F)) only if it uses the ''normalization method of accounting'' (as defined in section 167(1)(3)(G)). Corporation A elects to apply this section for 1972 with respect to all eligible property. In 1972, corporation A places in service eligible property with an unadjusted basis of $2 million. One hundred percent of the asset guideline period for such property is 22 years and the asset depreciation range is from 17.5 years to 26.5 years. The taxpayer uses the double declining balance method of depreciation, selects an asset depreciation period of 17.5 years and applies the half-year convention (described in paragraph (c)(2)(iii) of this section). The depreciation allowable under this section with respect to such property in 1972 is $114,285. The taxpayer will be considered to normalize the tax deferral resulting from the election to apply this section and to use the ''normalization method of accounting'' (within the meaning of section 167(1)(3)(G)) if it computes its tax expense for purposes of determining its cost of service for rate making purposes and for reflecting operating results in its regulated books of account using a ''subsection (1) method'' of depreciation, such as the straight line method, determined by using a depreciation period of 22 years (that is, 100 percent of the asset guideline period). A depreciation allowance computed in this manner is $45,454. The difference in the amount determined under this section ($114,285) and the amount used in computing its tax expense for purposes of estimating its cost of service for rate making purposes and for reflecting operating results in its regulated books of account ($45,454) is $68,831. Assuming a tax rate of 48 percent, the deferral of taxes resulting from an election to apply this section and using a different method of depreciation for tax purposes from that used for establishing its cost of service for rate making purposes and for reflecting operating results in its regulated books of account is 48 percent of $68,831, or $33,039, which amount should be added to a reserve to reflect the deferral of taxes resulting from the election to apply this section and from the use of a different method of depreciation in computing the allowance for depreciation under section 167 from that used in computing its depreciation expense for purposes of establishing its cost of service for rate making purposes and for reflecting operating results in its regulated books of account.

Example 2. Corporation B, a telephone company subject to the jurisdiction of the Federal Communications Commission used a "flow-through method of accounting" (as defined in section 167(1)(3)(H)) for its "July 1969 accounting period" (as defined in section 167(1)(3)(I)) with respect to all of its pre-1970 public utility property and did not make an election under section 167(1)(4)(A). Thus, corporation B is entitled under section 167(1) to use a method of depreciation other than a "subsection (1) method" with respect to certain property without using the "normalization method of accounting." In 1972, corporation B makes an election to apply this section with respect to all eligible property. Corporation B is not required to normalize the tax deferral resulting from the election to apply this section in the case of property for which it is not required to use the "normalization method of accounting" under section 167(1).

Example 3. Assume the same facts as in example (2) except that corporation B made a timely election under section 167(1)(4)(A) that section 167(1)(2)(C) not apply with respect to property which increases the productive or operational capacity of the taxpayer. Corporation B must normalize the tax deferral resulting from the election to apply this section with respect to such property.

(7) *Mere change in form of conducting a trade or business.* Property which was first placed in service by the transferor before January 1, 1971, shall not be eligible property if such property is first placed in service by the transferee after December 31, 1970, by reason of a mere change in the form of conducting a trade or business in which such property is used. A mere change in the form of conducting a trade or business in which such property is used will be considered to have occurred if—

(i) The transferor (or in a case where the transferor is a partnership, estate, trust, or corporation, the partners, beneficiaries, or shareholders) of such property retains a substantial interest in such trade or business, or

(ii) The basis of such property in the hands of the transferee is determined in whole or in part by reference to the basis of such property in the hands of the transferor.

For purposes of this subparagraph, a transferor (or in a case where the transferor is a partnership, estate, trust, or corporation, the partners, beneficiaries, or shareholders) shall be considered as having retained a substantial interest in the trade or business only if, after the change in form, his (or their) interest in such trade or business is substantial in relation to the total interest of all persons in such trade or business. This subparagraph shall apply to property first placed in service prior to January 1, 1971, held for the production of income (within the meaning of section 167(a)(2)) as well as to property used in a trade or business. The principles of this subdivision may be illustrated by the following examples:

Example 1. Corporation X and corporation Y are includible corporations in an affiliated group as defined in section 1504(a). In 1971 corporation X sells property to corporation Y for cash. The property would meet the requirements of subparagraph (2) of this paragraph for eligible property except that it was first placed in service by corporation X in 1970. After the transfer, the property is first placed in service by corporation Y in 1971. The property is not eligible property because of the mere change in the form of conducting a trade or business.

Example 2. In 1971, in a transaction to which section 351 applies, taxpayer B transfers to corporation W property which would meet the requirements of subparagraph (2) of this paragraph for eligible property except that the property was first placed in service by B in 1969. Corporation W first places the property in service in 1971. The property is not eligible property because of the mere change in the form of conducting a trade or business.

(c) *Manner of determining allowance*—(1) *In general*—(i) *Computation of allowance.* (*a*) The allowance for depreciation of property in a vintage account shall be determined in the manner specified in this paragraph by using the method of depreciation adopted by the taxpayer for the account and a rate based upon the asset depreciation period for the account. (For limitations on methods of depreciation permitted with respect to property, see section 167 (c) and (j) and subdivision (iv) of this subparagraph.) In applying the method of depreciation adopted by the taxpayer, the annual allowance for depreciation of a vintage account shall be determined without adjustment for the salvage value of the property in such account except that no account may be depreciated below the reasonable salvage value of the account. (For rules regarding estimation and treatment of salvage value, see paragraph (d)(1) and (3) (vii) and (viii) of this section.) Regardless of the method of depreciation adopted by the taxpayer, the depreciation allowable for a taxable year with respect to a vintage account may not exceed the amount by which (as of the beginning of the taxable year) the unadjusted basis of the account exceeds (*1*) the reserve for depreciation established for the account plus (*2*) the salvage value of the account. The unadjusted basis of a vintage account is defined in subdivision (v) of this subparagraph. The adjustments to the depreciation reserve are described in subdivision (ii) of this subparagraph.

(*b*) The annual allowance for depreciation of a vintage account using the straight line method of depreciation shall be determined by dividing the unadjusted basis of the vintage account (without reduction for salvage value) by the number of years in the asset depreciation period selected for the account. See subdivision (iii)(*b*) of this subparagraph for the manner of computing the depreciation allowance following a change from the declining balance method or the sum of the years-digits method to the straight line method.

(*c*) In the case of the sum of the years-digits method, the annual allowance for depreciation of a vintage account shall be computed by multiplying the unadjusted basis of the vintage account (without reduction for salvage value) by a fraction, the numerator of which changes each year to a number which corresponds to the years remaining in the asset depreciation period for the account (including the year for which the allowance is being computed) and the denominator of which is the sum of all the year's digits corresponding to the asset depreciation period for the account. See subdivision (iii)(*c*) of this subparagraph for the manner of computing the depreciation allowance following a change from the declining balance method to the sum of the years-digits method.

(*d*) The annual allowance for depreciation of a vintage account using a declining balance method is determined by applying a uniform rate to the excess of the unadjusted basis of the vintage account over the depreciation reserve established for that account. The rate under the declining balance method may not exceed twice the straight line rate based upon the asset depreciation period for the vintage account.

(*e*) The allowance for depreciation under this paragraph shall constitute the amount of depreciation allowable under section 167. See section 179 for additional first-year allowance for certain property.

(ii) *Establishment of depreciation reserve.* The taxpayer must establish a depreciation reserve for each vintage account. The amount of the reserve for a guideline class must be stated on each income tax return on which depreciation with respect to such class is determined under this section. The depreciation reserve for a vintage account consists of the accumulated depreciation allowable under this section with respect to the vintage account, increased by the adjustments for ordinary retirements prescribed by paragraph (d)(3)(iii) of this section, by the adjustments for reduction of the salvage value of a vintage account prescribed by paragraph (d)(3)(vii)(*d*) of this section, and by the adjustments for transfers to supplies or scrap prescribed by paragraph (d)(3)(viii)(*b*) of this section, and decreased by the adjustments for extraordinary retirements and certain special retirements as prescribed by paragraph (d)(3) (iv) and (v) of this section, by the adjustments for the amount of the reserve in excess of the unadjusted basis of a vintage account prescribed by paragraph (d)(3)(ix)(*a*) of this section, and by the adjustments for property removed from a vintage account prescribed by paragraphs (b)(4)(iii)(*e*), (5)(v)(*b*) and (6)(iii) of this section. The adjustments to the depreciation reserve for ordinary retirements during the taxable year shall be made as of the beginning of the taxable year. The adjustments to the depreciation reserve for extraordinary retirements shall be made as of the date the retirement is treated as having occurred in accordance with the first-year convention (described in subparagraph (2) of this paragraph) adopted by the taxpayer for the vintage account. The adjustment to the depreciation reserve for reduction of salvage value and for transfers to supplies or scrap shall, in the case of an ordinary retirement, be made as of the beginning of the taxable year, and in the case of an extraordinary retirement the adjustment for reduction of salvage value shall be made as of the date the retirement is treated as having occurred in accordance with the first-year convention (described in subparagraph (2) of this paragraph) adopted by the taxpayer for the vintage account. The adjustment to the depreciation reserve for property removed from a vintage account in accordance with paragraph (b)(4)(iii)(*e*), (5)(v)(*b*) and (6)(iii) of this section shall be made as of the beginning of the taxable year. The depreciation reserve of a vintage account may not be decreased below zero.

(iii) *Consent to change in method of depreciation.* (*a*) During the asset depreciation period for a vintage account, the taxpayer is permitted to change under this section from a declining balance method of depreciation to the sum of the years-digits method of depreciation and from a declining balance method of depreciation or the sum of the years-digits method of depreciation to the straight line method of depreciation with respect to such account. Except as provided in section 167(j)(2)(1), and paragraph (e)(3)(i) of this section, no other changes in the method of depreciation adopted for a vintage account will be permitted. The provisions of §1.167(e)–1 shall not apply to any change in depreciation method permitted under this section. The change in method applies to all property in the vintage account and must be adhered to for the entire taxable year of the change.

(*b*) When a change is made to the straight line method of depreciation, the annual allowance for depreciation of the vintage account shall be determined by dividing the adjusted basis of the vintage account (without reduction for salvage value) by the number of years remaining (at the time as of which the change is made) in the asset depreciation period selected for the account. However, the depreciation allowable for any taxable year following a change to the straight line method may not exceed an amount determined by dividing the unadjusted basis of the vintage account (without reduction for salvage value) by the number of years in the asset depreciation period selected for the account.

(*c*) When a change is made from the declining balance method of depreciation to the sum of the years-digits method of depreciation, the annual allowance for depreciation of a vintage account shall be determined by multiplying the adjusted basis of the account (without reduction for salvage value) at the time as of which the change is made by a fraction, the numerator of which changes each year to a number which corresponds to the number of years remaining in the asset depreciation period selected for the account (including the year for which the allowance is being computed), and the denominator of which is the sum of all the year's digits corresponding to the number of years remaining in the asset depreciation period at the time as of which the change is made.

(*d*) The number of years remaining in the asset depreciation period selected for an account is equal to the asset depreciation period less the number of years of depreciation previously allowed. For this purpose, regardless of the first year convention adopted by the taxpayer, it will be assumed that depreciation was allowed for one-half of a year in the first year.

(*e*) The taxpayer shall furnish a statement setting forth the vintage accounts for which the change is made with the income tax return filed for the taxable year of the change.

(*f*) The principles of this subdivision may be illustrated by the following examples:

Example 1. A, a calendar year taxpayer, places new section 1245 property in service in a trade or business as follows:

Asset	Placed in service	Unadjusted basis	Estimated salvage
X	Mar. 15, 1971	$400	$20
Y	June 13, 1971	500	50
Z	July 30, 1971	100	0

The property is eligible property and is properly included in a single vintage account. The asset depreciation range for such property is 5 to 7 years and the taxpayer selects an asset depreciation period of 5½ years and adopts the 200-percent declining balance method of depreciation. The taxpayer adopts the half-year convention described in subparagraph (2)(iii) of this paragraph. After 3 years, A changes from the 200-percent declining balance method to the straight line method of depreciation. Depreciation allowances would be as follows:

Year	Unadjusted basis	Rate	Depreciation	Reserve	Adjusted basis
1971	$1,000	0.18182	$181.82	$181.82	$818.18
1972	1,000	.36363	297.52	479.34	520.66
1973	1,000	.36363	189.33	668.67	331.33
1974	1,000	[1] .33333	110.44	779.11	220.89
1975	1,000	.33333	110.44	889.56	110.44
1976	1,000	.33333	[2] 40.44	930.00	70.00

[1] Rate applied to adjusted basis of the account (without reduction by salvage) at the time as of which the change is made to the straight line method.
[2] The allowable depreciation is limited by estimated salvage.

Example 2. The facts are the same as in example (1) except that A elects to use the modified half-year convention described in subparagraph (2)(ii) of this paragraph. The depreciation allowances would be as follows:

Year	Unadjusted basis	Rate	Depreciation	Reserve	Adjusted basis
1971	$1,000	[1] 0.36363	$327.27	$327.27	$672.73
1972	1,000	.36363	244.63	571.90	428.10
1973	1,000	.36363	155.67	727.57	272.43
1974	1,000	.33333	90.81	818.38	181.62
1975	1,000	.33333	90.81	909.19	90.81
1976	1,000	.33333	[2] 20.81	930.00	70.00

[1] Rate applied to $900, the amount of assets placed in service during the first half of the taxable year.
[2] The allowable depreciation is limited by estimated salvage.

Example 3. The facts are the same as in example (1) except that A adopted the sum of the years-digits method of depreciation and does not change to the straight line method of depreciation. The depreciation allowances would be as follows:

Year	Unadjusted basis	Rate	Depreciation	Reserve	Adjusted basis
1971	$1,000	[1] 2.75/18	$152.78	$152.78	$847.22
1972	1,000	5/18	277.78	430.56	569.44
1973	1,000	4/18	222.22	652.78	347.22
1974	1,000	3/18	166.67	819.45	180.55
1975	1,000	2/18	[2] 110.55	930.00	70.00
1976	1,000	1/18	0.00	930.00	70.00
1977	1,000	0.25/18	0.00	930.00	70.00

[1] Rate is equal to one-half of 5.5/18. The denominator is equal to 5.5+4.5+3.5+2.5+1.5+0.5.
[2] The allowable depreciation is limited by estimated salvage.

Example 4. The facts are the same as in example (3) except that A elects to use the modified half-year convention described in subparagraph (2) (ii) of this paragraph. The depreciation allowances would be as follows:

Year	Unadjusted basis	Rate	Depreciation	Reserve	Adjusted basis
1971	$1,000	[1] 5.5/18	$275.00	$275.00	$725.00
1972	1,000	5/18	277.78	552.78	447.22
1973	1,000	4/18	222.22	775.00	225.00
1974	1,000	3/18	[2] 155.00	930.00	70.00
1975	1,000	2/18	0.00	930.00	70.00
1976	1,000	1/18	0.00	930.00	70.00
1977	1,000	0.25/18	0.00	930.00	70.00

[1] Rate applied to $900, the amount of assets placed in service during the first half of the taxable year.
[2] The allowable depreciation is limited by estimated salvage.

Example 5. The facts are the same as in example (2) except that after 2 years A changes from the 200-percent declining balance method to the sum of the years-digits method of depreciation. The depreciation allowances would be as follows:

Year	Unadjusted basis	Rate	Depreciation	Reserve	Adjusted basis
1971	$1,000	0.36363	$327.27	$327.27	$672.73
1972	1,000	.36363	244.63	571.90	428.10
1973	1,000	4/10	171.24	743.14	256.86
1974	1,000	3/10	128.43	871.57	128.43
1975	1,000	2/10	[1] 58.43	930.00	70.00
1976	1,000	1/10	0.00	930.00	70.00

[1] The allowable depreciation is limited by estimated salvage.

(iv) *Limitation on methods.* (*a*) The same method of depreciation must be adopted for all property in a single vintage account. Generally, the method of depreciation which may be adopted is subject to the limitations contained in section 167 (c), (j) and (l).

(*b*) Except as otherwise provided in section 167(j) with respect to certain eligible section 1250 property—

(*1*) In the case of a vintage account for which the taxpayer has selected an asset depreciation period of 3 years or more and which only contains property the original use of which commences with the taxpayer, any method of depreciation described in section 167(b) (1), (2), or (3) may be adopted, but if the vintage account contains property the original use of which does not commence with the taxpayer, or if the asset depreciation period for the account is less than 3 years, a method of depreciation described in section 167(b) (2) or (3) may not be adopted for the account, and

(*2*) The declining balance method using a rate not in excess of 150 percent of the straight line rate based upon the asset depreciation period for the vintage account may be adopted for the account even if the original use of the property does not commence with the taxpayer provided the asset depreciation period for the account is at least 3 years.

(*c*) The term ''original use'' means the first use to which the property is put, whether or not such use corresponds to the use of such property by the taxpayer. (See § 1.167(c)–1).

(v) *Unadjusted and adjusted basis.* (*a*) For purposes of this section, the unadjusted basis of an asset (including an ''excluded addition'' and a ''property improvement'' as described, respectively, in paragraph (d)(2) (vi) and (vii) of this section) is its cost or other basis without any adjustment for depreciation or amortization (other than depreciation under section 179) but with other adjustments required under section 1016 or other applicable provisions of law. The unadjusted basis of a vintage account is the total of the unadjusted bases of all the assets in the account. The unadjusted basis of a ''special basis vintage account'' as described in paragraph (d)(3)(vi) of this section is the amount of the property improvement determined in paragraph (d)(2)(vii)(*a*) of this section.

(*b*) The adjusted basis of a vintage account is the amount by which the unadjusted basis of the account exceeds the reserve for depreciation for the account. The adjusted basis of an asset in a vintage account is the amount by which the unadjusted basis of the asset exceeds the amount of depreciation allowable for the asset under this section computed by using the method of depreciation and the rate applicable to the account. For purposes of this subdivision, the depreciation allowable for an asset shall include, to the extent identifiable, the amount of proceeds previously added to the depreciation reserve in accordance with paragraph (d)(3)(iii) of this section upon the retirement of any portion of such asset. (See paragraph (d)(3)(vi) of this section for election under certain circumstances to allocate adjusted basis of an amount of property improvement determined under paragraph (d)(2)(vii)(*a*) of this section.)

(2) *Conventions applied to additions and retirements*—(i) *In general.* The allowance for depreciation of a vintage account (whether an item account or a

multiple asset account) shall be determined by applying one of the conventions described in subdivisions (ii) and (iii) of this subparagraph. (For the manner of applying a convention in the case of taxable years beginning before and ending after December 31, 1970, see subparagraph (3) of this paragraph.) The same convention must be adopted for all vintage accounts of a taxable year, but the same convention need not be adopted for the vintage accounts of another taxable year. An election to apply this section must specify the convention adopted. (See paragraph (f) of this section for information required in making the election.) The convention adopted by the taxpayer is a method of accounting for purposes of section 446, but the consent of the Commissioner will be deemed granted to make an annual adoption of either of the conventions described in subdivisions (ii) and (iii) of this subparagraph.

(ii) *Modified half-year convention.* The depreciation allowance for a vintage account for which the taxpayer adopts the ''modified half-year convention'' shall be determined by treating: (*a*) All property in such account which is placed in service during the first half of the taxable year as placed in service on the first day of the taxable year; and (*b*) all property in such account which is placed in service during the second half of the taxable year as placed in service on the first day of the succeeding taxable year. The depreciation allowance for a vintage account for a taxable year in which there is an extraordinary retirement (as defined in paragraph (d) (3) (ii) of this section) of property first placed in service during the first half of the taxable year is determined by treating all such retirements from such account during the first half of the taxable year as occurring on the first day of the taxable year and all such retirements from such account during the second half of the taxable year as occurring on the first day of the second half of the taxable year. The depreciation allowance for a vintage account for a taxable year in which there is an extraordinary retirement (as defined in paragraph (d)(3)(ii) of this section) of property first placed in service during the second half of the taxable year is determined by treating all such retirements from such account during the first half of the taxable year as occurring on the first day of the second half of the taxable year and all such retirements in the second half of the taxable year as occurring on the first day of the succeeding taxable year.

(iii) *Half-year convention.* The depreciation allowance for a vintage account for which the taxpayer adopts the ''half-year convention'' shall be determined by treating all property in the account as placed in service on the first day of the second half of the taxable year and by treating all extraordinary retirements (as defined in paragraph (d)(3)(ii) of this section) from the account as occurring on the first day of the second half of the taxable year.

(iv) *Rules of application.* (*a*) The first-year convention adopted for a vintage account must be consistently applied to all additions to and all extraordinary retirements from such account. See paragraph (d)(3) (ii) and (iii) of this section for definition and treatment of ordinary retirements.

(*b*) If the actual number of months in a taxable year is other than 12 full calendar months, depreciation is allowed only for such actual number of months and the term ''taxable year'', for purposes of this subparagraph, shall mean only such number of months. In such event, the first half of such taxable year shall be deemed to expire at the close of the last day of a calendar month which is the closest such last day to the middle of such taxable year and the second half of such taxable year shall be deemed to begin the day after the expiration of the first half of such taxable year. If a taxable year consists of a period which includes only 1 calendar month, the first half of the taxable year shall be deemed to expire on the first day which is nearest to the midpoint of the month, and the second half of the taxable year shall begin the day after the expiration of the first half of the month.

(*c*) For purposes of this subparagraph, for property placed in service after November 14, 1979, other than depreciable property described in paragraph (c)(2)(iv)(*e*) of this section, the taxable year of the person placing such property in service does not include any month before the month in which the person begins engaging in a trade or business or holding depreciable property for the production of income.

(*d*) For purposes of paragraph (c)(2)(iv)(*c*) of this section—

(*1*) For property placed in service after February 21, 1981, an employee is not considered engaged in a trade or business by virtue of employment.

(*2*) If a person engages in a small amount of trade or business activity after February 21, 1981, for the purpose of obtaining a disproportionately large depreciation deduction for assets for the taxable year in which they are placed in service, and placing those assets in service represents a substantial increase in the person's level of business activity, then for purposes of depreciating those assets the person will not be treated as beginning a trade or business until the increased amount of business activity begins. For property held for the production of income, the principle of the preceding sentence applies.

(*3*) A person may elect to apply the rules of §1.167(a)–11 (c)(2)(iv)(*d*) as set forth in T.D. 7763 ("(*d*) rules in T.D. 7763"). This election shall be made by reflecting it under paragraph (f)(4) of this section in the books and records. If necessary, amended returns shall be filed.

(*4*) If an averaging convention was adopted in reliance on or in anticipation of the (*d*) rules in T.D. 7763, that convention may be changed without regard to paragraph (f)(3) of this section. Similarly, if an election is made under paragraph (c)(2)(iv)(*d*)(*3*) of this section to apply to the (*d*) rules in T.D. 7763, the averaging convention adopted for the taxable years for which the election is made may be changed. The change shall be made by filing a timely amended return for the taxable year for which the convention was adopted. Notwithstanding the three preceding sentences, if an averaging convention was adopted in reliance on or in anticipation of the (*d*) rules in T.D. 7763, and if an election is made to apply those rules, the averaging convention adopted cannot be changed except as provided in paragraph (f) of this section.

(*e*) The rules in paragraph (c)(2)(iv)(*c*) of this section do not apply to depreciable property placed in service after November 14, 1979, and the rules in paragraph (c)(2)(iv)(*d*) of this section do not apply to depreciable property placed in service after February 21, 1981, with respect to which substantial expenditures were paid or incurred prior to November 15, 1979. For purposes of the preceding sentence, expenditures will not be considered substantial unless they exceed the lesser of 30 percent of the final cost of the property or $10 million. Expenditures that are not includible in the basis of the depreciable property will be considered expenditures with respect to property if they are directly related to a specific project involving such property. For purposes of determining whether expenditures were paid or incurred prior to November 15, 1979, expenditures made by a person (transferor) other than the person placing the property in service (transferee) will be taken into account only if the basis of the property in the hands of the transferee is determined in whole or in part by reference to the basis in the hands of the transferor. The principle of the preceding sentence also applies if there are multiple transfers.

(v) *Mass assets.* In the case of mass assets, if extraordinary retirements of such assets in a guideline class during the first half of the taxable year are allocated to a particular vintage year for which the taxpayer applied the modified half-year convention, then that portion of the mass assets so allocated which bears the same ratio to the total number of mass assets so allocated as the mass assets in the same vintage and assets guideline class placed in service during the first half of that vintage year bear to the total mass assets in the same vintage and asset guideline class shall be treated as retired on the first day of the taxable year. The remaining mass assets which are subject to extraordinary retirement during the first half of the taxable year and which are allocated to that vintage year and assets guideline class shall be treated as retired on the first days of the second half of the taxable year. If extraordinary retirements of mass assets in a guideline class occur in the second half of the taxable year and are allocated to a particular vintage year for which the taxpayer applied the modified half-year convention, then that portion of the mass assets so allocated which bears the same ratio to the total number of mass assets so allocated as the mass assets in the same vintage and asset guideline class first placed in service during the first half of that vintage year bear to the total mass assets in the same vintage and asset guideline class shall be treated as retired on the first day of the second half of the taxable year. The remaining mass assets which are subject to extraordinary retirements during the second half of the taxable year and which are allocated to that same vintage and asset guideline class shall be treated as retired on the first day of the succeeding taxable year. If the taxpayer has applied the half-year convention for the vintage year to which the extraordinary retirements are allocated, the mass assets shall be treated as retired on the first day of the second half of the taxable year.

(3) *Taxable years beginning before and ending after December 31, 1970.* In the case of a taxable year which begins before January 1, 1971, and ends after December 31, 1970, property first placed in service after December 31, 1970, but treated as first placed in service before January 1, 1971, by application of a convention described in subparagraph (2) of this paragraph shall be treated as provided in this subparagraph. The depreciation allowed (or allowable) for the taxable year shall consist of the depreciation allowed (or allowable) for the period before January 1, 1971, determined without regard to this section plus the amount allowable for the period after December 31, 1970, determined under this section. However, neither the modified half-year convention described in subparagraph (2)(ii) of this paragraph, nor the half-year convention described in subparagraph (2)(iii) of this paragraph may for any such taxable year be applied with respect to property placed in service after December 31, 1970, to allow depreciation for any period prior to January 1, 1971, unless such convention is consistent with the convention applied by the taxpayer with respect to property placed in service in such taxable year prior to January 1, 1971.

(4) *Examples.* The principles of this paragraph may be illustrated by the following examples:

Example 1. Taxpayer A, a calendar year taxpayer, places new property in service in a trade or business as follows:

Asset	Placed in service	Unadjusted basis
W	Apr. 1, 1971	$5,000
X	June 30, 1971	8,000
Y	July 15, 1971	12,000

Taxpayer A adopts the modified half-year convention described in subparagraph (2) (ii) of this paragraph. Assets W, X, and Y are placed in a multiple asset account for which the asset depreciation range is 8 to 12 years. A selects 8 years, the minimum asset depreciation period with respect to such assets, and adopts the declining balance method of depreciation using a rate twice the straight line rate (computed without reduction for salvage). The annual rate under this method using a period of 8 years is 25 percent. The depreciation allowance for assets W and X for 1971 is $3,250, a full year's depreciation under the modified half-year convention (that is, basis of $13,000 (unreduced by salvage) multiplied by 25 percent). The depreciation allowance for asset Y for 1971 is zero under the modified half-year convention.

Example 2. The facts are the same as in example (1), except that the taxpayer adopts the half-year convention described in subparagraph (2) (iii) of this paragraph. The depreciation allowance with respect to asset Y is $1,500 (that is the basis of $12,000 multiplied by 25 percent, then multiplied by ½). Assets W and X are also entitled to a depreciation allowance for only a half year. Thus, the depreciation allowance for assets W and X for 1971 is $1,625 (that is, ½ of the $3,250 allowance computed in example (1)).

Example 3. Asset Z is placed in service by a calendar year taxpayer on December 1, 1971. The taxpayer places asset Z in an item account and adopts the sum of the years-digits method and the half year convention described in subparagraph (2) (iii) of this paragraph. The asset depreciation range for such asset is 4 to 6 years and the taxpayer selects an asset depreciation period of 5 years. The depreciation allowance for asset Z in 1971 is $10,000 (that is, basis of $60,000 (unreduced by salvage) multiplied by 5⁄15, the appropriate fraction using the sum of the years-digits method then multiplied by ½, since only one half year's depreciation is allowable under the convention).

Example 4. A is a calendar year taxpayer. All taxpayer A's assets are placed in service in the first half of 1971. If the taxpayer selects the modified half-year convention described in subparagraph (2) (ii) of this paragraph, a full year's depreciation is allowable for all assets.

Example 5. (i) The taxpayer during his taxable year which begins April 1, 1970, and ends March 31, 1971, places new property in service in a trade or business as follows:

Asset	Placed in service	Unadjusted basis
A	Apr. 30, 1970	$10,000
B	Dec. 15, 1970	10,000
C	Jan. 1, 1971	10,000

The taxpayer adopted a convention under §1.167(a)–10(b) with respect to assets placed in service prior to January 1, 1971, which treats assets placed in service during the first half of the year as placed in service on the first day of such year and assets placed in service in the second half of the year as placed in service on the first day of the following year. If the taxpayer selects the half-year convention described in subparagraph (2) (iii) of this paragraph, one year's depreciation is allowable on asset A determined without regard to this section. No depreciation is allowable for asset B. No depreciation is allowable for asset C for the period prior to January 1, 1971. One-fourth year's depreciation is allowable on asset C determined under this section.

(ii) The facts are the same as in (i) of this example except that the taxpayer adopts the modified half-year convention described in subparagraph (2) (ii) of this paragraph for 1971. No depreciation is allowable for assets B and C which were placed in service in the second half of the taxable year.

Example 6. The taxpayer during his taxable year which begins August 1, 1970, and ends July 31, 1971, places new property in service in a trade or business as follows:

Asset	Placed in service
A	Aug. 1, 1970.
B	Jan. 15, 1971.
C	June 30, 1971.

The taxpayer adopted a convention under §1.167(a)–10(b) with respect to assets placed in service prior to January 1, 1971, which treats all assets as placed in service at the mid-point of the taxable year. If the taxpayer selects the half-year convention described in subparagraph (2) (iii) of this paragraph, one-half year's depreciation is allowable for asset A determined without regard to this section. One-half year's depreciation is allowable for assets B and C determined under this section.

Example 7. X, a calendar year corporation, is incorporated on July 1, 1978, and begins engaging in a trade or business in September 1979. X purchases asset A and places it in service on November 20, 1979. Substantial expenditures were not paid or incurred by X with respect to asset A prior to November 15, 1979. For purposes of applying the conventions under this section to determine depreciation for asset A, the 1979 taxable year is treated as consisting of 4 months. The first half of the taxable year ends on October 31, 1979, and the second half begins on November 1, 1979. X adopts the half-year convention. Asset A is treated as placed in service on November 1, 1979.

Example 8. On January 20, 1982, A, B, and C enter an agreement to form partnership P for the purpose of purchasing and leasing a ship to a third party, Z. P uses the calendar year as its taxable year. On December 15, 1982, P acquires the ship and leases it to Z. For purposes of applying the conventions, P begins its leasing business in December 1982, and its taxable year begins on December 1, 1982. Assuming that P elects to apply this section and adopts the modified half-year convention, P depreciates the ship placed in service in 1982 for the 1-month period beginning December 1, 1982, and ending December 31, 1982.

Example 9. A and B form partnership P on December 15, 1981, to conduct a business of leasing small aircraft. P uses the calendar year as its taxable year. On January 15, 1982, P acquires and places in service a $25,000 aircraft. P begins engaging in business with only one aircraft for the purpose of obtaining a disproportionately large depreciation deduction for aircraft that P plans to acquire at the end of the year. On December 10, 1982, P acquires and places in service 4 aircraft, the total purchase price of which is $250,000. For purposes of applying the conventions to the aircraft acquired in December, P begins its leasing business in December 1982, and P's taxable year begins December 1, 1982, and ends December 31, 1982. Assuming that P elects to apply this section and adopts the modified half-year convention, P depreciates the aircraft placed in service in December 1982, for the 1-month period beginning December 1, 1982, and ending December 31, 1982. P depreciates the aircraft placed in service in January 1982, for the 12-month period beginning January 1, 1982, and ending December 31, 1982.

(d) *Special rules for salvage, repairs and retirements*—(1) *Salvage value*—(i) *Definition of gross salvage value.* ''Gross salvage'' value is the amount which is estimated will be realized upon a sale or other disposition of the property in the vintage account when it is no longer useful in the taxpayer's trade or business or in the production of his income and is to be retired from service, without reduction for the cost of removal, dismantling, demolition or similar operations. If a taxpayer customarily sells or otherwise disposes of property at a time when such property is still in good operating condition, the gross salvage value of such property is the amount expected to be realized upon such sale or disposition, and under certain circumstances, as where such property is customarily sold at a time when it is still relatively new, the gross salvage value may constitute a relatively large proportion of the unadjusted basis of such property.

(ii) *Definition of salvage value.* ''Salvage value'' means gross salvage value less the amount, if any, by which the gross salvage value is reduced by application of section 167(f). Generally, as provided in section 167(f), a taxpayer may reduce the amount of gross salvage value of a vintage account by an amount which does not exceed 10 percent of the unadjusted basis of the personal property (as defined in section 167(f)(2)) in the account. See paragraph (b)(3)(ii) of this section for requirement of separate vintage accounts for personal property described in section 167(f)(2).

(iii) *Estimation of salvage value.* The salvage value of each vintage account of the taxable year shall be estimated by the taxpayer at the time the election to apply this section is made, upon the basis of all the facts and circumstances existing at the close of the taxable year in which the account is established. The taxpayer shall specify the amount, if any, by which gross salvage value taken into account is reduced by application of section 167(f). See paragraph (f)(2) of this section for requirement that the election specify the estimated salvage value for each vintage account of the taxable year of election. The salvage value estimated by the taxpayer will not be redetermined merely as a result of fluctuations in price levels or as a result of other facts and circumstances occurring after the close of the taxable year of election. Salvage value for a vintage account need not be established or increased as a result of a property improvement as described in subparagraph (2) (vii) of this paragraph. The taxpayer shall maintain records reasonably sufficient to determine facts and circumstances taken into account in estimating salvage value.

(iv) *Salvage as limitation on depreciation.* In no case may a vintage account be depreciated below a reasonable salvage value after taking into account any reduction in gross salvage value permitted by section 167(f).

(v) *Limitation on adjustment of reasonable salvage value.* The salvage value established by the taxpayer for a vintage account will not be redetermined if it is reasonable. Since the determination of salvage value is a matter of estimation, minimal adjustments will not be made. The salvage value established by the taxpayer will be deemed to be reasonable unless there is sufficient basis in the facts and circumstances existing at the close of the taxable year in which the account is established for a determination of an amount of salvage value for the account which exceeds the salvage value established by the taxpayer for the account by an amount greater than 10 percent of the unadjusted basis of the account at the close of the taxable year in which the account is established. If the salvage value established by the taxpayer for the account is not within the 10 percent range, or if the taxpayer follows the practice of understating his estimates of gross salvage value to take advantage of this subdivision, and if there is a determination of an amount of salvage value for the account which exceeds the salvage value established by the taxpayer for the account, an adjustment will be made by increasing the salvage value established by the taxpayer for the account by an amount equal to the difference between the salvage value as determined and the salvage value established by the taxpayer for the account. For the purposes of this subdivision, a determination of salvage value shall include all determinations at all levels of audit and appellate proceedings, and as well as all final determinations within the meaning of section 1313(a)(1). This subdivision shall apply to each such determination. (See example (3) of subdivision (vi) of this subparagraph.)

(vi) *Examples.* The principles of this subparagraph may be illustrated by the following examples in which it is assumed that the taxpayer has not followed a practice of understating his estimates of gross salvage value:

Example 1. Taxpayer B elects to apply this section to assets Y and Z, which are placed in a multiple asset vintage account of 1971 for which the taxpayer selects an asset depreciation period of 8 years. The unadjusted basis of asset Y is $50,000 and the unadjusted basis of asset Z is $30,000. B estimates a gross salvage value of $55,000. The property qualifies under section 167(f) (2) and B reduces the amount of salvage taken into account by $8,000 (that is, 10 percent of $80,000 under section 167(f)). Thus, B establishes a salvage value of $47,000 for the account. Assume that there is not sufficient basis for determining a salvage value for the account greater than $52,000 (that is, $60,000 minus the $8,000 reduction under section 167(f)). Since the salvage value of $47,000 established by B for the account is within the 10 percent range, it is reasonable. Salvage value for the account will not be redetermined.

Example 2. The facts are the same as in example (1) except that B estimates a gross salvage value of $50,000 and establishes a salvage value of $42,000 for the account (that is, $50,000 minus the $8,000 reduction under section 167(f)). There is sufficient basis for determining an amount of salvage value greater than $50,000 (that is, $58,000 minus the $8,000 reduction under section 167(f)). The salvage value of $42,000 established by B for the account can be redetermined without regard to the limitation in subdivision (v) of this subparagraph, since it is not within the 10 percent range. Upon audit of B's tax return for a taxable year for which the redetermination would affect the amount of depreciation allowable for the account, salvage value is determined to be $52,000 after taking into account the reduction under section 167(f). Salvage value for the account will be adjusted to $52,000.

Example 3. The facts are the same as in example (1) except that upon audit of B's tax return for a taxable year the examining officer determines the salvage value to be $58,000 (that is, $66,000 minus the $8,000 reduction under section 167(f)), and proposes to adjust salvage value for the vintage account to $58,000 which will result in disallowing an amount of depreciation for the taxable year. B does not agree with the finding of the examining officer. After receipt of a ''30-day letter'', B waives a district conference and initiates proceedings before the Appellate Division. In consideration of the case by the Appellate Division it is concluded that there is not sufficient basis for determining an amount of salvage value for the account in excess of $55,000 (that is $63,000 minus the $8,000 reduction under section 167(f)). Since the salvage of $47,000 established by B for the account is within the 10 percent range, it is reasonable. Salvage value for the account will not be redetermined.

Example 4. Taxpayer C elects to apply this section to factory building X which is placed in an item vintage account of 1971. The unadjusted basis of factory building X is $90,000. C estimates a gross salvage value for the account of $10,000. The property does not qualify under section 167(f)(2). C establishes a salvage value of $10,000 for the account. Assume that there is not sufficient basis for determining a salvage value for the account greater than $18,000. Since the salvage value of $10,000 established by B for the account is within the 10 percent range, it is reasonable. Salvage value for the account will not be redetermined.

(2) *Treatment of repairs*—(i) *In general.* (*a*) Sections 162, 212, and 263 provide general rules for the treatment of certain expenditures for the repair, maintenance, rehabilitation or improvement of property. In general, under those sections, expenditures which substantially prolong the life of an asset, or are made to increase its value or adapt it to a different use are capital expenditures. If an expenditure is treated as a capital expenditure under section 162, 212, or 263, it is subject to the allowance for depreciation. On the other hand, in general, expenditures which do not substantially prolong the life of an asset or materially increase its value or adapt it for a substantially different use may be deducted as an expense in the taxable year in which paid or incurred. Expenditures, or a series of expenditures, may have characteristics both of deductible expenses and capital expenditures. Other expenditures may have the characteristics of capital expenditures, as in the case of an ''excluded addition'' (as defined in subdivision (vi) of this subparagraph). This subparagraph provides a simplified procedure for determining whether expenditures with respect to certain property are to be treated as deductible expenses or capital expenditures.

(*b*) [Reserved]

(ii) *Election of repair allowance.* In the case of an asset guideline class which consists of ''repair allowance property'' as defined in subdivision (iii) of this subparagraph, subject to the provisions of subdivision (v) of this subparagraph, the taxpayer may elect to apply the asset guideline class repair allowance described in subdivision (iii) of this subparagraph for any taxable year ending after December 31, 1970, for which the taxpayer elects to apply this section.

(iii) *Repair allowance for an asset guideline class.* For a taxable year for which the taxpayer elects to apply this section, the ''repair allowance'' for an asset guideline class which consists of ''repair allowance property'' is an amount equal to—

(*a*) The average of (*1*) the unadjusted basis of all ''repair allowance property'' in the asset guideline class at the beginning of the taxable year, less in the case of such property in a vintage account the unadjusted basis of all such property retired in an ordinary retirement (as described in subparagraph (3)(ii) of this paragraph) in prior taxable years, and (*2*) the unadjusted basis of all ''repair allowance property'' in the asset guideline class at the end of the taxable year, less in the case of such property in a vintage account the unadjusted basis of all such property retired in an ordinary retirement (including ordinary retirements during the taxable year), multiplied by—

(*b*) The repair allowance percentage in effect for the asset guideline class for the taxable year.

In applying the assets guideline class repair allowance to buildings which are section 1250 property, for the purpose of this subparagraph each building shall be treated as in a separate asset guideline class. If two or more buildings are in the same asset guideline class determined without regard to the preceding sentence and are operated as an integrated unit (as evidenced by their actual operation, management, financing and accounting), they shall be treated as a single building for this purpose. The ''repair allowance percentages'' in effect for taxable years ending before the effective date of the first supplemental repair allowance percentages established pursuant to this section are set forth in Revenue Procedure 72–10. Repair allowance percentages will from time to time be established, supplemented and revised with express reference to this section. These repair allowance percentages will be published in the Internal Revenue Bulletin. The repair allowance percentages in effect on the last day of the taxable year shall apply for the taxable year, except that the repair allowance percentage for a particular taxable year shall not be less than the repair allowance percentage in effect on the first day of such taxable year (or as of such later time in such year as a repair allowance percentage first established during such year becomes effective). Generally, the repair allowance percentages for a taxable year shall not be changed to reflect any supplement or revision of the repair allowance percentages after the end of such taxable year. However, if expressly provided in such a supplement or revision of the repair allowance percentages, the taxpayer may, at his option in the manner specified therein, apply the revised or supplemented repair allowance percentages for such taxable year and succeeding taxable years. For the purposes of this section, ''repair allowance property'' means eligible property determined without regard to paragraph (b)(2)(ii) of this section (that is, without regard to whether such property was first placed in service by the taxpayer before or after December 31, 1970) in an asset guideline class for which a repair allowance percentage is in effect for the taxable year. The determination whether property is repair allowance property shall be made without regard to whether such property is excluded, under paragraph (b)(5) of this section, from an election to apply this section. Property in an asset guideline class for which the taxpayer elects to apply the asset guideline class repair allowance described in this subdivision, which results from expenditures in the taxable year of election for the repair, maintenance, rehabilitation, or improvement of property in an asset guideline class shall not be ''repair allowance property'' for such taxable year but shall be for each succeeding taxable year provided such property is a property improvement as described in subdivision (vii) (*a*) of this subparagraph and is in an asset guideline class for which a repair allowance percentage is in effect for such succeeding taxable year.

(iv) *Application of asset guideline class repair allowance.* In accordance with the principles of sections 162, 212, and 263, if the taxpayer pays or incurs any expenditures during the taxable year for the repair, maintenance, rehabilitation or improvement of eligible property (determined without regard to paragraph (b)(2)(ii) of this section), the taxpayer must either—

(*a*) If such property is repair allowance property and if the taxpayer elects to apply the repair allowance for the asset guideline class, treat an amount of all such expenditures in such taxable year with respect to all such property in the asset guideline class which does not exceed in total the repair allowance for that asset guideline class as deductible repairs, and treat the excess of all such expenditures with respect to all such property in the asset guideline class in the manner described for a property improvement in subdivision (viii) of this subparagraph, or

(*b*) If such property is not repair allowance property or if the taxpayer does not elect to apply the repair allowance for the asset guideline class, treat each of such expenditures in such taxable year with respect to all such property in the asset guideline class as either a capital expenditure or as a deductible repair in accordance with the principles of sections 162, 212, and 263 (without regard to (*a*) of this subdivision), and treat the expenditures which are required to be capitalized under sections 162, 212, and 263 (without regard to (*a*) of this subdivision) in the manner described for a property improvement in subdivision (viii) of this subparagraph.

For the purposes of (*a*) of this subdivision, expenditures for the repair, maintenance, rehabilitation or improvement of property do not include expenditures for an excluded addition or for which a deduction is allowed under section 167(k). (See subdivision (viii) of this subparagraph for treatment of an excluded addition.) The taxpayer shall elect each taxable year whether to apply the repair allowance and treat expenditures under (*a*) of this subdivision, or to treat expenditures under (*b*) of this subdivision. The treatment of expenditures under this subdivision for a taxable year for all asset guideline classes shall be specified in the books and records of the taxpayer for the taxable year. The taxpayer may treat expenditures under (*a*) of this subdivision with respect to property in one asset guideline class and treat expenditures under (*b*) of this subdivision with respect to property in some other asset guideline class. In addition, the taxpayer may treat expenditures with respect to property in an asset guideline class under (*a*) of this subdivision in one taxable year, and treat expenditures with respect to property in that asset guideline class under (*b*) of this subdivision in another taxable year.

(v) *Special rules for repair allowance.* (*a*) The asset guideline class repair allowance described in subdivision (iii) of this subparagraph shall apply only to expenditures for the repair, maintenance, rehabilitation or improvement of repair allowance property (as described in subdivision (iii) of this subparagraph). The taxpayer may apply the asset guideline class repair allowance for the taxable year only if he maintains books and records reasonably sufficient to determine:

(*1*) The amount of expenditures paid or incurred during the taxable year for the repair, maintenance, rehabilitation or improvement of repair allowance property in the asset guideline class, and

(*2*) The expenditures (and the amount thereof) with respect to such property which are for excluded additions (such as whether the expenditure is for an additional identifiable unit of property, or substantially increases the productivity or capacity of an existing identifiable unit of property or adapts it for a substantially different use).

In general, such books and records shall be sufficient to identify the amount and nature of expenditures with respect to specific items of repair allowance property or groups of similar properties in the same asset guideline class. However, in the case of such expenditures with respect to property, part of which is in one asset guideline class and part in another, or part of which is repair allowance property and part of which is not, and in comparable circumstances involving property in the same asset guideline class, to the extent books and records are not maintained identifying such expenditures with specific items of property or groups of similar properties and it is not practicable to do so, the total amount of such expenditures which is not specifically identified may be allocated by any reasonable method consistently applied. In any case, the cost of repair, maintenance, rehabilitation or improvement of property performed by production personnel may be allocated by any reasonable method consistently applied and if performed incidental to production and not substantial in amount, no allocation to repair, maintenance, rehabilitation or improvement need be made. The types of expenditures for which specific identification would ordinarily be made include: Substantial expenditures such as for major parts or major structural materials for which a work order is or would customarily be written; expenditures for work performed by an outside contractor; or expenditures under a specific down time program. Types of expenditures for which specific identification would ordinarily be impractical include: General maintenance costs of machinery, equipment, and plant in the case of a taxpayer having assets in more than one class (or different types of assets in the same class) which are located together and generally maintained by the same work crew; small supplies which are used with respect to various classes or types of property; labor costs of personnel who work on property in different classes, or different types of property in the same class, if the work is performed on a routine, as needed, basis and the only identification of the property repaired is by the personnel. Factors which will be taken into account in determining the reasonableness of the taxpayer's allocation of expenditures include prior experience of the taxpayer; relative bases of the assets in the guideline class; types of assets involved; and relationship to specifically identified expenditures.

(*b*) If for the taxable year the taxpayer elects to deduct under section 263(e) expenditures with respect to repair allowance property consisting of railroad rolling stock (other than a locomotive) in a particular asset guideline class, the taxpayer may not, for such taxable year, use the asset guideline class repair allowance described in subdivision (iii) of this subparagraph for any property in such asset guideline class.

(*c*)(*1*) If the taxpayer repairs, rehabilitates or improves property for sale or resale to customers, the asset guideline class repair allowance described in subdivision (iii) of this subparagraph shall not apply to expenditures for the repair, maintenance, rehabilitation or improvement of such property, or (*2*) if a taxpayer follows the practice of acquiring for his own use property (in need of repair, rehabilitation or improvement to be suitable for the use intended by the taxpayer) and of making expenditures to repair, rehabilitate or improve such property in order to take advantage of this subparagraph, the asset guideline class repair allowance described in subdivision (iii) of this subparagraph shall not apply to such expenditures. In either event, such property shall not be ''repair allowance property'' as described in subdivision (iii) of this subparagraph.

(vi) *Definition of excluded addition.* The term ''excluded addition'' means—

(*a*) An expenditure which substantially increases the productivity of an existing identifiable unit of property over its productivity when first acquired by the taxpayer;

(*b*) An expenditure which substantially increases the capacity of an existing identifiable unit of property over its capacity when first acquired by the taxpayer;

(*c*) An expenditure which modifies an existing identifiable unit of property for a substantially different use;

(*d*) An expenditure for an identifiable unit of property if (*1*) such expenditure is for an additional identifiable unit of property or (*2*) such expenditure (other than an expenditure described in (*e*) of this subdivision) is for replacement of an identifiable unit of property which was retired;

(*e*) An expenditure for replacement of a part in or a component or portion of an existing identifiable unit of property (whether or not such part, component or portion is also an identifiable unit of property) if such part, component or portion is for replacement of a part, component or portion which was retired in a retirement upon which gain or loss is recognized (or would be recognized but for a special nonrecognition provision of the Code or § 1.1502–13).

(*f*) In the case of a building or other structure (in addition to (*b*), (*c*), (*d*), and (*e*) of this subdivision which also apply to such property), an expenditure for additional cubic or linear space; and

(*g*) In the case of those units of property of pipelines, electric utilities, telephone companies, and telegraph companies consisting of lines, cables and poles (in addition to (*a*) through (*e*) of this subdivision which also apply to such property), an expenditure for replacement of a material portion of the unit of property.

Except as provided in (*d*) and (*e*) of this subdivision, notwithstanding any other provision of this subdivision, the term ''excluded addition'' does not include any expenditure in connection with the repair, maintenance, rehabilitation or improvement of an identifiable unit of property which does not exceed $100. For this purpose all related expenditures with respect to the unit of property shall be treated as a single expenditure. For the purposes of (*a*), and (*b*) of this subdivision, an increase in productivity or capacity is substantial only if the increase is more than 25 percent. An expenditure which merely extends the productive life of an identifiable unit of property is not an increase in productivity within the meaning of (*a*) of this subdivision. Under (*g*) of this subdivision a replacement is material only if the portion replaced exceeds 5 percent of the unit of property with respect to which the replacement is made. For the purposes of this subdivision, a unit of property generally consists of each operating unit (that is, each separate machine or piece of equipment) which performs a discrete function and which the taxpayer customarily acquires for original installation and retires as a unit. The taxpayer's accounting classification of units of property will generally be accepted for purposes of this subdivision provided the classifications are reasonably consistent with the preceding sentence and are consistently applied. In the case of a building the unit of property generally consists of the building as well as its structural components; except that each building service system (such as an elevator, an escalator, the electrical system, or the heating and cooling system) is an identifiable unit for the purpose of (*a*), (*b*), (*c*), and (*d*) of this subdivision. However, both in the case of machinery and equipment and in the case of a building, for the purpose of applying (*d*)(*1*) of this subdivision a unit of property may consist of a part in or a component or portion of a larger unit of property. In the case of property described in (*g*) of this subdivision (such as a pipeline), a unit of property generally consists of each segment which performs a discrete function either as to capacity, service, transmission or distribution between identifiable points. Thus, for example, under this subdivision in the case of a vintage account of five automobiles each automobile is an identifiable unit of property (which is not merely a part in or a component or portion of larger unit of property within the meaning of (*e*) of this subdivision). Accordingly, the replacement of one of the automobiles (which is retired) with another automobile is an excluded addition under (*d*)(*2*) of this subdivision. Also the purchase of a sixth automobile is an expenditure for an additional identifiable unit of property and is an excluded addition under (*d*)(*1*) of this subdivision. An automobile air conditioner is also an identifiable unit of property for the purposes of (*d)(1)* of this subdivision, but not for the purposes of (*d*)(*2*) of this subdivision. Accordingly, the addition of an air conditioner to an automobile is an excluded addition under (*d*)(*1*) of this subdivision, but the replacement of an existing air conditioner in an automobile is not an excluded addition under (*d*)(*2*) of this subdivision (since it is merely the replacement of a part in an existing identifiable unit of property). The replacement of the air conditioner may, however, be an excluded addition under (*e*) of this subdivision, if the air conditioner replaced was retired in a retirement upon which gain or loss was recognized. The principles of this subdivision may be further illustrated by the following examples in which it is assumed (unless otherwise stated) that (*e*) of this subdivision does not apply:

Example 1. For the taxable year, B pays or incurs only the following expenditures: (*1*) $5,000 for general maintenance of repair allowance property (as described in subdivision (iii) of this subparagraph) such as inspection, oiling, machine adjustments, cleaning, and painting; (*2*) $175 for replacement of bearings and gears in an existing lathe; (*3*) $125 for replacement of an electric starter (of the same capacity) and certain electrical wiring in an automatic drill press; (*4*) $300 for modification of a metal fabricating machine (including replacement of certain parts) which substantially increases its capacity; (*5*) $175 for repair of the same metal fabricating machine which does not substantially increase its capacity; (*6*) $800 for the replacement of an existing lathe with a new lathe; and (*7*) $65 for the repair of a drill press. Expenditures (*1*) through (*3*) are expenditures for the repair, maintenance, rehabilitation or improvement of property to which B can elect to apply the asset guideline class repair allowance described in subdivision (iii) of this subparagraph. Expenditure (*4*) is an excluded addition under (*b*) of this subdivision. Expenditure (*5*) is not an excluded addition. Expenditure (*6*) is an excluded addition under (*d*)(*2*) of this subdivision. Without regard to (*a*), (*b*), and (*c*) of this subdivision, expenditure (*7*) is not an excluded addition since the expenditure does not exceed $100.

Example 2. Corporation M operates a steel plant which produces rails, blooms, billets, special bar sections, reinforcing bars, and large diameter line pipe. During the taxable year, corporation M: (*1*) relines an openhearth furnace; (*2*) places in service 20 new ingot molds; (*3*) replaces one reversing roll in the blooming mill; (*4*) overhauls the rail and billet mill with no increase in capacity; (*5*) replaces a roll stand in the 20-inch bar mill; and (*6*) overhauls the 11-inch bar mill and reducing stands increasing billet speed from 1,800 feet per minute to 2,300 feet per minute. Assume that each expenditure exceeds $100. Expenditure (*1*) is not an excluded addition. Expenditure (*2*) is an excluded addition under (*d*)(*1*) of this subdivision. Expenditure (*3*) is not an excluded addition since the expenditure for the reversing roll merely replaces a part in an existing identifiable unit of property. Expenditure (*4*) is not an excluded addition. Expenditure (*5*) is an excluded addition under (*d*)(*2*) of this subdivision since the roll stand is not merely a part of an existing identifiable unit of property. Expenditure (*6*) is an excluded addition under (*a*) of this subdivision since it increases the billet speed by more than 25 percent.

Example 3. For the taxable year, corporation X pays or incurs the following expenditures: (*1*) $1,000 for two new temporary partition walls in the company's offices; (*2*) $1,400 for repainting the exterior of a terminal building; (*3*) $300 for repair of the roof of a warehouse; (*4*) $150 for replacement of two window frames and panes in the warehouse; and (*5*) $100 for plumbing repair. Expenditure (*1*) is an excluded addition under (*d*)(*1*) of this subdivision. None of the other expenditures are excluded additions.

Example 4. For the taxable year, corporation Y pays or incurs the following expenditures: (*1*) $10,000 for expansion of a loading dock from 600 square feet to 750 square feet; (*2*) $600 for replacement of two roof girders in a factory building; and (*3*) $9,500 for replacement of columns and girders supporting the floor of a second story loft storage area within the factory building in order to permit storage of supplies with a gross weight 50 percent greater than the previous capacity of the loft. Expenditure (*1*) is an excluded addition under (*f*) of this subdivision. Expenditure (*2*) is not an excluded addition. Expenditure (*3*) is an excluded addition under (*b*) of this subdivision.

Example 5. Corporation A has an office building with an unadjusted basis of $10 million. The building has 10 elevators, five of which are manually operated and five of which are automatic. During 1971, corporation A:

(*1*) Replaces the five manually operated elevators with highspeed automatic elevators at a cost of $400,000;

(*2*) Replaces the cable in one of the existing automatic elevators at a cost of $1,700. The replacements of the elevators are excluded additions under (*d*)(*2*) of this subdivision. The replacement of the cable is not an excluded addition.

Example 6. Taxpayer W, a cement manufacturer, engages in the following modification and maintenance activities during the taxable year: (*1*) Replaces eccentric-bearing, spindle, and wearing surface in a gyratory crusher; (*2*) places in service a new apron feeder and hammer mill; (*3*) replaces four buckets on a chain bucket elevator; (*4*) relines refractory surface in the burning zone of a rotary kiln; (*5*) installs additional new dust collectors; and (*6*) Replaces two 16-inch × 90-foot belts on his conveyer system. Assume that there is no increase in productivity or capacity and that each expenditure exceeds $100. Expenditure (*1*) is not an excluded addition. Expenditure (*2*) an excluded addition under (*d*)(*1*) of this subdivision. Expenditures (*3*) and (*4*) are not excluded additions. Expenditures (*5*) is an excluded addition under (*d*)(*1*) of this subdivision. Expenditure (*6*) is not an excluded addition.

Example 7. Corporation X, a gas pipeline company, has, in addition to others, the following units of property: (*1*) A gathering pipeline for a field consisting of 25 gas wells; (*2*) the main transmission line between compressor stations (that is, in the case of a 500-mile main transmission line with a compressor station every 100 miles, each one hundred miles section between compressor stations is a separate unit of property); (*3*) a lateral transmission line from the main transmission line to a city border station; (*4*) a medium pressure distribution line to the northern portion of the city; and (*5*) a low pressure distribution line serving a group of approximately 200 residential customers off the medium pressure distribution line. In 1971, corporation X pays or incurs the following expenditures in connection with the repair, maintenance, rehabilitation or improvement of repair allowance property: (*1*) replaces a meter on a gas well; (*2*) in connection with the repair and rehabilitation of a unit of property consisting of a 2-mile gathering pipeline, replaces a 3,000-foot section of the gathering line; (*3*) in connection with the repair of leaks in a unit of property consisting of a 100-mile gas transmission line (that is, the 100 miles between compressor stations), replaces a 2,000-foot section of pipeline at one point; and (*4*) at another point replaces a 7-mile section of the same 100-mile gas transmission line. Assume that none of these expenditures substantially increases capacity and that each expenditure exceeds $100. Expenditure (*1*) is an excluded addition under (*d*) of this subdivision. Expenditure (*2*) is an excluded addition under (*g*) of this subdivision since the portion replaced is more than 5 percent of the unit of property. Expenditure (*3*) is not an excluded addition. Expenditure (*4*) is an excluded addition under (*g*) of this subdivision.

Example 8. Taxpayer Y, an electric utility company, has in addition to others, the following units of property: (*1*) A high voltage transmission circuit from the switching station (at the generating station) to the transmission station; (*2*) a series of 100 poles (fully dressed) supporting the circuit in (*1*); (*3*) a high voltage circuit from the transmission station to the distribution substation; (*4*) a high voltage distribution circuit (either radial or looped) from the distribution substation; (*5*) a transformer on a distribution pole; (*6*) a circuit breaker on a distribution pole; and (*7*) all 220 (and lower) volt circuit (including customer service connections) off the distribution circuit in (*4*). In 1971, taxpayer Y pays or incurs the following expenditures for the repair, maintenance, rehabilitation or improvement of repair allowance property: (*1*) Replaces 25 adjacent poles in a unit of property consisting of the 300 poles supporting a radial distribution circuit from a distribution substation; (*2*) replaces a transformer on one of the poles in (*1*); (*3*) replaces a cross-arm on one of the poles in (*1*); (*4*) replaces a 200-foot section of a 2-mile radial distribution circuit serving 100 residential customers; and (*5*) replaces a 2,000-foot section on a 10-mile high voltage circuit from a transmission station to a distribution substation which was destroyed by a casualty which taxpayer Y treated as an extraordinary retirement under paragraph (d)(3)(ii) of this section. Expenditure (*1*) is an excluded addition under (*g*) of this subdivision. Expenditure (*2*) is an excluded addition under (*d*)(*2*) of this subdivision. Expenditures (*3*) and (*4*) are not excluded additions. Expenditure (*5*) is an excluded addition under (*e*) of this subdivision.

Example 9. Corporation Z, a telephone company, has in addition to others, the following units of property: (*1*) A buried feeder cable 3 miles in length off a local switching station; (*2*) a buried subfeeder cable 1 mile in length off the feeder cable in (*1*); (*3*) all the distribution cable (and customer service drops) off the subfeeder cable in (*2*); (*4*) the 300 poles (fully dressed) supporting the distribution cable in (*3*); (*5*) a 10-mile local trunk cable which interconnects two local tandem switching stations; (*6*) a toll connecting trunk cable from a local tandem switching station to a long distance tandem switching station; (*7*) a toll trunk cable 50 miles in length from the access point at one city to the access point at another city. In 1971, corporation Z pays or incurs the following expenditures in connection with the repair, maintenance, rehabilitation or improvement of repair allowance property: (*1*) replaces 100 feet of distribution cable in a unit of property consisting of 8 miles of local distribution cable (plus customer service drops); (*2*) replaces an amplifier in the distribution system; and (*3*) replaces 10 miles of a unit of property consisting of a toll trunk cable 50 miles in length. Expenditure (*1*) is not an excluded addition. Expenditure (*2*) is an excluded addition under (*d*)(*2*) of this subdivision. Expenditure (*3*) is an excluded addition under (*g*) of this subdivision.

(vii) *Definition of property improvement.* The term ''property improvement'' means—

(*a*) If the taxpayer treats expenditures for the asset guideline class under subdivision (iv) (*a*) of this subparagraph, the amount of all expenditures paid or incurred during the taxable year for the repair, maintenance, rehabilitation or improvement of repair allowance property in the asset guideline class, which exceeds the asset guideline class repair allowance for the taxable year; and

(*b*) If the taxpayer treats expenditures for the asset guideline class under subdivision (iv) (*b*) of this subparagraph, the amount of each expenditure paid or incurred during the taxable year for the repair, maintenance, rehabilitation or improvement of property which is treated under sections 162, 212, and 263 as a capital expenditure.

The term ''property improvement'' does not include any expenditure for an excluded addition.

(viii) *Treatment of property improvements and excluded additions.* If for the taxable year there is a property improvement as described in subdivision (vii) of this subparagraph or an excluded addition as described in subdivision (vi) of this subparagraph, the following rules shall apply—

(*a*) The total amount of any property improvement for the asset guideline class determined under subdivision (vii)(*a*) of this subparagraph shall be capitalized in a single ''special basis vintage account'' of the taxable year in accordance with the taxpayer's election to apply this section for the taxable year (applied without regard to paragraph (b)(5)(v)(*a*) of this section). See subparagraph (3)(vi) of this paragraph for definition and treatment of a ''special basis vintage account''.

(*b*) Each property improvement determined under subdivision (vii)(*b*) of this subparagraph, if it is eligible property, shall be capitalized in a vintage account of the taxable year in accordance with the taxpayer's election to apply this section for the taxable year (applied without regard to paragraph (b)(5)(v)(*a*) of this section).

(*c*) Each excluded addition, if it is eligible property, shall be capitalized in a vintage account of the taxable year in accordance with the taxpayer's election to apply this section for the taxable year.

For rule as to date on which a property improvement or an excluded addition is first placed in service, see paragraph (e)(1) (iii) and (iv) of this section.

(ix) *Examples.* The principles of this subparagraph may be illustrated by the following examples:

Example 1. For the taxable year 1972, B elects to apply this section. B has repair allowance property (as described in subdivision (iii) of this subparagraph) in asset guideline class 20.2 under Revenue Procedure 72–10 with an average unadjusted basis determined as provided in subdivision (iii) (*a*) of this subparagraph of $100,000 and repair allowance property in asset guideline class 24.4 with an average unadjusted basis of $300,000. The repair allowance percentage for asset guideline class 20.2 is 4.5 percent and for asset guideline class 24.4 is 6.5 percent. The two asset guideline class repair allowances for 1972 are $4,500 and $19,500, respectively, determined as follows:

Asset Guideline Class 20.2	
$100,000 average unadjusted basis multiplied by 4.5 percent	$4,500
Asset Guideline Class 24.4	
$300,000 average unadjusted basis multiplied by 6.5 percent	$19,500

Example 2. The facts are the same as in example (1). During the taxable year 1972, B pays or incurs the following expenditures for the repair, maintenance, rehabilitation or improvement of repair allowance property in asset guideline class 20.2

General maintenance (including primarily labor costs)	$3,000
Replacement of parts in several machines (including labor costs of $1,650)	4,000
	7,000

In addition, in connection with the rehabilitation and improvement of two other machines B pays or incurs $6,000 (including labor costs of $2,000) which is treated as an excluded addition because the capacity of the machines was substantially increased. For 1972, B elects to apply this section and to apply the asset guideline class repair allowance to asset guideline class 20.2. Since the asset guideline class repair allowance is $4,500, B can deduct $4,500 in accordance with subdivision (iv) (*a*) of this subparagraph. B must capitalize $2,500 in a special basis vintage account in accordance with subdivisions (vii) (*a*) and (viii) (*a*) of this subparagraph. Since the excluded addition is a capital item and is eligible property, B must also capitalize $6,000 in a vintage account in accordance with subdivision (viii) (*c*) of this subparagraph. B selects from the asset depreciation range an asset depreciation period of 17 years for the special basis vintage account. B includes the excluded addition in a vintage account of 1972 for which he also selects an asset depreciation period of 17 years.

(3) *Treatment of retirements*—(i) *In general.* The rules of this subparagraph specify the treatment of all retirements from vintage accounts. The rules of §1.167(a)–8 shall not apply to any retirement from a vintage account. An asset in a vintage account is retired when such asset is permanently withdrawn from use in a trade or business or in the production of income by the taxpayer. A retirement may occur as a result of a sale or exchange, by other act of the taxpayer amounting to a permanent disposition of an asset, or by physical abandonment of an asset. A retirement may also occur by transfer of an asset to supplies or scrap.

(ii) *Definitions of ordinary and extraordinary retirements.* The term ''ordinary retirement'' means any retirement of section 1245 property from a vintage account which is not treated as an ''extraordinary retirement'' under this subparagraph. The retirement of an asset from a vintage account in a taxable year is an ''extraordinary retirement'' if—

(*a*) The asset is section 1250 property;

(*b*) The asset is section 1245 property which is retired as the direct result of fire, storm, shipwreck, or other casualty and the taxpayer, at his option consistently applied (taking into account type, frequency, and the size of such casualties) treats such retirements as extraordinary; or

(*c*)*(1)* The asset is section 1245 property which is retired (other than by transfer to supplies or scrap) in a taxable year as the direct result of a cessation, termination, curtailment, or disposition of a business, manufacturing, or other income producing process, operation, facility or unit, and (2) the unadjusted basis (determined without regard to subdivision (vi) of this subparagraph) of all such assets so retired in such taxable year from such account as a direct result of the event described in (*c*)*(1)* of this subdivision exceeds 20 percent of the unadjusted basis of such account immediately prior to such event.

For the purposes of (*c*) of this subdivision, all accounts (other than a special basis vintage account as described in subdivision (vi) of this subparagraph) containing section 1245 property of the same vintage in the same asset guideline class, and from which a retirement as a direct result of such event occurs within the taxable year, shall be treated as a single vintage account. See subdivision (xi) of this subparagraph for special rule for item accounts. The principles of this subdivision may be illustrated by the following examples:

Example 1. Taxpayer A is a processor and distributor of dairy products. Part of taxpayer A's operation is a bottle washing facility consisting of machines X, Y, and Z, each of which is in an item vintage account of 1971. Each item vintage account has an unadjusted basis of $1,000. Taxpayer A also has a 1971 multiple asset vintage account consisting of machines E, S, and C. Machines E and S, used in processing butter, each has an unadjusted basis of $10,000. Machine C used in capping bottles has an unadjusted basis of $1,000. In 1975, taxpayer A changes to the use of paper milk cartons and disposes of all bottle washing machines (X, Y, and Z) as well as machine C which was used in capping bottles. The sales of machine C, X, Y, and Z are the direct result of the termination of a manufacturing process. However, since the total unadjusted basis of the eligible section 1245 property retired as a direct result of such event is only $4,000 (which is less than 20 percent of the total unadjusted basis of machines E, S, C, X, Y, and Z, $24,000) the sales are ordinary retirements. All the assets are in the same asset guideline class and are of the same vintage. Accordingly, machines E, S, C, X, Y, and Z are for this purpose treated as being in a single vintage account.

Example 2. The facts are the same as in example (1) except that in 1976, taxpayer A sells six of his 12 milk delivery trucks as a direct result of eliminating home deliveries to customers in the suburbs. Deliveries within the city require only six trucks. Each of the trucks has an unadjusted basis of $3,000. Six of the taxpayer's delivery trucks are in a multiple asset vintage account of 1974 and six are in a multiple asset vintage account of 1972. Neither account contains any other property. Four trucks are retired from the 1972 vintage account and two trucks are retired from the 1974 vintage account. The sales result from the curtailment of taxpayer A's home delivery operation. The unadjusted basis of the four trucks retired from the 1972 vintage exceeds 20 percent of the total unadjusted basis of the affected account. The same is true for the two trucks retired from the 1974 vintage account. The sales of the trucks are extraordinary retirements.

(*d*) The asset is section 1245 property which is retired after December 30, 1980 by a charitable contribution for which a deduction is allowable under section 170.

(iii) *Treatment of ordinary retirements.* No loss shall be recognized upon an ordinary retirement. Gain shall be recognized only to the extent specified in this subparagraph. All proceeds from ordinary retirements shall be added to the depreciation reserve of the vintage account from which the retirement occurs. See subdivision (vi) of this subparagraph for optional allocation of basis in the case of a special basis vintage account. See subdivision (ix) of this subparagraph for recognition of gain when the depreciation reserve exceeds the unadjusted basis of the vintage account. The amount of salvage value for a vintage account shall be reduced (but not below zero) as of the beginning of the taxable year by the excess of (*a*) the depreciation reserve for the account, after adjustment for depreciation allowable for such taxable year and all other adjustments prescribed by this section (other than the adjustment prescribed by subdivision (ix) of this subparagraph), over (*b*) the unadjusted basis of the account less the amount of salvage value for the account before such reduction. Thus, in the case of a vintage account with an unadjusted basis of $1,000 and a salvage value of $100, to the extent that proceeds from ordinary retirements increase the depreciation reserve above $900, the salvage value is reduced. If the proceeds increase the depreciation reserve for the account to $1,000, the salvage value is reduced to zero. The unadjusted basis of the asset retired in an ordinary retirement is not removed from the account and the depreciation reserve for the account is not reduced by the depreciation allowable for the retired asset. The previously unrecovered basis of the retired asset will be recovered through the allowance for depreciation with respect to the vintage account. See subdivision (v)(*a*) of this subparagraph for treatment of retirements on which gain or loss is not recognized in whole or in part. See subdivision (v)(*b*) of this subparagraph for treatment of retirements by disposition to a member of an affiliated group as defined in section 1504(a). See subdivision (v)(*c*) of this subparagraph for treatment of transfers between members of an affiliated group of corporations or other related parties as extraordinary retirements.

(iv) *Treatment of extraordinary retirements*. (*a*) Unless the transaction is governed by a special nonrecognition section of the Code such as 1031 or 337 or is one to which subdivision (v)(*b*) of this subparagraph applies, gain or loss shall be recognized upon an extraordinary retirement in the taxable year in which such retirement occurs subject to section 1231, section 165, and all other applicable provisions of law such as sections 1245 and 1250. If the asset which is retired in an extraordinary retirement is the only or last asset in the account, the account shall terminate and no longer be an account to which this section applies. In all other cases, the unadjusted basis of the retired asset shall be removed from the unadjusted basis of the vintage account, and the depreciation reserve established for the account shall be reduced by the depreciation allowable for the retired asset computed in the manner prescribed in paragraph (c) (1)(v)(*b*) of this section for determination of the adjusted basis of the asset. See subdivision (ix) of this subparagraph for recognition of gain in the case of an account containing section 1245 property when the depreciation reserve exceeds the unadjusted basis of the vintage account. See subdivision (iii) of this subparagraph for reduction of salvage value for such an account when the depreciation reserve exceeds the unadjusted basis of the account minus salvage value. See subdivision (v)(*b*) of this subparagraph for treatment of retirements by disposition to a member of an affiliated group as defined in section 1504(a).

(*b*) The principles of this subdivision may be illustrated by the following examples:

Example 1. Corporation X has a multiple asset vintage account of 1971 consisting of assets K, R, A, and P all of which are section 1245 property. The unadjusted basis of the account is $40,000. The unadjusted basis of asset A is $10,000. When the reserve for depreciation for the account is $20,000, asset A is sold in an extraordinary retirement for $8,000 in cash. The $10,000 unadjusted basis of asset A is removed from the account and the $5,000 depreciation allowable for asset A is removed from the reserve for depreciation. Gain in the amount of $3,000 (to which section 1245 applies) is recognized upon the sale of asset A.

Example 2. Corporation X has an item vintage account of 1972 consisting of residential apartment unit A. Unit A is section 1250 property. It is residential rental property and meets the requirements of section 167(j)(2). Corporation X adopts the declining balance method of depreciation using a rate twice the straight line rate. The asset depreciation period is 40 years. Unit A has an unadjusted basis of $200,000. On June 30, 1974, when the reserve for depreciation for the account is $19,500, unit A is sold for $220,000. Since unit A is section 1250 property, the sale is an extraordinary retirement in accordance with subdivision (ii)(*a*) of this subparagraph (without regard to subdivision (ii)(*b*) or (*c*) of this subparagraph). The adjusted basis of unit A is $180,500. Gain in the amount of $39,500 is recognized. The ''additional depreciation'' (as defined in section 1250(b)) for unit A is $9,500. Accordingly, $9,500 is in accordance with section 1250 treated as gain from the sale or exchange of an asset which is neither a capital asset nor property described in section 1231. The $30,000 balance of the gain from the sale of unit A may be gain to which section 1231 applies.

(v) *Special rule for certain retirements.* (*a*) In the case of an ordinary retirement on which gain or loss is in whole or in part not recognized because of a special nonrecognition section of the Code, such as 1031 or 337, no part of the proceeds from such retirement shall be added to the depreciation reserve of the vintage account in accordance with subdivision (iii) of this subparagraph. Instead, such retirement shall for all purposes of this section be treated as an extraordinary retirement.

(*b*) The provisions of § 1.1502–13 shall apply to a retirement. In the case of an ordinary retirement to which the provisions of § 1.1502–13 apply, no part of the proceeds from such retirement shall be added to the depreciation reserve of the vintage account in accordance with subdivision (iii) of this subparagraph. Instead, such retirement shall for all purposes of this section be treated as an extraordinary retirement.

(*c*) In a case in which property is transferred, in a transaction which would without regard to this subdivision be treated as an ordinary retirement, during the taxable year in which first placed in service to a person who bears a relationship described in section 179(d)(2) (A) or (B), such transfer shall for all purposes of this section be treated as an extraordinary retirement.

(*d*)(*1*) If, in the case of mass assets, it is impracticable for the taxpayer to maintain records from which he can establish the vintage of such assets as retirements occur, and if he adopts other reasonable recordkeeping practices, then the vintage of mass asset retirements may be determined by use of an appropriate mortality dispersion table. Such a mortality dispersion table may be based upon an acceptable sampling of the taxpayer's actual experience or other acceptable statistical or engineering techniques. Alternatively, the taxpayer may use a standard mortality dispersion table prescribed by the Commissioner for this purpose. If the taxpayer uses such standard mortality dispersion table for any taxable year of election, it must be used for all subsequent taxable years of election unless the taxpayer obtains the consent of the Commissioner to change to another dispersion table or to actual identification of retirements. For information requirements regarding mass assets, see paragraph (f)(5) of this section.

(*2*) For purposes of this section, the term ''mass assets'' has the same meaning as when used in paragraph (e)(4) of § 1.47–1.

(*e*) The principles of this subdivision may be illustrated by the following examples:

Example 1. Corporation X has a vintage account of 1971 consisting of machines A, B, and C, each with an unadjusted basis of $1,000. The unadjusted basis of the account is $3,000 and at the end of 1977 the reserve for depreciation is $2,100. On January 1, 1978, machine A is transferred to corporation Y solely for stock in the amount of $1,400 in a transaction to which section 351 applies. Since the adjusted basis of machine A is $300, a gain of $1,100 is realized, but no gain is recognized under section 351. Even though machine A was transferred in an ordinary retirement in accordance with (*a*) of this subdivision the rules for an extraordinary retirement are applied. The proceeds are not added to the reserve for depreciation for the account. Machine A is removed from the account, the unadjusted basis of the account is reduced by $1,000, and the reserve for depreciation for the account is reduced by $700.

Example 2. The facts are the same as in example (1) except that the consideration received for machine A is stock of corporation Y in the amount of $1,200 and cash in the amount of $200. The result is the same as in example (1) except that gain is recognized in the amount of $200 all of which is gain to which section 1245 applies.

Example 3. The facts are the same as in example (1) except that machine A is sold for $1,400 cash in an ordinary retirement and corporation X and corporation Y are includible corporations in an affiliated group as defined in section 1504(a) which files a consolidated return for 1978. Accordingly, (*b*) of this subdivision applies. The retirement is treated as an extraordinary retirement. Machine A is removed from the account, the unadjusted basis of the account is reduced by $1,000, and the reserve for depreciation for the account is reduced by $700. The gain of $1,100 is deferred gain to which §1.1502–13 applies.

(vi) *Treatment of special basis vintage accounts.* A ''special basis vintage account'' is a vintage account for an amount of property improvement determined under subparagraph (2)(vii)(*a*) of this paragraph. In general, reference in this section to a ''vintage account'' shall include a special basis vintage account. The unadjusted basis of a special basis vintage account shall be recovered through the allowance for depreciation in accordance with this section over the asset depreciation period for the account. Except as provided in this subdivision, the unadjusted basis, adjusted basis and reserve for depreciation of such account shall not be allocated to any specific asset in the asset guideline class, and the provisions of this subparagraph shall not apply to such account. However, in the event of a sale, exchange or other disposition of ''repair allowance property'' (as described in subparagraph (2)(iii) of this paragraph) in an extraordinary retirement as described in subdivision (ii) of this subparagraph (or if the asset is not in a vintage account, in an abnormal retirement as described in §1.167(a)–8), the taxpayer may, if consistently applied to all such retirements in the taxable year and adequately identified in the taxpayer's books and records, elect to allocate the adjusted basis (as of the end of the taxable year) of all special basis vintage accounts for the asset guideline class to each such retired asset in the proportion that the adjusted basis of the retired asset (as of the beginning of the taxable year) bears to the adjusted basis of all repair allowance property in the asset guideline class at the beginning of the taxable year. The election to allocate basis in accordance with this subdivision shall be made on the tax return filed for the taxable year. The principles of this subdivision may be illustrated by the following example:

Example. In addition to other property, the taxpayer has machines A, B, and C all in the same asset guideline class and each with an adjusted basis on January 1, 1977, of $10,000. The adjusted basis on January 1, 1977, of all repair allowance property (as described in subparagraph (2)(iii) of this paragraph) in the asset guideline class is $90,000. The machines are sold in an extraordinary retirement in 1977. The taxpayer is entitled to and does elect to allocate basis in accordance with this subdivision. There is also a 1972 special basis vintage account for the asset guideline class, as follows:

	Unadjusted basis	Reserve for depreciation	Dec. 31, 1977, adjusted basis
1972 special basis vintage account, for which the taxpayer selected an asset depreciation period of 10 years, adopted the straight line method, and used the half-year convention	$2,000	$1,100	$900

By application of this subdivision, the adjusted basis of machines A, B, and C is increased to $10,100 each (that is, $10,000÷$90,000×$900 = $100). The unadjusted basis, reserve for depreciation and adjusted basis of the special basis vintage account are reduced, respectively, by one-third (that is, $300÷$900=⅓) in order to reflect the allocation of basis from the special basis vintage account.

(vii) *Reduction in the salvage value of a vintage account.* (*a*) A taxpayer may apply this section without reducing the salvage value for a vintage account in accordance with this subdivision or in accordance with subdivision (viii) of this subparagraph (relating to transfers to supplies or scrap). See subdivision (iii) of this subparagraph for reduction of salvage value in certain circumstances in the amount of proceeds from ordinary retirements.

(*b*) However, the taxpayer may, at his option, follow the consistent practice of reducing, as retirements occur, the salvage value for a vintage account by the amount of salvage value attributable to the retired asset, or the taxpayer may consistently follow the practice of so reducing the salvage value for a vintage account as extraordinary retirements occur while not reducing the salvage value for the account as ordinary retirements occur. If the taxpayer does not reduce the salvage value for a vintage account as ordinary retirements occur, the taxpayer may be entitled to a deduction in the taxable year in which the last asset is retired from the account in accordance with subdivision (ix) (*b*) of this subparagraph.

(*c*) For purposes of this subdivision, the portion of the salvage value for a vintage account attributable to a retired asset may be determined by multiplying the salvage value for the account by a fraction, the numerator of which is the unadjusted basis of the retired asset and the denominator of which is the unadjusted basis of the account, or any other method consistently applied which reasonably reflects that portion of the salvage value for the account originally attributable to the retired asset.

(*d*) In the case of ordinary retirements the taxpayer may—

(*1*) In the case of retirements (other than by transfer to supplies or scrap) follow the consistent practice of reducing the salvage value for the account by the amount of salvage value attributable to the retired asset and not adding the same amount to the depreciation reserve for the account, and

(*2*) In the case of retirements by transfer to supplies or scrap, follow the consistent practice of reducing the salvage value for the account by the amount of salvage value attributable to the retired asset and not adding the same amount to the depreciation reserve for the account (in which case the basis in the supplies or scrap account of the retired asset will be zero) or follow the consistent practice of reducing the salvage value for the account by the amount of salvage value attributable to the retired asset and adding the same amount to the depreciation reserve for the account (up to an amount which does not increase the depreciation reserve to an amount in excess of the unadjusted basis of the account) in which case the basis in the supplies or scrap account of the retired asset will be the amount added to the depreciation reserve for the account.

Thus, for example, in the case of an ordinary retirement by transfer of an asset to supplies or scrap, the basis of the asset in the supplies or scrap account would either be zero or the amount added to the depreciation reserve of the vintage account from which the retirement occurred. When the depreciation reserve for the account equals the unadjusted basis of the account no further adjustment to salvage value for the account will be made. See subdivision (viii) of this subparagraph for special optional rule for reduction of salvage value in the case of an ordinary retirement by transfer of an asset to supplies or scrap.

(*e*) In the event of a removal of property from a vintage account in accordance with paragraph (b)(4)(iii)(*e*), (5)(v)(*b*) or (6)(iii) of this section the salvage value for the account may be reduced by the amount of salvage value attributable to the asset removed determined as provided in (*c*) of this subdivision.

(viii) *Special optional adjustments for transfers to supplies or scrap.* If the taxpayer does not follow the consistent practice of reducing, as ordinary retirements occur, the salvage value for a vintage account in accordance with subdivision (vii) of this subparagraph, the taxpayer may (in lieu of the method described in subdivision (vii) (*c*) and (*d*) of this subparagraph) follow the consistent practice of reducing salvage value as ordinary retirements occur by transfer of assets to supplies or scrap and of determining the basis (in the supplies or scrap account) as assets retired in an ordinary retirement by transfer to supplies or scrap, in the following manner—

(*a*) The taxpayer may determine the value of the asset (not to exceed its unadjusted basis) by any reasonable method consistently applied (such as average cost, conditioned cost, or fair market value) if such method is adequately identified in the taxpayer's books and records.

(*b*) The value attributable to the asset determined in accordance with (*a*) of this subdivision shall be subtracted from the salvage value for the account (to the extent thereof) and the greater of (*1*) the amount subtracted from the salvage value for the vintage account and (*2*) the value of the asset determined in accordance with (*a*) of this subdivision, shall be added to the reserve for depreciation of this vintage account.

(*c*) The amount added to the reserve for depreciation of the vintage account in accordance with (*b*) of this subdivision shall be treated as the basis of the retired asset in the supplies or scrap account.

If the taxpayer makes the adjustments in accordance with this subdivision, the reserve for depreciation of the vintage account may exceed the unadjusted basis of the account, and in that event gain will be recognized in accordance with subdivision (ix) of this subparagraph.

(ix) *Recognition of gain or loss in certain situations.* (*a*) In the case of a vintage account for section 1245 property, if at the end of any taxable year after adjustment for depreciation allowable for such taxable year and all other adjustments prescribed by this section, the depreciation reserve established for such account exceeds the unadjusted basis of the account, the entire amount of such excess shall be recognized as gain in such taxable year. Such gain—

(*1*) Shall constitute gain to which section 1245 applies to the extent that it does not exceed the total amount of depreciation allowances in the depreciation reserve at the end of such taxable year, reduced by gain recognized pursuant to this subdivision with respect to the account previously treated as gain to which section 1245 applies, and

(*2*) May constitute gain to which section 1231 applies to the extent that it exceeds such total amount as so reduced.

In such event, the depreciation reserve shall be reduced by the amount of gain recognized, so that after such reduction the amount of the depreciation reserve is equal to the unadjusted basis of the account.

(*b*) In the case of an account for section 1245 property, if at the time the last asset in the vintage account is retired the unadjusted basis of the account exceeds the depreciation reserve for the account (after all adjustments prescribed by this section), the entire amount of such excess shall be recognized in such taxable year as a loss under section 165 or as a deduction for depreciation under section 167. If the retirement of such asset occurs by sale or exchange on which gain or loss is recognized, the amount of such excess may constitute a loss subject to section 1231. Upon retirement of the last asset in a vintage account, the account shall terminate and no longer be an account to which this section applies. See subdivision (xi) of this subparagraph for treatment of certain multiple asset and item accounts.

(*c*) The principles of this subdivision may be illustrated by the following example:

Example. The taxpayer has a vintage account for section 1245 property with an unadjusted basis of $1,000 and a depreciation reserve of $700 (of which $600 represents depreciation allowances and $100 represents the proceeds of ordinary retirements from the account). If $500 is realized during the taxable year from ordinary retirements of assets from the account, the reserve is increased to $1,200, gain is recognized to the extent of $200 (the amount by which the depreciation reserve before further adjustment exceeds $1,000) and the depreciation reserve is then decreased to $1,000. The $200 of gain constitutes gain to which section 1245 applies. If the amount realized from ordinary retirements during the year had been $1,100 instead of $500, the gain of $800 would have consisted of $600 of gain to which section 1245 applies and $200 of gain to which section 1231 may apply.

(x) *Dismantling cost.* The cost of dismantling, demolishing, or removing an asset in the process of a retirement from the vintage account shall be treated as an expense deductible in the year paid or incurred, and such cost shall not be subtracted from the depreciation reserve for the account.

(xi) *Special rule for treatment of multiple asset and item accounts.* For the purposes of subdivision (ix)(*b*) of this subparagraph, all accounts (other than a special basis vintage account as described in subdivision (vi) of this subparagraph) of the same vintage in the same asset guideline class for which the taxpayer has selected the same asset depreciation period and adopted the same method of depreciation, and which contain only section 1245 property permitted by paragraph (b)(3)(ii) of this section to be included in the same vintage account, shall be treated as a single multiple asset vintage account.

(4) *Examples.* The principles of this paragraph may be illustrated by the following examples:

Example 1. (*a*)Taxpayer A has a multiple asset vintage account for selection 1245 property with an unadjusted basis of $1,000. All the assets were first placed in service by A on January 15, 1971. This account contains all of A's assets in a single asset guideline class. A elects to apply this section for 1971 and adopts the modified half-year convention. A estimates a salvage value for the account of $100 and this estimate is determined to be reasonable. (See subparagraph (1)(v) of this paragraph for limitation on adjustment of reasonable salvage value.) A adopts the straight line method of depreciation with respect to the account and selects a 10-year asset depreciation period. A does not follow a practice of reducing the salvage value for the account in the amount of salvage value attributable to each retired asset in accordance with subparagraph (3)(vii) of this paragraph. The depreciation allowance for each of the first 4 years is $100, that is 1/10 multiplied by the unadjusted basis of $1,000, with reduction for salvage.

(*b*) In the fifth year of the asset depreciation period, three assets are sold in an ordinary retirement for $300. Under paragraph (c)(1)(ii) of this section and subparagraph (3)(iii) of this paragraph, the proceeds of the retirement are added to the depreciation reserve as of the beginning of the fifth year. Accordingly, the reserve as of the beginning of the fifth year is $700, that is, $400 of depreciation as of the beginning of the year plus $300 proceeds from ordinary retirements. The depreciation allowance for the fifth year is $100, that is 1/10 multiplied by the unadjusted basis of $1,000, without reduction for salvage. Accordingly, the depreciation reserve at the end of the fifth year is $800.

(*c*) In the sixth year, asset X is sold in an extraordinary retirement for $30 and gain or loss is recognized. Under the first-year convention used by the taxpayer, the unadjusted basis of X, $300, is removed from the unadjusted basis of the vintage account as of the beginning of the sixth year and the depreciation reserve as of the beginning of such year is reduced to $650 by removing the depreciation applicable to asset X, $150 (see subparagraph (3)(iv) of this paragraph). Since the depreciation reserve ($650) exceeds the unadjusted basis of the account ($700) minus salvage value ($100) by $50, under subparagraph (3)(iii) of this paragraph, salvage value is reduced by $50. No depreciation is allowable for the sixth year.

(*d*) In the seventh year, an asset is sold in an ordinary retirement for $110. This would increase the reserve as of the beginning of the seventh year to $760 and under subparagraph (3)(iii) of this paragraph the salvage value is reduced to zero. Under subparagraph (3)(ix)(*a*) of this paragraph the depreciation reserve is then decreased to $700 (the unadjusted basis of the account) and $60 is reported as gain, without regard to the adjusted basis of the asset. No depreciation is allowable for the seventh year since the depreciation reserve ($700) equals the unadjusted basis of the account ($700).

(*e*)(*1*) In the eighth year, A elects to apply this section and to treat expenditures during the year for repair, maintenance, rehabilitation or improvement under subparagraph (2)(iii) and (iv)(*a*) of this paragraph (the "guideline class repair allowance"). This results in the treatment of $300 as a property improvement for the asset guideline class. (See subparagraph (2)(vii) of this paragraph for definition of a property improvement.) The property improvement is capitalized in a special basis vintage account of the eighth taxable year (see subparagraph (2)(viii)(*a*) of this paragraph). A selects an asset depreciation period of 10 years and adopts the straight line method for the special basis vintage account. A adopts the modified half-year convention for the eighth year.

(*2*) In the eighth year, A sells asset Y in an ordinary retirement for $175. Under paragraph (c)(1)(ii) of this section and subparagraph (3)(iii) of this paragraph, $175 is added to the depreciation reserve for the account as of the beginning of the taxable year. Since the depreciation reserve for the account ($875) exceeds the unadjusted basis of the account ($700) by $175, that amount of gain is recognized under subparagraph (3)(ix) of this paragraph. Upon recognition of gain in the amount of $175, the depreciation reserve for the account is reduced to $700.

(*3*) No depreciation is allowable in the eighth year for the vintage account since the depreciation reserve ($700) equals the unadjusted basis of the account ($700). The depreciation allowable in the eighth year for the special basis vintage account is $15, that is, unadjusted basis of $300, multiplied by 1/10, the asset depreciation period selected for the special basis vintage account, but limited to $15 under the modified half-year convention. (See paragraph (e)(1)(iv) of this section for treatment of $150 of the property improvement as first placed in service in the first half of the taxable year and $150 of the property improvement as first placed in service in the last half of the taxable year.)

Example 2. Taxpayer B has a 1971 multiple asset vintage account for section 1245 property with an unadjusted basis of $100,000. B selects from the asset depreciation range an asset depreciation period of 10 years and adopts the straight line method of depreciation and the modified half-year convention. B establishes a salvage value for the account of $10,000. All the assets in the account are first placed in service on January 15, 1971. B follows the practice of reducing salvage value for the account as ordinary retirements occur in accordance with subparagraph (3)(vii) of this paragraph, but does not follow the optional practice of determining the basis of assets transferred to supplies or scrap in accordance with subparagraph (3)(vii) of this paragraph. No retirements occur during the first five years. The depreciation reserve at the beginning of the sixth year is $50,000. In the sixth year an asset with an unadjusted basis of $20,000 is transferred to supplies in an ordinary retirement. By application of subparagraph (3)(vii) (*c*) and (*d*)(*2*) of this paragraph B determines the reduction in salvage value for the account attributable to such asset to be $2,000 (that is, $\$20,000 \div \$100,000 \times \$10,000 = \$2,000$).

B reduces the salvage value for the account by $2,000 and adds 2,000 to the depreciation reserve for the account. The basis of the retired asset in the supplies account is $2,000. The depreciation allowable for the account for the sixth year is $10,000. The depreciation reserve for the account at the beginning of the seventh year is $62,000. At the mid-point of the seventh year all the remaining assets in the account are sold in an ordinary retirement for $20,000, which is added to the depreciation reserve as of the beginning of the seventh year, thus increasing the reserve to $82,000. The $5,000 depreciation allowable for the account for the seventh year (one-half of a full-year's depreciation of $10,000) increases the depreciation reserve to $87,000. Under subparagraph (3)(ix)(*b*) of this paragraph, a loss of $13,000 subject to section 1231 is realized in the seventh year (that is, the excess of the unadjusted basis of $100,000 over the depreciation reserve of $87,000). No depreciation is allowable for the account after the mid-point of the seventh year since all the assets are retired and the account has terminated.

(e) *Accounting for eligible property*—(1) *Definition of first placed in service*—(i) *In general*. The term ''first placed in service'' refers to the time the property is first placed in service by the taxpayer, not to the first time the property is placed in service. Property is first placed in service when first placed in a condition or state of readiness and availability for a specifically assigned function, whether in a trade or business, in the production of income, in a tax-exempt activity, or in a personal activity. In general, the provisions of paragraph (d)(1)(ii) and (d)(2) of § 1.46–3 shall apply for the purpose of determining the date on which property is placed in service, but see subdivision (ii) of this subparagraph for special rule for certain replacement parts. In the case of a building which is intended to house machinery and equipment and which is constructed, reconstructed, or erected by or for the taxpayer and for the taxpayer's use, the building will ordinarily be placed in service on the date such construction, reconstruction, or erection is substantially complete and the building is in a condition or state of readiness and availability. Thus, for example, in the case of a factory building, such readiness and availability shall be determined without regard to whether the machinery or equipment which the building houses, or is intended to house, has been placed in service. However, in an appropriate case, as for example where the building is essentially an item of machinery or equipment, or the use of the building is so closely related to the use of the machinery or equipment that it clearly can be expected to be replaced or retired when the property it initially houses is replaced or retired, the determination of readiness or availability of the building shall be made by taking into account the readiness and availability of such machinery or equipment. The date on which depreciation begins under a convention used by the taxpayer or under a particular method of depreciation, such as the unit of production method or the retirement method, shall not determine the date on which the property is first placed in service. See paragraph (c)(2) of this section for application of a first-year convention to determine the allowance for depreciation of property in a vintage account.

(ii) *Certain replacement parts*. Property (such as replacement parts) the cost or other basis of which is deducted as a repair expense in accordance with the asset guideline repair allowance described in paragraph (d)(2)(iii) of this section shall not be treated as placed in service.

(iii) *Property improvements and excluded additions*. (*a*) Except as provided in (*b*) of this subdivision, a property improvement determined under paragraph (d)(2)(vii)(*b*) of this section, and an excluded addition (other than an excluded addition referred to in the succeeding sentence) is first placed in service when its cost is paid or incurred. The general rule in subdivision (i) of this subparagraph applies to an excluded addition described in paragraph (d) (2)(vi) (*d*), (*e*), (*f*), or (*g*) of this section.

(*b*) If a property improvement or an excluded addition to which the first sentence of (*a*) of this subdivision applies is paid or incurred in part in one taxable year and in part in the succeeding taxable year (or in part in the first half of a taxable year and in part in the last half of the taxable year) the taxpayer may at his option consistently treat such property improvements and excluded additions under the general rule in subdivision (i) of this subparagraph.

(iv) *Certain property improvements.* In the case of an amount of property improvement determined under paragraph (d)(2)(vii)(*a*) of this section, one-half of such amount is first placed in service in the first half of the taxable year in which the cost is paid or incurred and one-half is first placed in service in the last half of such taxable year.

(v) *Special rules for clearing accounts.* In the case of public utilities which consistently account for certain property through ''clearing accounts,'' the date on which such property is first placed in service shall be determined in accordance with rules to be prescribed by the Commissioner.

(2) *Special rules for transferred property.* If eligible property is first placed in service by the taxpayer during a taxable year of election, and the property is disposed of before the end of the taxable year, the election for such taxable year shall include such property unless such property is excluded in accordance with paragraph (b)(5) (iii), (iv, (v), (vi), or (vii) of this section.

(3) *Special rules in the case of certain transfers*—(i) *Transaction to which section 381(a) applies.* (*a*) In general the acquiring corporation in a transaction to which section 381(a) applies is for the purposes of this section treated as if it were the distributor or transferor corporation.

(*b*) If the distributor or transferor corporation (including any distributor or transferor corporation of any distributor or transferor corporation) has made an election to apply this section to eligible property transferred in a transaction to which section 381(a) applies, the acquiring corporation must segregate such eligible property (to which the distributor or transferor corporation elected to apply this section) into vintage accounts as nearly coextensive as possible with the vintage accounts created by the distributor or transferor corporation identified by reference to the year the property was first placed in service by the distributor or transferor corporation. The asset depreciation period for the vintage account in the hands of the distributor or transferor corporation must be used by the acquiring corporation. The method of depreciation adopted by the distributor or transferor corporation, shall be used by the acquiring corporation unless such corporation obtains the consent of the Commissioner to use another method of depreciation in accordance with paragraph (e) of §1.446–1 or changes the method of depreciation under paragraph (c)(1)(iii) of this section.

(*c*) The acquiring corporation may apply this section to the property so acquired only if the distributor or transferor corporation elected to apply this section to such property.

(*d*) See paragraph (b)(7) of this section for special rule for certain property where there is a mere change in the form of conducting a trade or business.

(ii) *Partnerships, trusts, estates, donees, and corporations.* Except as provided in subdivision (i) of this subparagraph with respect to transactions to which section 381(a) applies and subdivision (iv) of this subparagraph with respect to certain transfers between members of an affiliated group of corporations or other related parties, if eligible property is placed in service by an individual, trust, estate, partnership or corporation, the election to apply this section shall be made by the individual, trust, estate, partnership or corporation placing such property in service. For example, if a partnership places in service property contributed to the partnership by a partner, the partnership may elect to apply this section to such property. If the partnership does not make the election, this section will not apply to such property. See paragraph (b)(7) of this section for special rule for certain property where there is mere change in the form of conducting a trade or business.

(iii) *Leased property.* The asset depreciation range and the asset depreciation period for eligible property subject to a lease shall be determined without regard to the period for which such property is leased, including any extensions or renewals of such period. See paragraph (b)(5)(v) of this section for exclusion of property amortized under paragraph (b) of § 1.162–11 from an election to apply this section. In the case of a lessor of property, unless there is an asset guideline class in effect for lessors of such property, the asset guideline class for such property shall be determined as if the property were owned by the lessee. However, in the case of an asset guideline class based upon the type of property (such as trucks or railroad cars) as distinguished from the activity in which used, the property shall be classified without regard to the activity of the lessee. Notwithstanding the preceding sentence, if a lease with respect to property, which would be includible in an asset guideline class based upon the type of property under the preceding sentence (such as trucks or railroad cars), is entered into after March 12, 1971, and before April 23, 1973, or a written contract to execute such a lease is entered into during such period and such contract is binding on April 23, 1973, and at all times thereafter, and if the rent or rate of return is based on a classification of such property as if it were owned by the lessee, then such property shall be classified as if it were owned by the lessee. However, the preceding sentence shall not apply if pursuant to the terms or conditions of the lease or binding contract the rent or rate of return may be adjusted to take account of a change in the period for depreciation with respect to the property resulting from inclusion of the property in an asset guideline class based upon the type of property rather than in an asset guideline class based upon the activity of the lessee. Similarly, where the terms of such a lease or contract provide that the obligation of the taxpayer to enter into the lease is subject to a condition that the property be included in an asset guideline class based upon the activity of the lessee, the contract or lease will not be considered as binding upon the taxpayer, for purposes of this subdivision. See paragraph (b)(4)(iii)(*b*) of this section for general rule for classification of property according to primary use.

(iv) *Treatment of certain transfers between members of affiliated groups or other related persons.* If section 38 property in an asset guideline class (determined without regard to whether the taxpayer elects to apply this section) is transferred by the taxpayer to a person who bears a relationship described in section 179(d)(2) (A) or (B), such property is in the same asset guideline class in the hands of transferee, and the transfer is neither described in section 381(a) nor treated as a disposition or cessation within the meaning of section 47, then the asset guideline period for such property selected by the taxpayer under this section shall not be shorter than the period used for computing the qualified investment with respect to the property under section 46(c). In a case in which the asset depreciation range for the asset guideline class which includes such property does not include the period for depreciation used by the transferor in computing the qualified investment with respect to such property, the transferee will not be permitted to include such property in an election under this section. However, in such a case, the transferor of the property may recompute the qualified investment for the year the property was placed in service using a period for depreciation which falls within the asset depreciation range.

(f) *Election with respect to eligible property*—(1) *Time and manner of election*—(i) *In general.* An election to apply this section to eligible property shall be made with the income tax return filed for the taxable year in which the property is first placed in service (see paragraph (e)(1) of this section) by the taxpayer. In the case of an affiliated group of corporations (as defined in section 1504(a)) which makes a consolidated return with respect to income tax in accordance with section 1502 and the regulations thereunder, each corporation which joins in the making of such return may elect to apply this section for a taxable year. An election to compute the allowance for depreciation under this section is a method of accounting but the consent of the Commissioner will be deemed granted to make an annual election. For election by a partnership see section 703 (b) and paragraph (e)(3)(ii) of this section. If the taxpayer does not file a timely return (taking into account extensions of the time for filing) for the taxable year in which the property is first placed in service, the election shall be filed at the time the taxpayer files his first return for that year. The election may be made with an amended return filed within the time prescribed by law (including extensions) for filing the original return for the taxable year of election. If an election is not made within the time and in the manner prescribed in this paragraph, no election may be made for such taxable year (by the filing of an amended return or in any other manner) with respect to any eligible property placed in service in the taxable year.

(ii) *Other elections under this section.* All other elections under this section may be made only within the time and in the manner prescribed by subdivision (i) of this subparagraph with respect to an election to apply this section.

(iii) *Effective date.* See paragraph (f)(6) of this section for the effective date of this paragraph.

(2) *Information required.* A taxpayer who elects to apply this section must specify in the election:

(i) That the taxpayer makes such election and consents to and agrees to apply, all the provisions of this section;

(ii) The asset guideline class for each vintage account of the taxable year;

(iii) The first-year convention adopted by the taxpayer for the taxable year of election;

(iv) Whether the special 10 percent used property rule described in paragraph (b)(5)(iii) of this section has been applied to exclude used property from the election;

(v) Whether the taxpayer elects to apply the asset guideline class repair allowance described in paragraph (d)(2)(iii) of this section;

(vi) Whether the taxpayer elects for the taxable year to allocate the adjusted basis of a special basis vintage account in accordance with paragraph (d)(3)(vi) of this section;

(vii) Whether any eligible property for which the taxpayer was not required or permitted to make an election was excluded because of the special rules of paragraph (b)(5)(v) or (6), or paragraph (e)(3)(i) or (iv) of this section;

(viii) Whether any ''section 38 property'' was excluded under paragraph (b)(5)(iv) of this section from the election to apply this section;

(ix) If the taxpayer is an electric or gas utility, whether the taxpayer elects to apply this section on the basis of a composite asset guideline class in accordance with paragraph (b)(4)(iii)(*a*) of this section; and

(x) Such other information as may reasonably be required.

The information required under this subparagraph may be provided in accordance with rules prescribed by the Commissioner for reasonable grouping of assets or accounts. Form 4832 is provided for making an election and for submission of the information required. An election may be made and the information submitted only in accordance with Form 4832. An election to apply this section will not be rendered invalid under this subparagraph so long as there is substantial compliance, in good faith, with the requirements of this subparagraph.

(3) *Irrevocable election.* An election to apply this section to eligible property for any taxable year may not be revoked or changed after the time for filing the election prescribed under subparagraph (1) of this paragraph has expired. No other election under this section may be revoked or changed after such time unless expressly provided for under this section. (See paragraph (b)(5)(v)(*b*) of this section for special rule.)

(4) *Special conditions to election to apply this section*—(i) *Maintenance of books and records.* The taxpayer may not elect to apply this section for a taxable year unless the taxpayer maintains the books and records required under this section. In addition to any other information required under this section, the taxpayer's books and records must specify—

(*a*) The asset depreciation period selected by the taxpayer for each vintage account;

(*b*) If the taxpayer applies the modified half-year convention, the total cost or other basis of all eligible property first placed in service in the first half of the taxable year and the total cost or other basis of all eligible property first placed in service in the last half of the taxable year;

(*c*) The unadjusted basis and salvage value for each vintage account, and the amount, if any, by which gross salvage value was decreased under section 167 (f);

(*d*) Each asset guideline class for which the taxpayer elects to apply the asset guideline class repair allowance described in paragraph (d)(2)(iii) of this section;

(*e*) The amount of property improvement, determined under paragraph (d)(2)(vii)(*a*) of this section, for each asset guideline class for which the taxpayer elects to apply the asset guideline class repair allowance;

(*f*) A reasonable description of property excluded from an election to apply this section and the basis for the exclusion;

(*g*) The total unadjusted basis of all assets retired during the taxable year from each asset guideline class, and the proceeds realized during the taxable year from such retirements; and

(*h*) The vintage (that is, the taxable year in which established) of the assets retired during the year from each asset guideline class.

For purposes of paragraph (f)(4)(i) (*g*) and (*h*) of this section, all accounts of the same vintage and asset guideline class may be treated as a single account. The taxpayer must specify the information required under paragraph (f)(4)(i) (*g*) and (*h*) without regard to the retirement of an asset by transfer to a supplies account for reuse.

(ii) *Response to survey.* Taxpayers who elect to apply this section must respond to infrequent data surveys conducted by the Treasury Department. These periodic surveys, which will be conducted on the basis of scientifically sound sampling methods, are designed to obtain data (including industry asset acquisitions and retirements) used to keep the asset guideline classes and periods up to date.

(iii) *Effect of noncompliance.* An election to apply this section will not be rendered invalid under this subparagraph so long as there is substantial compliance, in good faith, with the requirements of this subparagraph.

(5) *Mass assets.* In the case of mass assets, if the taxpayer assigns retirements to vintage accounts in the manner provided in paragraph (d)(3)(v)(*c*) of this section, the following information must be supplied with form 4832:

(i) Whether the taxpayer used the standard mortality dispersion curve or a curve based upon his own experience, and

(ii) Such other reasonable information as may be required by the Commissioner.

(6) *Effective date.* The rules in this paragraph apply to elections for taxable years ending on or after December 31, 1978. In the case of an election for a taxable year ending before December 31, 1978, the rules in paragraph (f) of this section, in effect before the amendments made by T.D. 7593 approved January 11, 1979, shall apply. See 26 CFR § 1.167(a)–11(f) (1977) for paragraph (f) of this section as it appeared before the amendments made by T.D. 7593.

(g) *Relationship to other provisions*—(1) *Useful life*—(i) *In general.* Except as provided in subdivision (ii) of this subparagraph, an election to apply this section to eligible property constitutes an agreement under section 167(d) and this section to treat the asset depreciation period for each vintage account as the useful life of the property in such account for all purposes of the Code, including sections 46, 47, 48, 57, 163(d), 167(c), 167(f)(2), 179, 312(m), 514(a), and 4940(c). For example, since section 167(c) requires a useful life of at least 3 years and the asset depreciation period selected is treated as the useful life for purposes of section 167(c), the taxpayer may adopt a method of depreciation described in section 167(b) (2) or (3) for an account only if the asset depreciation period selected for the account is at least 3 years.

(ii) *Special rules.* (*a*) For the purposes of paragraph (d) of this section, the anticipated period of use (estimated at the close of the taxable year in which the asset is first placed in service) on the basis of which salvage value is estimated, shall be determined without regard to the asset depreciation period for the property.

(*b*) For the purposes of sections 162 and 263 and the regulations thereunder, whether an expenditure prolongs the life of an asset shall be determined on the basis of the anticipated period of use of the asset (estimated at the close of the taxable year in which the asset is first placed in service) without regard to the asset depreciation period for such asset.

(*c*) The determination whether a transaction with respect to qualified property constitutes a sale or a lease of such property shall be made without regard to the asset depreciation period for the property.

(*d*) The principles of this subdivision may be illustrated by the following example:

Example. Corporation X has assets in asset guideline class 32.3 which are used in the manufacture of stone and clay products. The asset depreciation range for assets in asset guideline class 32.3 is from 12 to 18 years. Assume that corporation X selects 14 years as the asset depreciation period for all assets in asset guideline class 32.3. Under paragraph (d)(1)(i) of this section, corporation X must estimate salvage value on the basis of the anticipated period of use of the property (determined as of the close of the taxable year in which the property is first placed in service). The anticipated period of use must also be used for purposes of sections 162 and 263 in determining whether an expenditure materially prolongs the useful life of an asset. The anticipated period of use of an asset is determined without regard to the asset depreciation period of 14 years. Corporation X has, among other assets in the asset guideline class, machines A, B, and C. Corporation X estimates the anticipated period of use of machines A, B, and C as 8 years, 14 years, and 22 years, respectively. These estimates are reasonable and will be used for estimating salvage value and for purposes of sections 162 and 263.

(2) *Section 167(d) agreements.* If the taxpayer has, prior to January 1, 1971, entered into a section 167(d) agreement which applies to any eligible property, the taxpayer will be permitted to withdraw the eligible property from the agreement provided that an election is made to apply this section to such property. The statement of intent to withdraw eligible property from such an agreement must be made in an election filed for the taxable year in which the property is first placed in service. The withdrawal, in accordance with this subparagraph, of any eligible property from a section 167(d) agreement shall not affect any other property covered by such an agreement.

(3) *Relationship to the straight line method*—(i) *In general.* For purposes of determining the amount of depreciation which would be allowable under the straight line method of depreciation, such amount shall be computed with respect to any property in a vintage account using the straight line method in the manner described in paragraph (c)(1)(i) of this section and a rate based upon the period for the vintage account selected from the asset depreciation range. Thus, for example, section 57(a)(3) requires a taxpayer to compute an amount using the straight line method of depreciation if the taxpayer uses an accelerated method of depreciation. For purposes of section 57(a)(3), the amount for property in a vintage account shall be computed using the asset depreciation period for the vintage account selected from the asset depreciation range. In the case of property to which the taxpayer does not elect to apply this section, such amount computed by using the straight line method shall be determined under §1.167(b)–1 without regard to this section.

(ii) *Examples.* The principles of this subparagraph may be illustrated by the following example:

Example. (*a*) Corporation X places a new asset in service to which it elects to apply this section. The cost of the asset is $200,000 and the estimated salvage value is zero. The taxpayer selects 9 years from the applicable asset depreciation range of 8 to 12 years. Corporation X adopts the double declining balance method of depreciation and thus the rate of depreciation is 22.2 percent (twice the applicable straight line rate). The depreciation allowance in the first year would be $44,400, that is, 22.2 percent of $200,000.

(*b*) Assume that the provisions of section 57(a)(3) apply to the property. The amount of the tax preference would be $22,200, that is, the excess of the depreciation allowed under this section ($44,400) over the depreciation which would have been allowable if the taxpayer had used the period selected from the asset depreciation range and the straight line rate ($22,200).

(Secs. 167(m), 85 Stat. 508 (26 U.S.C. 167(m) and 7805, 68A Stat. 917, (26 U.S.C. 7805))

[T.D. 7272, 38 FR 9967, Apr. 23, 1973]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §1.167(a)–11, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov*.

§ 1.167(a)–12 Depreciation based on class lives for property first placed in service before January 1, 1971.

(a) *In general*—(1) *Summary*. This section provides an elective class life system for determining the reasonable allowance for depreciation of certain classes of assets for taxable years ending after December 31, 1970. The system applies only to assets placed in service before January 1, 1971. Depreciation for such assets during periods prior to January 1, 1971, may have been determined in accordance with Revenue Procedure 62–21. Accordingly, rules are provided which permit taxpayers to apply the system in taxable years ending after December 31, 1970, to such assets without the necessity of changing or regrouping their depreciation accounts other than as previously required by Revenue Procedure 62–21. The system is designed to minimize disputes between taxpayers and the Internal Revenue Service as to the useful life of assets, salvage value, and repairs. See §1.167(a)–11 for a similar system for property placed in service after December 31, 1970. See paragraph (d)(2) of §1.167(a)–11 for treatment of expenditures for the repair, maintenance, rehabilitation or improvement of certain property. The system provided by this section is optional with the taxpayer. An election under this section applies only to qualified property in an asset guideline class for which an election is made and only for the taxable year of election. The taxpayer's election is made with the income tax return for the taxable year. This section also revokes the reserve ratio test for taxable years ending after December 31, 1970, and provides transitional rules for taxpayers who after January 11, 1971, adopt Revenue Procedure 62–21 for a taxable year ending prior to January 1, 1971.

(2) *Revocation of reserve ratio test and other matters*. Except as otherwise expressly provided in this section and in paragraph (b)(5)(vi) of §1.167(a)–11, the provisions of Revenue Procedure 62–21 shall not apply to any property for any taxable year ending after December 31, 1970, whether or not the taxpayer elects to apply this section to any property. See paragraph (f) of this section for rules for the adoption of Revenue Procedure 62–21 for taxable years ending prior to January 1, 1971.

(3) *Definition of qualified property*. The term ''qualified property'' means tangible property which is subject to the allowance for depreciation provided by section 167(a), but only if—

(i) An asset guideline class and asset guideline period are in effect for such property for the taxable year, and

(ii) The property is first placed in service by the taxpayer before January 1, 1971,

(iii) The property is placed in service before January 1, 1971, but first placed in service by the taxpayer after December 31, 1970, and is not includible in an election under §1.167(a)–11 by reason of §1.167(a)–11(b)(7) (property acquired as a result of a mere change in form) or §1.167(a)–11(e)(3)(i) (certain property acquired in a transaction to which section 381(a) applies), or

(iv) The property is acquired and first placed in service by the taxpayer after December 31, 1970, pursuant to a binding written contract entered into prior to January 1, 1971, and is excluded in accordance with paragraph (b)(5)(iv) of §1.167(a)–11 from an election to apply §1.167(a)–11.

The provisions of paragraph (e)(1) of §1.167(a)–11 apply in determining whether property is first placed in service before January 1, 1971. See subparagraph (4)(ii) of this paragraph for special rules for the exclusion of property from the definition of qualified property.

(4) *Requirements of election*—(i) *In general*. An election to apply this section to qualified property must be made within the time and in the manner specified in paragraph (e) of this section. The election must specify that the taxpayer consents to and agrees to apply all the provisions of this section. The election may be made separately

for each asset guideline class. Thus, a taxpayer may for the taxable year elect to apply this section to one, more than one, or all asset guideline classes in which he has qualified property. An election to apply this section for a taxable year must include all qualified property in the asset guideline class for which the election is made.

(ii) *Special rules for exclusion of property from application of this section.* (*a*) If for the taxable year of election, the taxpayer computes depreciation under section 167(k) or computes amortization under sections 169, 185, 187, 188, or paragraph (b) of §1.162–11 with respect to property, such property is not qualified property for such taxable year. If for the taxable year of election, the taxpayer computes depreciation under any method of depreciation (other than a method described in the preceding sentence) not permitted by subparagraph (5)(v) of this paragraph for any property in an asset guideline class (other than subsidiary assets excluded from an election under (*b*) of this subdivision), no property in such asset guideline class is qualified property for such taxable year.

(*b*) The taxpayer may exclude from an election to apply this section all (but not less than all) subsidiary assets. Subsidiary assets so excluded are not qualified property for such taxable year. For purposes of this subdivision the term ''subsidiary assets'' includes jigs, dies, molds, returnable containers, glassware, silverware, textile mill cam assemblies, and other equipment includable in Group One, Class 5, of Revenue Procedure 62–21 which is usually and properly accounted for separately from other property and under a method of depreciation not expressed in terms of years.

(iii) *Special rule for certain public utility property.* (*a*) In the case of public utility property described in section 167(1)(3)(A)(iii) for which no guideline life was prescribed in Revenue Procedure 62–21 (or for which reference was made in Revenue Procedure 62–21 to lives or rates established by governmental regulatory agencies) of a taxpayer which—

(*1*) Is entitled to use a method of depreciation other than a ''subsection (1) method'' of depreciation (as defined in section 167(1)(3)(F)) only if it uses the ''normalization method of accounting'' (as defined in section 167(1)(3)(G)) with respect to such property, or

(*2*) Is entitled for the taxable year to use only a ''subsection (1) method'' of depreciation,

such property shall be qualified property (as defined in subparagraph (3) of this paragraph) only if the taxpayer normalizes the tax deferral resulting from the election to apply this section.

(*b*) The taxpayer will be considered to normalize the tax deferral resulting from the election to apply this section only if it computes its tax expense for purposes of establishing its cost of service for ratemaking purposes and for reflecting operating results in its regulated books of account using a period for depreciation no less than the period used for computing its depreciation expense for ratemaking purposes and for reflecting operating results in its regulated books of account for the taxable year, and the taxpayer makes adjustments to a reserve to reflect the deferral of taxes resulting from the use of a period for depreciation under section 167 in accordance with an election to apply this section different from the period used for computing its depreciation expense for ratemaking purposes and for reflecting operating results in its regulated books of account for the taxable year. A determination whether the taxpayer is considered to normalize under this subdivision the tax deferral resulting from the election to apply this section shall be made in a manner consistent with the principles for determining whether a taxpayer is using the ''normalization method of accounting'' (within the meaning of section 167(1)(3)(G)). See §1.167(l)–1(h).

(*c*) If a taxpayer, which has elected to apply this section to any qualified public utility property and is required under (*a*) of this subdivision to normalize the tax deferral resulting from the election to apply this section to such property, fails to normalize such tax deferral, the election to apply this section to such property shall terminate as of the beginning of the taxable year for which the taxpayer fails to normalize such tax deferral. Application of this section to such property for any period prior to the termination date will not be affected by this termination.

(5) *Determination of reasonable allowance for depreciation*—(i) *In general.* The allowance for depreciation of qualified property to which the taxpayer elects to apply this section shall be determined in accordance with this section. The annual allowance for depreciation is determined by using the method of depreciation adopted by the taxpayer and a rate based upon a life permitted by this section. In the case of the straight-line method of depreciation, the rate of depreciation shall be based upon the class life (or individual life if the taxpayer assigns individual depreciable lives in accordance with subdivision (iii) of this subparagraph) used by the taxpayer with respect to the assets in the asset guideline class. Such rate will be applied to the unadjusted basis of the asset guideline class (individual assets or depreciation accounts if the taxpayer assigns individual depreciable lives). In the case of the sum of the years-digits method of depreciation, the rate of depreciation will be determined based upon the remaining life of the class (or individual remaining lives if the taxpayer assigns such lives in accordance with subdivision (iii) of this subparagraph) and is applied to the adjusted basis of the class (or individual accounts or assets) as of the beginning of the taxable year of election. The remaining life of a depreciation account is determined by dividing the unrecovered cost or other basis of the account, as computed by straight-line depreciation, by the gross cost or unadjusted basis of the account, and multiplying the result by the class life used with respect to the account. In the case of the declining balance method of depreciation, the rate of depreciation for the asset guideline class shall be based upon the class life (or individual life if the taxpayer assigns such lives in accordance with subdivision (iii) of this subparagraph). Such rate is applied to the adjusted basis of the class (or individual accounts or assets) as of the beginning of the taxable year of election.

(ii) *Reasonable allowance by reference to class lives.* The amount of depreciation for all qualified property in an asset guideline class to which the taxpayer elects to apply this section will constitute the reasonable allowance provided by section 167(a) and the depreciation for the asset guideline class will not be adjusted if—

(*a*) The taxpayer's qualified property is accounted for in one or more depreciation accounts which conform to the asset guideline class, and the depreciation for each such account is determined by using a rate based upon a life not less than the class life, or

(*b*) The taxpayer's qualified property is accounted for in one or more depreciation accounts (whether or not conforming to the asset guideline class) for which depreciation is determined at a rate based upon the taxpayer's estimate of the lives of the assets (instead of the class life) and the total amount of depreciation so determined for the asset guideline class for the taxable year of election is not more than would be permitted under (*a*) of this subdivision for such year using the method of depreciation adopted by the taxpayer for the property.

See subdivision (vii) of this subparagraph for determination of reasonable allowance if depreciation exceeds the amount permitted by this subdivision. See paragraph (b) of this section for rules regarding the determination of "class life". For rules for regrouping depreciation accounts to conform to the asset guideline class, see subdivision (iv) of this subparagraph.

(iii) *Consistency when individual lives are used.* If the taxpayer assigns individual depreciable lives to assets in accordance with subdivision (ii)(*b*) of this subparagraph, even though the total amount of depreciation for the asset guideline class will not be adjusted, the lives assigned to the various assets in the asset guideline class must be reasonably in proportion to their relative expected periods of use in the taxpayer's business. Thus, although the taxpayer who uses individual asset lives normally has latitude in thereby allocating the depreciation for the asset guideline class among the assets, if the lives are grossly disproportionate (as where a short life is assigned to one asset and a long life to another even though the expected periods of use are the same), the taxpayer's allocation of depreciation to particular assets or depreciation accounts may be adjusted. For example, the taxpayer's allocation may be adjusted for purposes of determining adjusted basis under section 1016(a) or in allocating depreciation to the 50-percent limitation on percentage depletion provided by section 613(a). See paragraph (d) of this section for rules regarding the use of individual asset lives for purposes of classifying retirements as normal or abnormal.

(iv) *Regrouping depreciation accounts.* Without the consent of the Commissioner, the taxpayer may for any taxable year for which he elects to apply this section to an asset guideline class, regroup his accounts for that and all succeeding taxable years to conform to the asset guideline class. Other changes in accounting, including a change from item accounts to multiple-asset accounting, may be made with the consent of the Commissioner. No depreciation accounts for which the straight line or sum of the years-digits method of depreciation is adopted may be combined under this section which would not be permitted to be combined under part III of Revenue Procedure 65–13, as in effect on January 1, 1971. Accordingly, whether or not the taxpayer adopted the guideline system of Revenue Procedure 62–21 for a taxable year to which part III of Revenue Procedure 65–13 is applicable, the depreciation allowance for any taxable year of election under this section may not exceed that amount which would have been allowed for such year if the taxpayer had used item accounts or year of acquisition accounts. Thus, for example, if a calendar year taxpayer acquired a $90 asset on the first day of each year from 1966 through 1970, placed such assets in a single multiple asset account, adopted the sum of the years-digits method of depreciation and used a 5-year depreciable life for such assets, and in 1971 uses the 5-year class life determined under paragraph (b) of this section, the depreciation allowance for such assets in 1971 under this section may not exceed $60, that is, the amount which would be allowed if the taxpayer had used year of acquisition accounts for the assets for the years 1966 through 1970. For purposes of this subparagraph, a taxpayer's depreciation accounts conform to the asset guideline class if each depreciation account includes only assets of the same asset guideline class.

(v) *Method of depreciation.* The same method of depreciation must be applied to all property in a single depreciation account. The method of depreciation is subject to the limitations of section 167 (c), (j), and (l). Except as otherwise provided in this subdivision, the taxpayer must apply a method of depreciation described in section 167(b) (1), (2), or (3) for qualified property to which the taxpayer elects to apply this section. A method of depreciation permitted under section 167(b)(4) may be used under this section if the method was used by the taxpayer with respect to the property for his last taxable year ending before January 1, 1971, the method is expressed in terms of years, the taxpayer establishes to the satisfaction of the Commissioner that the method is both a reasonable and consistent method, and if the taxpayer applies paragraph (b)(2) of this section (relating to class lives in special situations) to determine a class life, that the method of determining such class life is consistent with the principles of Revenue Procedure 62–21 as applied to such a method. If the taxpayer has applied a method of depreciation with respect to the property which is not described in section 167(b) (1), (2), (3), or (4) (as permitted under the preceding sentence), he must change under this section to a method of depreciation described in section 167(b) (1), (2), or (3) for the first taxable year for which an election is made under this section. Other changes in depreciation method may be made with the consent of the Commissioner (see sec. 446 and the regulations thereunder). (See also sec. 167(e).)

(vi) *Salvage value.* In applying the method of depreciation adopted by the taxpayer, the annual allowance for depreciation is determined without adjustment for the salvage value of the property, except that no depreciation account may be depreciated below a reasonable salvage value for the account. See paragraph (c) of this section for definition and treatment of salvage value.

(vii) *Reasonable allowance when depreciation exceeds amount based on class life.* In the event that the total amount of depreciation claimed by the taxpayer on his income tax return, in a claim for refund, or otherwise, for an asset guideline class with respect to which an election is made under this section for the taxable year, exceeds the maximum amount permitted under subdivision (ii)(*a*) of this subparagraph—

(*a*) If the excess is established to the satisfaction of the Commissioner to be the result of a good faith mistake by the taxpayer in determining the maximum amount permitted under subdivision (ii) (*a*) of this subparagraph, the taxpayer's election to apply this section will be treated as valid and only such excess will be disallowed, and

(*b*) In all other cases, the taxpayer's election to apply this section to the asset guideline class for the taxable year is invalid and the reasonable allowance for depreciation will be determined without regard to this section. (See §1.167(a)–1 (b) for rules regarding the estimated useful life of property.)

(b) *Determination of class lives*—(1) *Class lives in general.* The class life determined under this paragraph (without regard to any range or variance permitted with respect to class lives under §1.167(a)–11) will be applied for purposes of determining whether the allowance for depreciation for qualified property included in an election under this section is subject to adjustment. The taxpayer is not required to use the class life determined under this paragraph for purposes of determining the allowance for depreciation. Except as provided in subparagraph (2) of this paragraph, the class life of qualified property to which the taxpayer elects to apply this section is the shorter of—

(i) The asset guideline period for the asset guideline class as set forth in Revenue Procedure 72–10 as in effect on March 1, 1972 (applied without regard to any special provision therein with respect to property predominantly used outside the United States), or

(ii) The asset guideline period for the asset guideline class as set forth in any supplement or revision of Revenue Procedure 72–10, but only if and to the extent by express reference in such supplement or revision made applicable for the purpose of changing the asset guideline period or classification of qualified property to which this section applies.

See paragraph (e)(3)(iii) of this section for requirement that the election for the taxable year specify the class life for each asset guideline class. Generally, the applicable asset guideline class and asset guideline period for qualified property to which the taxpayer has elected to apply this section will not be changed for the taxable year of election to reflect any supplement or revision thereof after the taxable year. However, if expressly provided in such a supplement or revision, the taxpayer may, at his option in the manner specified therein, apply the revised or supplemented asset guideline classes or periods to such property for such taxable year and succeeding taxable years. The principles of this subparagraph may be illustrated by the following example:

Example. (i) Corporation X, a calendar year taxpayer, has assets in asset guideline class 20.4 of Revenue Procedure 72–10 which were placed in service by corporation X in 1967, 1968, and 1970. Corporation X also has assets in asset guideline class 22.1 of Revenue Procedure 72–10 which were placed in service at various times prior to 1971. Corporation X has no other qualified property. Corporation X elects to apply this section for 1971 to both classes. Assume that the class lives are determined under this subparagraph and not under subparagraph (2) of this paragraph.

(ii) The class lives for asset guideline classes 20.4 and 22.1 are their respective asset guideline periods of 12 years and 9 years in Revenue Procedure 72–10.

(iii) Accordingly, in the election for the taxable year, in accordance with paragraph (e)(3)(iii) of this section, corporation X specifies a class life of 12 years for asset guideline class 20.4 and a class life of 9 years for asset guideline class 22.1

(2) *Class lives in special situations.* Notwithstanding subparagraph (1) of this paragraph, for the purposes of this section the class life for the asset guideline class determined under this subparagraph shall be used if such class life is shorter than the class life determined under subparagraph (1) of this paragraph. If property described in paragraph (a)(2)(iii) of this section in an asset guideline class is acquired by the taxpayer in a transaction to which section 381(a) applies, for purposes of

this subparagraph such property shall be segregated from other property in the class and treated as in a separate asset guideline class, and the class life for that asset guideline class under this subparagraph shall be the shortest class life the transferor was entitled to use under this section for such property on the date of such transfer. In all other cases, the class life for the asset guideline class for purposes of this subparagraph shall be the shortest class life (within the meaning of sec. 4, part II, of Revenue Procedure 62–21) which can be justified by application of secs. 3.02(a), 3.03(a), or 3.05, part II, of Revenue Procedure 62–21 (other than the portion of such sec. 3.05 dealing with justification of a class life by reference to facts and circumstances) for the taxpayer's last taxable year ending prior to January 1, 1971.

A class life justified by application of section 3.03(a), Part II, of Revenue Procedure 62–21 shall not be shorter than can be justified under the Adjustment Table for Class Lives in Part III of such Revenue Procedure. For purposes of this subparagraph and paragraph (f)(1)(iii) of this section, the reserve ratio test is met only if the taxpayer's reserve ratio does not exceed the upper limit of the appropriate reserve ratio range or in the alternative during the transitional period there provided does not exceed the appropriate ''transitional upper limit'' in section 3, Part II, of Revenue Procedure 65–13. References to Revenue Procedure 62–21 include all morifications, amendments, and supplements thereto as of January 1, 1971. The guideline form of the reserve ratio test, as described in Revenue Procedure 65–13, may be applied for purposes of this subparagraph in a manner consistent with the rules contained in section 7, Part II, of Revenue Procedure 65–13 and sections 3.02, 3.03, and 3.05, Part II, of Revenue Procedure 62–21. The principles of this subparagraph may be illustrated by the following examples:

Example 1. Corporation X, a calendar year taxpayer, has all its assets in asset guideline class 20.4 of Revenue Procedure 72–10 which were placed in service by corporation X prior to 1971. Corporation X elects to apply this section for 1971. For taxable years 1967 through 1969, corporation X had used a class life (within the meaning of section 4, Part II, of Revenue Procedure 62–21) for asset guideline class 20.4 of 12 years. The asset guideline period in Revenue Procedure 72–10 in effect for 1971 is also 12 years. Assume that for 1969 corporation X's reserve ratio was below the appropriate reserve ratio lower limit. However, corporation X could not justify a class life shorter than the asset guideline period of 12 years for 1970 since corporation X had not used the 12-year class life for a period at least equal to one-half of 12 years. (See section 3.03(a), Part II, of Revenue Procedure 62–21.) Accordingly, the class life for asset guideline class 20.4 in 1971 is the asset guideline period of 12 years in accordance with subparagraph (1) of this paragraph.

Example 2. The facts are the same as in example (1) except that corporation X had used a class life of 10 years for guideline class 20.4 since 1967. Corporation X had not used the class life of 10 years for a period at least equal to one-half of 10 years. However, in 1968 corporation X's 10-year class life was accepted on audit by the Internal Revenue Service and corporation X met the reserve ratio test in 1970 for guideline class 20.4 using a test life of 10 years. (See section 3.05, Part II, of Revenue Procedure 62–21.) Accordingly, the class life of 10 years is justified for 1970 and the class life for 1971 is 10 years in accordance with this subparagraph. If the taxpayer's class life had not been audited and accepted for 1968, and in the absence of other circumstances, the taxpayer could not justify a class life shorter than the asset guideline period of 12 years since it had not used the 10-year class life for a period at least equal to one-half of 10 years. (See section 3.02, Part II, of Revenue Procedure 62–21.)

Example 3. Corporation Y, a calendar year taxpayer, has all its assets in asset guideline class 13.3 of Revenue Procedure 72–10 which were placed in service from 1960 through 1970. Corporation Y elects to apply this section for 1971. The asset guideline period in Revenue Procedure 72–10 in effect for 1971 is 16 years. Since 1963 corporation Y had used a class life of 16 years for asset guideline 13.3. At the end of 1969 corporation Y's reserve ratio for guideline class 13.3 was 36 percent. With a growth rate of 8 percent and a test life of 16 years the appropriate reserve ratio lower limit was 37 percent. Corporation Y's reserve ratio of 36 percent was below the lower limit of the appropriate reserve ratio range. Corporation Y had used the 16-year class life for at least eight years. A class life of 13.5 years for 1970 was justified by application of section 3.03(a), Part II, of Revenue Procedure 62–21 and the Adjustment Table for Class Lives in Part III, of Revenue Procedure 62–21. The class life for 1971 is 13.5 years in accordance with this subparagraph.

(3) *Classification of property*—(i) *In general.* Property to which this section applies shall be included in the asset guideline class for the activity in which the property is primarily used in the taxable year of election. See paragraph (d)(5) of this section for rule regarding the classification of leased property.

(ii) *Insubstantial activity.* The provisions of Revenue Produce 62–21 with respect to classification of assets used in an activity which is insubstantial may be applied under this section.

(iii) *Special rule for certain public utilities.* An electric or gas utility which in accordance with Revenue Procedure 64–21 used a composite guideline class basis for applying Revenue Procedure 62–21 for its last taxable year prior to January 1, 1971, may apply Revenue Procedure 72–10 and this section on the basis of such composite asset guideline class determined as provided in Revenue Procedure 64–21. For the purposes of this section all property in the composite guideline class shall be treated as included in a single asset guideline class.

(c) *Salvage value*—(1) *In general*—(i) *Definition of gross salvage value.* ''Gross salvage'' value is the amount (determined at or as of the time of acquisition but without regard to the application of Revenue Procedure 62–21) which is estimated will be realized upon a sale or other disposition of qualified property when it is no longer useful in the taxpayer's trade or business or in the production of his income and is to be retired from service, without reduction for the cost of removal, dismantling, demolition, or similar operations. ''Net salvage'' is gross salvage reduced by the cost of removal, dismantling, demolition, or similar operations. If a taxpayer customarily sells or otherwise disposes of property at a time when such property is still in good operating condition, the gross salvage value of such property is the amount expected to be realized upon such sale or disposition, and under certain circumstances, as where such property is customarily sold at a time when it is still relatively new, the gross salvage value may constitute a relatively large proportion of the unadjusted basis of such property.

(ii) *Definition of salvage value.* ''Salvage value'' for purposes of this section means gross or net salvage value less the amount, if any, by which reduced by application of section 167(f). Generally, as provided in section 167(f), a taxpayer may reduce the gross or net salvage value for an account by an amount which does not exceed 10 percent of the unadjusted basis of the personal property (as defined in section 167(f)(2)) in the account.

(2) *Estimation of salvage value*—(i) *In general.* For the first taxable year for which he elects to apply this section, the taxpayer must (in accordance with paragraph (e)(3)(iv)(*c*) of this section) establish salvage value for all qualified property to which the election applies. The taxpayer may (in accordance with subparagraph (1) of this paragraph) determine either gross or net salvage, but an election under this section does not constitute permission to change the manner of estimating salvage. Permission to change the manner of estimating salvage must be obtained by filing form 3115 with the Commissioner of Internal Revenue, Washington, D.C. 20224, within the time otherwise permitted for the taxable year or before September 6, 1973. Salvage value in succeeding taxable years of election will be determined by adjustments of such initial salvage value for the account, as retirements occur. This salvage value established by the taxpayer for the first taxable year of election will not be redetermined merely as a result of fluctuations in price levels or as a result of other circumstances occurring after the close of such taxable year. See paragraph (e)(3)(iv) of this section for requirements that the taxpayer specify in his election the aggregate amount of salvage value for an asset guideline class and that the taxpayer maintain records reasonably sufficient to identify the salvage value established for each depreciation account in the class.

(ii) *Salvage as limitation on depreciation.* In no case may an account be depreciated under this section below a reasonable salvage value, after taking into account any reduction in gross or net salvage value permitted by section 167(f). For example, if the salvage value of an account for 1971 is $75, the unadjusted basis of the account is $500, and the depreciation reserve is $425, no depreciation is allowable for 1971.

(iii) *Special rule for first taxable year.* If for a taxable year ending prior to January 1, 1971, the taxpayer had adopted Revenue Procedure 62–21 prior to January 12, 1971 (see paragraph (f)(2) of this section), no adjustment in the amount of depreciation allowable for any taxable year ending prior to January 1, 1971, shall be made solely by reason of establishing salvage value under this paragraph for any taxable year ending after December 31, 1970. The principles of this subdivision may be illustrated by the following example:

Example. Taxpayer A had adopted Revenue Procedure 62–21 prior to January 12, 1971, for taxable years prior to 1971. Taxpayer A had not taken into account any salvage value for account No. 1 which is one of four depreciation accounts A has in the class. The reserve ratio test has been met for all years prior to 1971 and in accordance with Revenue Procedure 62–21 no adjustments in depreciable lives or salvage values were made. At the end of A's taxable year 1970, the unadjusted basis of account No. 1 was $10,000 and the reserve for depreciation was $9,800. Pursuant to this paragraph, A establishes a salvage value of $400 for account No. 1 (determined at or as of the time of acquisition). This salvage value is determined to be correct. No depreciation is allowable for account No. 1 in 1971. No depreciation is disallowed for any taxable year prior to 1971, solely by reason of establishing salvage value under this paragraph.

(3) *Limitation on adjustment of reasonable salvage value.* The salvage value established by the taxpayer for a depreciation account will not be redetermined if it is reasonable. Since the determination of salvage value is a matter of estimation, minimal adjustments will not be made. The salvage value established by the taxpayer will be deemed to be reasonable unless there is sufficient basis for a determination of an amount of salvage value for the account which exceeds the salvage value established by the taxpayer for the account by an amount greater than 10 percent of the unadjusted basis of the account at the close of such taxable year. If the salvage value established by the taxpayer for the account is not within the 10-percent range or if the taxpayer follows the practice of understating his estimates of salvage to take advantage of this subdivision, and if there is a determination of an amount of salvage value for the account for the taxable year which exceeds the salvage value established by the taxpayer for the account for such taxable year, an adjustment will be made by increasing the salvage value established by the taxpayer for the account by an amount equal to the difference between the salvage value as determined and the salvage value established by the taxpayer for the account. For the purposes of this subdivision, a determination of salvage value shall include all determinations at all levels of audit and appellate proceedings, and as well as all final determinations within the meaning of section 1313(a)(1). This subparagraph shall apply to each such determination.

(4) *Examples.* The principles of this paragraph may be illustrated by the following examples in which it is assumed that the taxpayer has established salvage value in accordance with this paragraph and has not followed a practice of understating his estimates of salvage value:

Example 1. Taxpayer B elects to apply this section for 1971. Assets Y and Z are the only assets in a multiple asset account of 1967, the year in which the assets were acquired. The unadjusted basis of asset Y is $50,000 and the unadjusted basis of asset Z is $30,000. B estimated a gross salvage value of $55,000 at the time of acquisition. The property qualified under section 167(f)(2) and B reduced the amount of salvage taken into account by $8,000 (that is, 10 percent of $80,000, under sec. 167(f)). Thus, in accordance with this paragraph and paragraph (e)(3)(iv)(*c*) of this section, B establishes a salvage value of $47,000 for the account for 1971. Assume that there is not sufficient basis for determining a salvage value for the account greater $52,000 (that is $60,000 minus the $8,000 reduction under sec. 167(f)). Since the salvage value of $47,000 established by B for the account is within the 10 percent range, it is reasonable. Salvage for the account will not be redetermined.

Example 2. The facts are the same as in example (1) except that B estimated a gross salvage value of $50,000 and establishes a salvage value of $42,000 for the account (that is, $50,000 minus the $8,000 reduction under section 167(f)). There is sufficient basis for determining an amount of salvage value greater than $50,000 (that is, $58,000 minus the $8,000 reduction under section 167(f)). The salvage value of $42,000 established by B for the account can be redetermined without regard to the limitation in subparagraph (3) of this paragraph, since it is not within the 10 percent range. Upon audit of B's tax return for 1971 (a year in which the redetermination would affect the amount of depreciation allowable for the account), salvage value is determined to be $52,000 after taking into account the reduction under section 167(f). Salvage value for the account will be adjusted to $52,000.

Example 3. The facts are the same as in example (1) except that upon audit of B's tax return for 1971 the examining officer determines the salvage value to be $58,000 (that is, $66,000 minus the $8,000 reduction under section 167(f)), and proposes to adjust salvage value for the account to $58,000 which will result in disallowing an amount of depreciation for the taxable year. B does not agree with the finding of the examining officer. After receipt of a ''30-day letter,'' B waives a district conference and initiates proceedings before the Appellate Division. In consideration of the case by the Appellate Division it is concluded that there is not sufficient basis for determining an amount of salvage value for the account in excess of $55,000 (that is, $63,000 minus the $8,000 reduction under section 167(f)). Since the salvage value of $47,000 established by B for the account is within the 10 percent range, it is reasonable. Salvage value for the account will not be redetermined.

Example 4. For 1971, taxpayer C elects to apply this section to factory building X which is in an item account of 1965, the year in which the building was acquired. The unadjusted basis of factory building X is $90,000. C estimated a gross salvage value for the account of $10,000. The property did not qualify under section 167(f)(2). Thus, C establishes a salvage value of $10,000 for the account for 1971. Assume that there is not sufficient basis for determining a salvage value for the account greater than $14,000. Since the salvage value of $10,000 established by C for the account is within the 10-percent range, it is reasonable. Salvage value for the account will not be redetermined.

(d) *Accounting for qualified property*—(1) *In general.* Qualified property for which the taxpayer elects to apply this section may be accounted for in any number of item or multiple asset accounts.

(2) *Retirements of qualified property*—(i) *In general.* The provisions of this subparagraph and §1.167(a)–8 apply to retirements of qualified property to which the taxpayer elects to apply this section for the taxable year. See subdivision (iii) of this subparagraph for special rule for normal retirements.

(ii) *Adjusted basis of assets retired.* In the case of a taxpayer who depreciates qualified property in a multiple-asset account conforming to the asset guideline class at a rate based on the class life in accordance with paragraph (a)(5)(ii)(*a*) of this section, §1.167(a)–8(c) (relating to basis of assets retired) shall be applied by assuming that the class life is the average expected useful life of the assets in the account. See §1.167(a)–8, generally, for the basis of assets retired.

(iii) *Definition of normal retirements.* Notwithstanding §1.167(a)– 8(b), the determination whether a retirement of qualified property is normal or abnormal shall be made in light of all the facts and circumstances, primarily with reference to the expected period of use of the asset in the taxpayer's business without regard to paragraph (a)(5)(ii) of this section. A retirement is not abnormal unless the taxpayer can show that the withdrawal of the asset was not due to a cause which would customarily be contemplated (in light of the taxpayer's practice and experience) in setting a depreciation rate for the assets without regard to paragraph (a)(5)(ii) of this section. Thus, for example, a retirement is normal if made within the range of years which would customarily be taken into account in setting such depreciation rate and if the asset has reached a condition at which, in the normal course of events, the taxpayer customarily retires similar assets from use in his business. A retirement may be abnormal if the asset is withdrawn at an earlier time or under other circumstances, as, for example, when the asset has been damaged by casualty or has lost its usefulness suddenly as the result of extraordinary obsolescence.

(3) *Special rules*—(i) *In general.* The provisions of this subparagraph shall apply to qualified property in a taxable year for which an election to apply this section is made.

(ii) *Repairs.* For the purpose of sections 162 and 263 and the regulations thereunder, whether an expenditure prolongs the life of an asset shall be determined by reference to the expected period of use of the asset in the taxpayer's business without regard to paragraph (a)(5)(ii) of this section.

(iii) *Sale and lease.* For the purpose of comparison with the term of a lease of such property, the remaining life of qualified property shall be determined by reference to the expected period of use of the asset in the taxpayer's business without regard to paragraph (a)(5)(ii) of this section.

(4) *Expected period of use.* For the purposes of subparagraphs (2) and (3) of this paragraph, the determination of the expected period of use of an asset shall be made in light of all the facts and circumstances. The expected period of use of a particular asset will not necessarily coincide with the class life used for depreciation (or with the individual asset life for depreciation under the alternative method in paragraph (a)(5)(ii) (*b*) of this section for applying the class life). Thus, for example, if the question is whether an asset has been leased for a period less than, equal to or greater than its remaining life, the determination shall be based on the remaining expected period of use of the individual asset without regard to the fact that the asset is depreciated at a rate based on the class life in accordance with paragraph (a)(5)(ii)(*a*) of this section.

(5) *Leased property.* In the case of a lessor of qualified property, unless there is an asset guideline class in effect for such lessors, the asset guideline class for such property shall be determined by reference to the activity in which such property is primarily used by the lessee. See paragraph (b)(3) of this section for general rule for classification of qualified property according to primary use. However, in the case of an asset guideline class based upon the type of property (such as trucks or railroad cars), as distinguished from the activity in which used, the property shall be classified without regard to the activity of the lessee.

(e) *Election under this section*—(1) *Consent to change in method of accounting.* An election to apply this section for a taxable year ending after December 31, 1970, is a method of accounting but the consent of the Commissioner will be deemed granted to make an annual election.

(2) *Election for taxable years ending after December 31, 1976.* For taxable years ending after December 31, 1976, the election to apply this section for a taxable year shall be made by attaching to the income tax return a statement that an election under this section is being made. If the taxpayer does not file a timely return (taking into account extensions of time for filing) for the taxable year, the election shall be made at the time the taxpayer files his first return for the taxable year. The election may be made with an amended return only if such amended return is filed no later than the time prescribed by law (including extensions thereof) for filing the return for the taxable year. A taxpayer who makes an election under this subparagraph must maintain books and records reflecting the information described in paragraph (e)(3) (ii) and (iii) of this section.

(3) *Election for taxable years ending on or before December 31, 1976.* (i) For taxable years ending on or before December 31, 1976, the election to apply this section for a taxable year may be made by filing Form 5006 with the income tax return for the taxable year. If the taxpayer does not file a timely return (taking into account extensions of time for filing) for the taxable year, the election shall be filed at the time the taxpayer files his first return for the taxable year. The election may be made with an amended return only if such amended return is filed no later than the later of (*a*) the time prescribed by law (including extensions thereof) for filing the return for the taxable year, or (*b*) November 5, 1973.

(ii) The election to apply this section for a taxable year ending on or before December 31, 1976, will be deemed to be made if the tax return (filed within the periods referred to in paragraph (e)(3)(i) of this section) contains information sufficient to establish the following:

(*a*) Each asset guideline class for which the election is intended to apply;

(*b*) The class life for each such asset guideline class and whether the class life is determined under paragraph (b)(1) or (2) of this section;

(*c*) For each asset guideline class, as of the end of the taxable year of election, (*1*) the total unadjusted basis of all qualified property, (*2*) the aggregate of the reserves for depreciation of all accounts in the asset guideline class, and (*3*) the aggregate of the salvage value established for all accounts in the asset guideline class; and

(*d*) Whether the taxpayer is an electric or gas utility using a composite asset guideline class basis in accordance with paragraph (b)(3)(iii) of this section.

If an election is deemed to be made under this subdivision (ii), the taxpayer will be deemed to have consented to apply all the provisions of this section.

(iii) A taxpayer to whom the election applies shall maintain books and records for each asset guideline class reasonably sufficient to identify the unadjusted basis, reserve for depreciation and salvage value established for each depreciation account in such asset guidelines class.

(f) *Depreciation for taxable years ending before January 1, 1971*—(1) *Adoption of Revenue Procedure 62–21*—(i) *In general*. Except as provided in subdivision (ii) of this subparagraph, a taxpayer may elect to be examined under the provisions of Revenue Procedure 62–21 for a taxable year ending before January 1, 1971, only in accordance with the rules of this paragraph. The election must specify:

(*a*) That the taxpayer makes such election and consents to, and agrees to apply, all the provisions of this paragraph;

(*b*) Each guideline class and taxable year for which the taxpayer elects to be examined under Revenue Procedure 62–21;

(*c*) The class life claimed for each such guideline class;

(*d*) The class life and the total amount of the depreciation for the guideline class claimed on the last income tax return for such taxable year filed prior to January 12, 1971 (or in case no income tax return was filed prior to January 12, 1971, on the first income tax return filed for such taxable year);

(*e*) The class life claimed and the total amount of depreciation for the guideline class under the election to apply Revenue Procedure 62–21, in accordance with this paragraph, for the taxable year; and

(*f*) If the class life or total amount of depreciation for the guideline class is different in (*d*) and (*e*) of this subdivision, a reasonable description of the computation of the class life in (*e*) of this subdivision, the amount of difference in tax liability resulting therefrom, and the amount of any refund or reduction in any deficiency in tax. The election shall be made in an amended tax return or claim for refund (or by a supplement to the tax return or claim) for the taxable year, and if the class life or total amount of depreciation for the guideline class is different in accordance with (*f*) of this subdivision, such difference shall be reflected in the amended tax return or claim for refund. Forms may be provided for making the election and submission of the information. In the case of an election made after issuance of such forms and more than 30 days after publication of notice thereof in the Internal Revenue Bulletin, the election may be made and the information submitted only in accordance with such forms. An election will not otherwise be invalid under this paragraph so long as there is substantial compliance, in good faith, with the requirements of this paragraph.

(ii) *Special rule*. The provisions of this subparagraph shall not apply to a guideline class in any taxable year for which the taxpayer has prior to January 12, 1971, adopted Revenue Procedure 62–21 for such class. See subparagraph (2) of this paragraph for determination of adoption of Revenue Procedure 62–21 prior to January 12, 1971.

(iii) *Justification of class life claimed and limitations on refunds*. If the taxpayer elects for a taxable year to be examined under the provisions of Revenue Procedure 62–21 in accordance with subdivision (i) of this subparagraph, any of the provisions of Revenue Procedure 62–21 may be applied to justify a class life claimed on the income tax return filed for such year or to offset an increase in tax liability for such year. Unless it meets the reserve ratio test, no class life will be accepted on audit which (after all other adjustments in tax liability for such year) results in a reduction (or further reduction) in the amount of tax liability shown on the income tax return (specified in subdivision (i)(*d*) of this subparagraph) for such taxable year, or results in an amount of loss carryback or carryover to any taxable year, but if it is justified under Revenue Procedure 62–21 and meets the reserve ratio test, a class life will be accepted on audit without regard to the foregoing limitations and, for example, may produce a refund or credit against tax. For example, if a class life of 9 years is otherwise justified under Revenue Procedure 62–21 for 1969, but the taxpayer does not meet the reserve ratio test for 1969 using a test life of 9 years, a class life of 9 years (or any class life justified under Revenue Procedure 62–21) will be accepted on audit under Revenue Procedure 62–21 pursuant to an election in accordance with this paragraph provided it does not result in the reduction or further reduction in tax liability or in an amount of loss carryback or carryover as described in the preceding sentence. On the other hand, for example, if a class life of 10 years is justified under Revenue Procedure 62–21 for 1969 and the taxpayer meets the reserve ratio test for 1969 using a test life of 10 years, a class life of 10 years will be accepted on audit under Revenue Procedure 62–21 pursuant to an election in accordance with this paragraph even though it results in a reduction or further reduction in tax liability or in an amount of loss carryback or carryover as described above and produces a refund of tax. For purposes of this section, the term ''audit'' includes examination of claims for refund or credit against tax.

(iv) *Definitions.* For purposes of this paragraph, the determination whether the reserve ratio test is met shall be made in accordance with that portion of paragraph (b)(2) of this section which is by express reference therein made applicable to this paragraph. In addition, the guideline form of the reserve ratio test, as described in Revenue Procedure 65–13, may be applied. For purposes of this paragraph, references to Revenue Procedure 62–21 include all modifications, amendments, and supplements thereto as of January 11, 1971. The terms ''class life'' and ''guideline class'' have the same meaning as in Revenue Procedure 62–21.

(2) *Determination whether Revenue Procedure 62–21 adopted prior to January 12, 1971*—(i) *In general.* For the purposes of this paragraph, a taxpayer will be treated as having adopted prior to January 12, 1971, Revenue Procedure 62–21 for a guideline class for a taxable year ending before January 1, 1971, only if—

(*a*) For the guideline class and taxable year, the taxpayer adopted Revenue Procedure 62–21 by expressly so indicating on the income tax return filed for such taxable year prior to January 12, 1971;

(*b*) For the guideline class and taxable year, the taxpayer adopted Revenue Procedure 62–21 prior to January 12, 1971, by expressly so indicating in a proceeding before the Internal Revenue Service (such as upon examination of the income tax return for such taxable year) and there is reasonable evidence to that effect; or

(*c*) There is other reasonable evidence that prior to January 12, 1971, the taxpayer adopted Revenue Procedure 62–21 for the guideline class and taxable year.

If not treated under (*b*) or (*c*) of this subdivision as having done so for the last taxable year ending before January 1, 1971, and if the taxpayer files his first income tax return for such taxable year after January 11, 1971, the taxpayer will be treated as having adopted Revenue Procedure 62–21 prior to January 12, 1971, for a guideline class for such taxable year if he expressly so indicated on that return, or is treated under this subparagraph as having adopted Revenue Procedure 62–21 prior to January 12, 1971, for that guideline class for the immediately preceding taxable year.

(ii) *Examples.* The principles of this subparagraph may be illustrated by the following examples:

Example 1. Taxpayer A, an individual who uses the calendar year as his taxable year, has property in Group Three, Class 16(a), of Revenue Procedure 62–21. On A's income tax return for 1968, filed prior to January 12, 1971, he adopted Revenue Procedure 62–21 for the guideline class by so indicating under ''Summary of Depreciation'' in the appropriate schedule of Form 1040 for 1968. Under subdivision (i) (*a*) of this subparagraph, A is treated as having adopted Revenue Procedure 62–21 for the guideline class for 1968 prior to January 12, 1971.

Example 2. Taxpayer B, an individual who uses the calendar year as his taxable year, has property in Group Two, Class 5, of Revenue Procedure 62–21. B filed timely income tax returns for 1966 through 1968 but did not adopt Revenue Procedures 62–21 on any of such returns. In 1969 upon audit of B's taxable years 1966 through 1968, B exercised his option to be examined under the provisions of Revenue Procedure 62–21. The Revenue Agent's report shows that B was examined under Revenue Procedure 62–21 for taxable years 1966 through 1968. B will be treated under subdivision (ii)(*b*) of this subparagraph as having adopted Revenue Procedure 62–21 for such years prior to January 12, 1971.

Example 3. The facts are the same as in example (2) except that B did not upon examination by the Revenue Agent in 1969 exercise his option to be examined under Revenue Procedure 62–21. B has six accounts in the guideline class, Nos. 1 through 6. The Revenue Agent proposed to lengthen the depreciable lives on accounts Nos. 2 and 3 from 8 years to 12 years. In proceedings before the Appellate Division in 1970, B exercised his option to be examined under the provisions of Revenue Procedure 62–21. This is shown by correspondence between B and the Appellate Conferee as well as by other documents in the case before the Appellate Division. The case was settled on that basis before the Appellate Division without adjustment of the depreciable lives for B's accounts Nos. 2 and 3. B will be treated under subdivision (ii) (*b*) of this subparagraph as having adopted Revenue Procedure 62–21 for taxable years 1966 through 1968 prior to January 12, 1971.

Example 4. Corporation X uses the calendar year as its taxable year and has assets in Group Two, Class 5, of Revenue Procedure 62–21. Beginning in 1964, corporation X used the guideline life of 10 years as the depreciable life for all assets in the guideline class. In 1967, corporation X's taxable years 1964 through 1966 were examined and corporation X exercised its option to be examined under the provisions of Revenue Procedure 62–21. Corporation X did not adopt Revenue Procedure 62–21 on any of its income tax returns, for the years 1964 through 1970. Corporation X has not been examined since 1967, but has continued to use the guideline life of 10 years for all property in the guideline class including additions since 1966. Corporation X will be treated under subdivision (ii) (*c*) and (*d*) of this subparagraph as having adopted Revenue Procedure 62–21 prior to January 12, 1971, for taxable years 1964 through 1970.

Example 5. Corporation Y uses the calendar year as its taxable year and has asset in Group Two, Class 5, of Revenue Procedure 62–21. Since 1964, corporation Y has used various depreciable lives, based on the facts and circumstances, for different accounts in the guideline class. Corporation Y was examined in 1968 for taxable years 1965 through 1967. Corporation Y was also examined in 1970 for taxable years 1968 and 1969. Corporation Y did not exercise its option to be examined under the provisions of Revenue Procedure 62–21. Corporation Y has not adopted Revenue Procedure 62–21 on any income tax return. For taxable years 1964 through 1970, corporation Y's class life (within the meaning of section 4, Part II, of Revenue Procedure 62–21) was between 12 and 14 years. In August of 1971, corporation Y filed amended income tax returns for 1968 and 1969, and an income tax return for 1970, using a depreciable life of 10 years (equal to the guideline life) for all assets in the guideline class. Corporation Y will not be treated as having adopted Revenue Procedure 62–21 prior to January 12, 1971.

Example 6. Corporation Z uses the calendar year as its taxable year and has assets in group 2, class 5, of Revenue Procedure 62–21. Corporation Z adopted Revenue Procedure 62–21 for this guideline class by expressly so indicating on its tax return for 1966, which was filed before January 12, 1971. Corporation Z computed its allowable depreciation for 1966 as if it adopted Revenue Procedure 62–21 for this guideline class for its taxable years 1962 through 1965, although it had earlier filed its tax returns for those years without regard to Revenue Procedure 62–21. The depreciation thus claimed in 1966 was less than what would have been allowable if corporation Z first adopted Revenue Procedure 62–21 in 1966. This was the result of certain accounts becoming fully depreciated through use of Revenue Procedure 62–21 in computing depreciation for 1962 through 1965. In addition, in deferred tax accounting procedures employed before January 12, 1971, for financial reporting purposes, corporation Z calculated its tax deferrals on the basis that it had adopted Revenue Procedure 62–21 for the years 1962 through 1965. Corporation Z will be treated under subdivision (i) (*c*) of this subparagraph as having adopted Revenue Procedure 62–21 for taxable years 1962 through 1965 prior to January 12, 1971.

(Sec. 167(m), 85 Stat. 508 (26 U.S.C. 167))

[T.D. 7278, 38 FR 14923, June 7, 1973, as amended by T.D. 7315, 39 FR 20195, June 7, 1974; T.D. 7517, 42 FR 58934, Nov. 14, 1977]

§ 1.167(a)–13T Certain elections for intangible property (temporary).

For rules applying the elections under section 13261(g) (2) and (3) of the Omnibus Budget Reconciliation Act of 1993 to intangible property described in section 167(f), see §1.197–1T.

[59 FR 11922, Mar. 15, 1994]

§ 1.167(a)–14 Treatment of certain intangible property excluded from section 197.

(a) *Overview.* This section provides rules for the amortization of certain intangibles that are excluded from section 197 (relating to the amortization of goodwill and certain other intangibles). These excluded intangibles are specifically described in §1.197–2(c) (4), (6), (7), (11), and (13) and include certain computer software and certain other separately acquired rights, such as rights to receive tangible property or services, patents and copyrights, certain mortgage servicing rights, and rights of fixed duration or amount. Intangibles for which an amortization amount is determined under section 167(f) and intangibles otherwise excluded from section 197 are amortizable only if they qualify as property subject to the allowance for depreciation under section 167(a).

(b) *Computer software*—(1) *In general*. The amount of the deduction for computer software described in section 167(f)(1) and §1.197–2(c)(4) is determined by amortizing the cost or other basis of the computer software using the straight line method described in §1.167(b)–1 (except that its salvage value is treated as zero) and an amortization period of 36 months beginning on the first day of the month that the computer software is placed in service. Before determining the amortization deduction allowable under this paragraph (b), the cost or other basis of computer software that is section 179 property, as defined in section 179(d)(1)(A)(ii), must be reduced for any portion of the basis the taxpayer properly elects to treat as an expense under section 179. In addition, the cost or other basis of computer software that is qualified property under section 168(k)(2) or §1.168(k)–1, 50-percent bonus depreciation property under section 168(k)(4) or §1.168(k)–1, or qualified New York Liberty Zone property under section 1400L(b) or §1.1400L(b)–1, must be reduced by the amount of the additional first year depreciation deduction allowed or allowable, whichever is greater, under section 168(k) or section 1400L(b) for the computer software. If costs for developing computer software that the taxpayer properly elects to defer under section 174(b) result in the development of property subject to the allowance for depreciation under section 167, the rules of this paragraph (b) will apply to the unrecovered costs. In addition, this paragraph (b) applies to the cost of separately acquired computer software if the cost to acquire the software is separately stated and the cost is required to be capitalized under section 263(a).

(2) *Exceptions*. Paragraph (b)(1) of this section does not apply to the cost of computer software properly and consistently taken into account under §1.162–11. The cost of acquiring an interest in computer software that is included, without being separately stated, in the cost of the hardware or other tangible property is treated as part of the cost of the hardware or other tangible property that is capitalized and depreciated under other applicable sections of the Internal Revenue Code.

(3) *Additional rules*. Rules similar to those in §1.197–2 (f)(1)(iii), (f)(1)(iv), and (f)(2) (relating to the computation of amortization deductions and the treatment of contingent amounts) apply for purposes of this paragraph (b).

(c) *Certain interests or rights not acquired as part of a purchase of a trade or business*—(1) *Certain rights to receive tangible property or services*. The amount of the deduction for a right (other than a right acquired as part of a purchase of a trade or business) to receive tangible property or services under a contract or from a governmental unit (as specified in section 167(f)(2) and §1.197–2(c)(6)) is determined as follows:

(i) *Amortization of fixed amounts*. The basis of a right to receive a fixed amount of tangible property or services is amortized for each taxable year by multiplying the basis of the right by a fraction, the numerator of which is the amount of tangible property or services received during the taxable year and the denominator of which is the total amount of tangible property or services received or to be received under the terms of the contract or governmental grant. For example, if a taxpayer acquires a favorable contract right to receive a fixed amount of raw materials during an unspecified period, the taxpayer must amortize the cost of acquiring the contract right by multiplying the total cost by a fraction, the numerator of which is the amount of raw materials received under the contract during the taxable year and the denominator of which is the total amount of raw materials received or to be received under the contract.

(ii) *Amortization of unspecified amount over fixed period.* The cost or other basis of a right to receive an unspecified amount of tangible property or services over a fixed period is amortized ratably over the period of the right. (See paragraph (c)(3) of this section regarding renewals).

(iii) *Amortization in other cases.* [Reserved]

(2) *Rights of fixed duration or amount.* The amount of the deduction for a right (other than a right acquired as part of a purchase of a trade or business) of fixed duration or amount received under a contract or granted by a governmental unit (specified in section 167(f)(2) and §1.197–2(c)(13)) and not covered by paragraph (c)(1) of this section is determined as follows:

(i) *Rights to a fixed amount.* The basis of a right to a fixed amount is amortized for each taxable year by multiplying the basis by a fraction, the numerator of which is the amount received during the taxable year and the denominator of which is the total amount received or to be received under the terms of the contract or governmental grant.

(ii) *Rights to an unspecified amount over fixed duration of less than 15 years.* The basis of a right to an unspecified amount over a fixed duration of less than 15 years is amortized ratably over the period of the right.

(3) *Application of renewals.* (i) For purposes of paragraphs (c) (1) and (2) of this section, the duration of a right under a contract (or granted by a governmental unit) includes any renewal period if, based on all of the facts and circumstances in existence at any time during the taxable year in which the right is acquired, the facts clearly indicate a reasonable expectancy of renewal.

(ii) The mere fact that a taxpayer will have the opportunity to renew a contract right or other right on the same terms as are available to others, in a competitive auction or similar process that is designed to reflect fair market value and in which the taxpayer is not contractually advantaged, will generally not be taken into account in determining the duration of such right provided that the bidding produces a fair market value price comparable to the price that would be obtained if the rights were purchased immediately after renewal from a person (other than the person granting the renewal) in an arm's-length transaction.

(iii) The cost of a renewal not included in the terms of the contract or governmental grant is treated as the acquisition of a separate intangible asset.

(4) *Patents and copyrights.* If the purchase price of an interest (other than an interest acquired as part of a purchase of a trade or business) in a patent or copyright described in section 167(f)(2) and §1.197–2(c)(7) is payable on at least an annual basis as either a fixed amount per use or a fixed percentage of the revenue derived from the use of the patent or copyright, the depreciation deduction for a taxable year is equal to the amount of the purchase price paid or incurred during the year. Otherwise, the basis of such patent or copyright (or an interest therein) is depreciated either ratably over its remaining useful life or under section 167(g) (income forecast method). If a patent or copyright becomes valueless in any year before its legal expiration, the adjusted basis may be deducted in that year.

(5) *Additional rules.* The period of amortization under paragraphs (c) (1) through (4) of this section begins when the intangible is placed in service, and rules similar to those in §1.197–2(f)(2) apply for purposes of this paragraph (c).

(d) *Mortgage servicing rights*—(1) *In general.* The amount of the deduction for mortgage servicing rights described in section 167(f)(3) and §1.197–2(c)(11) is determined by using the straight line method described in §1.167(b)–1 (except that the salvage value is treated as zero) and an amortization period of 108 months beginning on the first day of the month that the rights are placed in service. Mortgage servicing rights are not depreciable to the extent the rights are stripped coupons under section 1286.

(2) *Treatment of rights acquired as a pool*—(i) *In general.* Except as provided in paragraph (d)(2)(ii) of this section, all mortgage servicing rights acquired in the same transaction or in a series

of related transactions are treated as a single asset (the pool) for purposes of determining the depreciation deduction under this paragraph (d) and any gain or loss from the sale, exchange, or other disposition of the rights. Thus, if some (but not all) of the rights in a pool become worthless as a result of prepayments, no loss is recognized by reason of the prepayment and the adjusted basis of the pool is not affected by the unrecognized loss. Similarly, any amount realized from the sale or exchange of some (but not all) of the mortgage servicing rights is included in income and the adjusted basis of the pool is not affected by the realization.

(ii) *Multiple accounts.* If the taxpayer establishes multiple accounts within a pool at the time of its acquisition, gain or loss is recognized on the sale or exchange of all mortgage servicing rights within any such account.

(3) *Additional rules.* Rules similar to those in §1.197–2(f)(1)(iii), (f)(1)(iv), and (f)(2) (relating to the computation of amortization deductions and the treatment of contingent amounts) apply for purposes of this paragraph (d).

(e) *Effective dates*—(1) *In general.* This section applies to property acquired after January 25, 2000, except that §1.167(a)–14(c)(2) (depreciation of the cost of certain separately acquired rights) and so much of §1.167(a)–14(c)(3) as relates to §1.167(a)–14(c)(2) apply to property acquired after August 10, 1993 (or July 25, 1991, if a valid retroactive election has been made under §1.197–1T).

(2) *Change in method of accounting.* See §1.197–2(l)(4) for rules relating to changes in method of accounting for property to which §1.167(a)–14 applies. However, see §1.168(k)–1(g)(4) or 1.1400L(b)–1(g)(4) for rules relating to changes in method of accounting for computer software to which the third sentence in §1.167(a)–14(b)(1) applies.

(3) *Qualified property, 50-percent bonus depreciation property, qualified New York Liberty Zone property, or section 179 property.* This section also applies to computer software that is qualified property under section 168(k)(2) or qualified New York Liberty Zone property under section 1400L(b) acquired by a taxpayer after September 10, 2001, and to computer software that is 50-percent bonus depreciation property under section 168(k)(4) acquired by a taxpayer after May 5, 2003. This section also applies to computer software that is section 179 property placed in service by a taxpayer in a taxable year beginning after 2002 and before 2010.

[T.D. 8867, 65 FR 3825, Jan. 25, 2000, as amended by T.D. 9091, 68 FR 52990, Sept. 8, 2003; T.D. 9283, 71 FR 51737, Aug. 31, 2006]

§ 1.167(b)–0 Methods of computing depreciation.

(a) *In general.* Any reasonable and consistently applied method of computing depreciation may be used or continued in use under section 167. Regardless of the method used in computing depreciation, deductions for depreciation shall not exceed such amounts as may be necessary to recover the unrecovered cost or other basis less salvage during the remaining useful life of the property. The reasonableness of any claim for depreciation shall be determined upon the basis of conditions known to exist at the end of the period for which the return is made. It is the responsibility of the taxpayer to establish the reasonableness of the deduction for depreciation claimed. Generally, depreciation deductions so claimed will be changed only where there is a clear and convincing basis for a change.

(b) *Certain methods.* Methods previously found adequate to produce a reasonable allowance under the Internal Revenue Code of 1939 or prior revenue laws will, if used consistently by the taxpayer, continue to be acceptable under section 167(a). Examples of such methods which continue to be acceptable are the straight line method, the declining balance method with the rate limited to 150 percent of the applicable straight line rate, and under appropriate circumstances, the unit of production method. The methods described in section 167(b) and §§1.167(b)–1, 1.167(b)–2, 1.167(b)–3, and 1.167(b)–4 shall be deemed to produce a reasonable allowance for depreciation except as limited under section 167(c) and §1.167(c)–1. See also §1.167(e)–1 for rules relating to change in method of computing depreciation.

(c) *Application of methods.* In the case of item accounts, any method which results in a reasonable allowance for depreciation may be selected for each item of property, but such method must thereafter be applied consistently to that particular item. In the case of group, classified, or composite accounts, any method may be selected for each account. Such method must be applied to that particular account consistently thereafter but need not necessarily be applied to acquisitions of similar property in the same or subsequent years, provided such acquisitions are set up in separate accounts. See, however, § 1.167(e)–1 and section 446 and the regulations thereunder, for rules relating to changes in the method of computing depreciation, and § 1.167(c)–1 for restriction on the use of certain methods. See also § 1.167(a)–7 for definition of account.

§ 1.167(b)–1 Straight line method.

(a) *In general.* Under the straight line method the cost or other basis of the property less its estimated salvage value is deductible in equal annual amounts over the period of the estimated useful life of the property. The allowance for depreciation for the taxable year is determined by dividing the adjusted basis of the property at the beginning of the taxable year, less salvage value, by the remaining useful life of the property at such time. For convenience, the allowance so determined may be reduced to a percentage or fraction. The straight line method may be used in determining a reasonable allowance for depreciation for any property which is subject to depreciation under section 167 and it shall be used in all cases where the taxpayer has not adopted a different acceptable method with respect to such property.

(b) *Illustrations.* The straight line method is illustrated by the following examples:

Example 1. Under the straight line method items may be depreciated separately:

Year and item	Cost or other basis less salaries	Useful life (years)	Depreciation allowable		
			1954	1955	1956
1954:					
Asset A	$1,600	4	[1] $200	$400	$400
Asset B	12,000	40	[1] 150	300	300

[1] In this example it is assumed that the assets were placed in service on July 1, 1954.

Example 2. In group, classified, or composite accounting, a number of assets with the same or different useful lives may be combined into one account, and a single rate of depreciation, *i.e.*, the group, classified, or composite rate used for the entire account. In the case of group accounts, *i.e.*, accounts containing assets which are similar in kind and which have approximately the same estimated useful lives, the group rate is determined from the average of the useful lives of the assets. In the case of classified or composite accounts, the classified or composite rate is generally computed by determining the amount of one year's depreciation for each item or each group of similar items, and by dividing the total depreciation thus obtained by the total cost or other basis of the assets. The average rate so obtained is to be used as long as subsequent additions, retirements, or replacements do not substantially alter the relative proportions of different types of assets in the account. An example of the computation of a classified or composite rate follows:

Cost or other basis	Estimated useful life (years)	Annual depreciation
$10,000	5	$2,000
10,000	15	667
20,000		2,667

Average rate is 13.33 percent ($2,667÷$20,000) unadjusted for salvage. Assuming the estimated salvage value is 10 percent of the cost or other basis, the rate adjusted for salvage will be 13.33 percent minus 10 percent of 13.33 percent (13.33% − 1.33%), or 12 percent.

Example 3. The use of the straight line method for group, classified, or composite accounts is illustrated by the following example: A taxpayer filing his returns on a calendar year basis maintains an asset account for which a group rate of 20 percent has been determined, before adjustment for salvage. Estimated salvage is determined to be 6⅔ percent, resulting in an adjusted rate of 18.67 percent. During the years illustrated, the initial investment, additions, retirements, and salvage recoveries, which were determined not to change the composition of the group sufficiently to require a change in rate, were assumed to have been made as follows:

1954—Initial investment of $12,000.

1957—Retirement $2,000, salvage realized $200.

1958—Retirement $2,000, salvage realized $200.

1959—Retirement $4,000, salvage realized $400.

1959—Additions $10,000.

1960—Retirement $2,000, no salvage realized.

1961—Retirement $2,000, no salvage realized.

DEPRECIABLE ASSET ACCOUNT AND DEPRECIATION COMPUTATION ON AVERAGE BALANCES

Year	Asset balance Jan. 1	Current additions	Current retirements	Asset balance Dec. 31	Average balance	Rate (percent)	Allowable depreciation
1954		$12,000		$12,000	$6,000	18.67	$1,120
1955	$12,000			12,000	12,000	18.67	2,240
1956	12,000			12,000	12,000	18.67	2,240
1957	12,000		$2,000	10,000	11,000	18.67	2,054
1958	10,000		2,000	8,000	9,000	18.67	1,680
1959	8,000	10,000	4,000	14,000	11,000	18.67	2,054
1960	14,000		2,000	12,000	13,000	18.67	2,427
1961	12,000		2,000	10,000	11,000	18.67	2,054

CORRESPONDING DEPRECIATION RESERVE ACCOUNT

Year	Depreciation reserve Jan. 1	Depreciation allowable	Current retirements	Salvage realized	Depreciation reserve Dec. 31
1954		$1,120			$1,120
1955	$1,120	2,240			3,360
1956	3,360	2,240			5,600
1957	5,600	2,054	$2,000	$200	5,854
1958	5,854	1,680	2,000	200	5,734
1959	5,734	2,054	4,000	400	4,188
1960	4,188	2,427	2,000		4,615
1961	4,615	2,054	2,000		4,669

§ 1.167(b)–2 Declining balance method.

(a) *Application of method.* Under the declining balance method a uniform rate is applied each year to the unrecovered cost or other basis of the property. The unrecovered cost or other basis is the basis provided by section 167(g), adjusted for depreciation previously allowed or allowable, and for all other adjustments provided by section 1016 and other applicable provisions of law. The declining balance rate may be determined without resort to formula. Such rate determined under section 167(b)(2) shall not exceed twice the appropriate straight line rate computed without adjustment for salvage. While salvage is not taken into account in determining the annual allowances under this method, in no event shall an asset (or an account) be depreciated below a reasonable salvage value. However, see section 167(f) and § 1.167(f)–1 for rules which permit a reduction in the amount of salvage value to be taken into account for certain personal property acquired after October 16, 1962. Also, see section 167(c) and § 1.167(c)–1 for restrictions on the use of the declining balance method.

(b) *Illustrations.* The declining balance method is illustrated by the following examples:

Example 1. A new asset having an estimated useful life of 20 years was purchased on January 1, 1954, for $1,000. The normal straight line rate (without adjustment for salvage) is 5 percent, and the declining balance rate at twice the normal straight line rate is 10 percent. The annual depreciation allowances for 1954, 1955, and 1956 are as follows:

Year	Basis	Declining balance rate (percent)	Depreciation allowance
1954	$1,000	10	$100
1955	900	10	90
1956	810	10	81

Example 2. A taxpayer filing his returns on a calendar year basis maintains a group account to which a 5 year life and a 40 percent declining balance rate are applicable. Original investment, additions, retirements, and salvage recoveries are the same as those set

forth in example (3) of paragraph (b) of §1.167(b)–1. Although salvage value is not taken into consideration in computing a declining balance rate, it must be recognized and accounted for when assets are retired.

DEPRECIABLE ASSET ACCOUNT AND DEPRECIATION COMPUTATION USING AVERAGE ASSET AND RESERVE BALANCES

Year	Asset balance Jan. 1	Current additions	Current retirements	Asset balance Dec. 31	Average	Average reserve before depreciation	Net depreciable balance	Rate (pct.)	Allowable depreciation
1954	....	$12,000	....	$12,000	$6,000	....	$6,000	40	$2,400
1955	$12,000	....	....	12,000	12,000	$2,400	9,600	40	3,840
1956	12,000	....	....	12,000	12,000	6,240	5,760	40	2,304
1957	12,000	....	$2,000	10,000	11,000	7,644	3,356	40	1,342
1958	10,000	....	2,000	8,000	9,000	7,186	1,814	40	726
1959	8,000	10,000	4,000	14,000	11,000	5,212	5,788	40	2,315
1960	14,000	....	2,000	12,000	13,000	4,727	8,273	40	3,309
1961	12,000	....	2,000	10,000	11,000	6,036	4,964	40	1,986

DEPRECIATION RESERVE

Year	Reserve Jan. 1	Current retirements	Salvage realized	Reserve Dec. 31, before depreciation	Average reserve before depreciation	Allowable depreciation	Reserve Dec. 31, after depreciation
1954	....	....	....	....	....	$2,400	$2,400
1955	$2,400	....	....	$2,400	$2,400	3,840	6,240
1956	6,240	....	....	6,240	6,240	2,304	8,544
1957	8,544	$2,000	$200	6,744	7,644	1,342	8,086
1958	8,086	2,000	200	6,286	7,186	726	7,012
1959	7,012	4,000	400	3,412	5,212	2,315	5,727
1960	5,727	2,000	....	3,727	4,727	3,309	7,036
1961	7,036	2,000	....	5,036	6,036	1,986	7,022

Where separate depreciation accounts are maintained by year of acquisition and there is an unrecovered balance at the time of the last retirement, such unrecovered balance may be deducted as part of the depreciation allowance for the year of such retirement. Thus, if the taxpayer had kept separate depreciation accounts by year of acquisition and all the retirements shown in the example above were from 1954 acquisitions, depreciation would be computed on the 1954 and 1959 acquisitions as follows:

1954 ACQUISITIONS

Year	Asset balance Jan. 1	Acquisitions	Current retirements	Asset balance Dec. 31	Average balance	Avg. reserve before depreciation	Net depreciable balance	Rate (percent)	Allowable depreciation
1954	....	$12,000	....	$12,000	$6,000	....	$6,000	40	$2,400
1955	$12,000	....	....	12,000	12,000	$2,400	9,600	40	3,840
1956	12,000	....	....	12,000	12,000	6,240	5,760	40	2,304
1957	12,000	....	$2,000	10,000	11,000	7,644	3,356	40	1,342
1958	10,000	....	2,000	8,000	9,000	7,186	1,814	40	726
1959	8,000	....	4,000	4,000	6,000	5,212	788	40	315
1960	4,000	....	2,000	2,000	3,000	2,727	273	40	109
1961	2,000	....	2,000	....	1,000	836	164	....	[1] 164

[1] Balance allowable as depreciation in the year of retirement of the last survivor of the 1954 acquisitions.

DEPRECIATION RESERVE FOR 1954 ACQUISITIONS

Year	Reserve Jan. 1	Current retirements	Salvage realized	Reserve Dec. 31, before depreciation	Average reserve before depreciation	Allowable depreciation	Reserve Dec. 31, after depreciation
1954	....	....	....	....	....	$2,400	$2,400

DEPRECIATION RESERVE FOR 1954 ACQUISITIONS—Continued

Year	Reserve Jan. 1	Current retirements	Salvage realized	Reserve Dec. 31, before depreciation	Average reserve before depreciation	Allowable depreciation	Reserve Dec. 31, after depreciation
1955	$2,400			$2,400	$2,400	3,840	6,240
1956	6,240			6,240	6,240	2,304	8,544
1957	8,544	$2,000	$200	6,744	7,644	1,342	8,086
1958	8,086	2,000	200	6,286	7,186	726	7,012
1959	7,012	4,000	400	3,412	5,212	315	3,727
1960	3,727	2,000		1,727	2,727	109	1,836
1961	1,836	2,000		(164)	836	164	

1959 ACQUISITIONS

Year	Asset balance Jan. 1	Acquisition	Asset balance Dec. 31	Avg. balance	Reserve Dec. 31, before depreciation	Net depreciable balance	Rate percent	Allowable depreciation	Reserve Dec. 31, after depreciation
1959		$10,000	$10,000	$5,000	None	$5,000	40	$2,000	$2,000
1960	$10,000		10,000	10,000	$2,000	8,000	40	3,200	5,200
1961	10,000		10,000	10,000	5,200	4,800	40	1,920	7,120

In the above example, the allowable depreciation on the 1954 acquisitions totals $11,200. This amount when increased by salvage realized in the amount of $800, equals the entire cost or other basis of the 1954 acquisitions ($12,000).

(c) *Change in estimated useful life.* In the declining balance method when a change is justified in the useful life estimated for an account, subsequent computations shall be made as though the revised useful life had been originally estimated. For example, assume that an account has an estimated useful life of ten years and that a declining balance rate of 20 percent is applicable. If, at the end of the sixth year, it is determined that the remaining useful life of the account is six years, computations shall be made as though the estimated useful life was originally determined as twelve years. Accordingly, the applicable depreciation rate will be 16⅔ percent. This rate is thereafter applied to the unrecovered cost or other basis.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6712, 29 FR 3653, Mar. 24, 1964]

§ 1.167(b)–3 Sum of the years-digits method.

(a) *Applied to a single asset*—(1) *General rule.* Under the sum of the years-digits method annual allowances for depreciation are computed by applying changing fractions to the cost or other basis of the property reduced by estimated salvage. The numerator of the fraction changes each year to a number which corresponds to the remaining useful life of the asset (including the year for which the allowance is being computed), and the denominator which remains constant is the sum of all the years digits corresponding to the estimated useful life of the asset. See section 167(c) and §1.167(c)–1 for restrictions on the use of the sum of the years-digits method.

(i) *Illustrations.* Computation of depreciation allowances on a single asset under the sum of the years-digits method is illustrated by the following examples:

Example 1. A new asset having an estimated useful life of five years was acquired on January 1, 1954, for $1,750. The estimated salvage is $250. For a taxpayer filing his returns on a calendar year basis, the annual depreciation allowances are as follows:

Year	Cost or other basis less salvage	Fraction[1]	Allowable depreciation	Depreciation reserve
1954	$1,500	$5/15$	$500	$500
1955	1,500	$4/15$	400	900
1956	1,500	$3/15$	300	1,200
1957	1,500	$2/15$	200	1,400
1958	1,500	$1/15$	100	1,500

Year	Cost or other basis less salvage	Fraction[1]	Allowable depreciation	Depreciation reserve
Unrecovered value (salvage)	....	....	....	$250

[1] The denominator of the fraction is the sum of the digits representing the years of useful life, *i.e.*, 5, 4, 3, 2, and 1, or 15.

Example 2. Assume in connection with an asset acquired in 1954 that three-fourths of a year's depreciation is allowable in that year. The following illustrates a reasonable method of allocating depreciation:

	Depreciation for 12 months	Allowable depreciation		
		1954	1955	1956
1st year	$500	(3/4) $375	(1/4) $125	
2d year	400	....	(3/4) 300	(1/4) $100
3d year	300	....	....	(3/4) 225
Total		375	425	325

(ii) *Change in useful life.* Where in the case of a single asset, a change is justified in the useful life, subsequent computations shall be made as though the remaining useful life at the beginning of the taxable year of change were the useful life of a new asset acquired at such time and with a basis equal to the unrecovered cost or other basis of the asset at that time. For example, assume that a new asset with an estimated useful life of ten years is purchased in 1954. At the time of making out his return for 1959, the taxpayer finds that the asset has a remaining useful life of seven years from January 1, 1959. Depreciation for 1959 should then be computed as though 1959 were the first year of the life of an asset estimated to have a useful life of seven years, and the allowance for 1959 would be 7/28 of the unrecovered cost or other basis of the asset after adjustment for salvage.

(2) *Remaining life*—(i) *Application.* Under the sum of the years-digits method, annual allowances for depreciation may also be computed by applying changing fractions to the unrecovered cost or other basis of the asset reduced by estimated salvage. The numerator of the fraction changes each year to a number which corresponds to the remaining useful life of the asset (including the year for which the allowance is being computed), and the denominator changes each year to a number which represents the sum of the digits corresponding to the years of estimated remaining useful life of the asset. For decimal equivalents of such fractions, see Table I of subdivision (ii) of this subparagraph. For example, a new asset with an estimated useful life of 10 years is purchased January 1, 1954, for $6,000. Assuming a salvage value of $500, the depreciation allowance for 1954 is $1,000 ($5,500×0.1818, the applicable rate from Table I). For 1955, the unrecovered balance is $4,500, and the remaining life is 9 years. The depreciation allowance for 1955 would then be $900 ($4,500×0.2000, the applicable rate from Table I).

(ii) *Table I.* This table shows decimal equivalents of sum of the years-digits fractions corresponding to remaining lives from 1 to 100 years.

TABLE I—DECIMAL EQUIVALENTS FOR USE OF SUM OF THE YEARS-DIGITS METHOD, BASED ON REMAINING LIFE

Remaining life (years)	Decimal equivalent
100.0	0.0198
99.9	.0198
99.8	.0198
99.7	.0199
99.6	.0199
99.5	.0199
99.4	.0199
99.3	.0199
99.2	.0200
99.1	.0200
99.0	.0200
98.9	.0200
98.8	.0200
98.7	.0201
98.6	.0201
98.5	.0201
98.4	.0201
98.3	.0201
98.2	.0202
98.1	.0202
98.0	.0202
97.9	.0202
97.8	.0202
97.7	.0203
97.6	.0203
97.5	.0203
97.4	.0203
97.3	.0203
97.2	.0204
97.1	.0204
97.0	.0204
96.9	.0204
96.8	.0204
96.7	.0205
96.6	.0205
96.5	.0205
96.4	.0205
96.3	.0206
96.2	.0206
96.1	.0206

TABLE I—DECIMAL EQUIVALENTS FOR USE OF SUM OF THE YEARS-DIGITS METHOD, BASED ON REMAINING LIFE—Continued

Remaining life (years)	Decimal equivalent
96.0	.0206
95.9	.0206
95.8	.0207
95.7	.0207
95.6	.0207
95.5	.0207
95.4	.0207
95.3	.0208
95.2	.0208
95.1	.0208
95.0	.0208
94.9	.0209
94.8	.0209
94.7	.0209
94.6	.0209
94.5	.0209
94.4	.0210
94.3	.0210
94.2	.0210
94.1	.0210
94.0	.0211
93.9	.0211
93.8	.0211
93.7	.0211
93.6	.0211
93.5	.0212
93.4	.0212
93.3	.0212
93.2	.0212
93.1	.0213
93.0	.0213
92.9	.0213
92.8	.0213
92.7	.0213
92.6	.0214
92.5	.0214
92.4	.0214
92.3	.0214
92.2	.0215
92.1	.0215
92.0	.0215
91.9	.0215
91.8	.0216
91.7	.0216
91.6	.0216
91.5	.0216
91.4	.0216
91.3	.0217
91.2	.0217
91.1	.0217
91.0	.0217
90.9	.0218
90.8	.0218
90.7	.0218
90.6	.0218
90.5	.0219
90.4	.0219
90.3	.0219
90.2	.0219
90.1	.0220
90.0	.0220
89.9	.0220
89.8	.0220
89.7	.0221
89.6	.0221
89.5	.0221
89.4	.0221
89.3	.0221
89.2	.0222
89.1	.0222
89.0	.0222
88.9	.0222
88.8	.0223
88.7	.0223
88.6	.0223
88.5	.0223
88.4	.0224
88.3	.0224
88.2	.0224
88.1	.0224
88.0	.0225
87.9	.0225
87.8	.0225
87.7	.0225
87.6	.0226
87.5	.0226
87.4	.0226
87.3	.0226
87.2	.0227
87.1	.0227
87.0	.0227
86.9	.0228
86.8	.0228
86.7	.0228
86.6	.0228
86.5	.0229
86.4	.0229
86.3	.0229
86.2	.0229
86.1	.0230
86.0	.0230
85.9	.0230
85.8	.0230
85.7	.0231
85.6	.0231
85.5	.0231
85.4	.0231
85.3	.0232
85.2	.0232
85.1	.0232
85.0	.0233
84.9	.0233
84.8	.0233
84.7	.0233
84.6	.0234
84.5	.0234
84.4	.0234
84.3	.0234
84.2	.0235
84.1	.0235
84.0	.0235
83.9	.0236
83.8	.0236
83.7	.0236
83.6	.0236
83.5	.0237
83.4	.0237
83.3	.0237
83.2	.0238
83.1	.0238
83.0	.0238
82.9	.0238
82.8	.0239
82.7	.0239
82.6	.0239
82.5	.0240

TABLE I—DECIMAL EQUIVALENTS FOR USE OF SUM OF THE YEARS-DIGITS METHOD, BASED ON REMAINING LIFE—Continued

Remaining life (years)	Decimal equivalent
82.4	.0240
82.3	.0240
82.2	.0240
82.1	.0241
82.0	.0241
81.9	.0241
81.8	.0242
81.7	.0242
81.6	.0242
81.5	.0242
81.4	.0243
81.3	.0243
81.2	.0243
81.1	.0244
81.0	.0244
80.9	.0244
80.8	.0244
80.7	.0245
80.6	.0245
80.5	.0245
80.4	.0246
80.3	.0246
80.2	.0246
80.1	.0247
80.0	.0247
79.9	.0247
79.8	.0248
79.7	.0248
79.6	.0248
79.5	.0248
79.4	.0249
79.3	.0249
79.2	.0249
79.1	.0250
79.0	.0250
78.9	.0250
78.8	.0251
78.7	.0251
78.6	.0251
78.5	.0252
78.4	.0252
78.3	.0252
78.2	.0253
78.1	.0253
78.0	.0253
77.9	.0253
77.8	.0254
77.7	.0254
77.6	.0254
77.5	.0255
77.4	.0255
77.3	.0255
77.2	.0256
77.1	.0256
77.0	.0256
76.9	.0257
76.8	.0257
76.7	.0257
76.6	.0258
76.5	.0258
76.4	.0258
76.3	.0259
76.2	.0259
76.1	.0259
76.0	.0260
75.9	.0260
75.8	.0260
75.7	.0261
75.6	.0261
75.5	.0261
75.4	.0262
75.3	.0262
75.2	.0262
75.1	.0263
75.0	.0263
74.9	.0264
74.8	.0264
74.7	.0264
74.6	.0265
74.5	.0265
74.4	.0265
74.3	.0266
74.2	.0266
74.1	.0266
74.0	.0267
73.9	.0267
73.8	.0267
73.7	.0268
73.6	.0268
73.5	.0268
73.4	.0269
73.3	.0269
73.2	.0270
73.1	.0270
73.0	.0270
72.9	.0271
72.8	.0271
72.7	.0271
72.6	.0272
72.5	.0272
72.4	.0272
72.3	.0273
72.2	.0273
72.1	.0274
72.0	.0274
71.9	.0274
71.8	.0275
71.7	.0275
71.6	.0275
71.5	.0276
71.4	.0276
71.3	.0277
71.2	.0277
71.1	.0277
71.0	.0278
70.9	.0278
70.8	.0279
70.7	.0279
70.6	.0279
70.5	.0280
70.4	.0280
70.3	.0280
70.2	.0281
70.1	.0281
70.0	.0282
69.9	.0282
69.8	.0282
69.7	.0283
69.6	.0283
69.5	.0284
69.4	.0284
69.3	.0284
69.2	.0285
69.1	.0285
69.0	.0286
68.9	.0286

TABLE I—DECIMAL EQUIVALENTS FOR USE OF SUM OF THE YEARS-DIGITS METHOD, BASED ON REMAINING LIFE—Continued

Remaining life (years)	Decimal equivalent
68.8	.0287
68.7	.0287
68.6	.0287
68.5	.0288
68.4	.0288
68.3	.0289
68.2	.0289
68.1	.0289
68.0	.0290
67.9	.0290
67.8	.0291
67.7	.0291
67.6	.0292
67.5	.0292
67.4	.0292
67.3	.0293
67.2	.0293
67.1	.0294
67.0	.0294
66.9	.0295
66.8	.0295
66.7	.0295
66.6	.0296
66.5	.0296
66.4	.0297
66.3	.0297
66.2	.0298
66.1	.0298
66.0	.0299
65.9	.0299
65.8	.0299
65.7	.0300
65.6	.0300
65.5	.0301
65.4	.0301
65.3	.0302
65.2	.0302
65.1	.0303
65.0	.0303
64.9	.0303
64.8	.0304
64.7	.0304
64.6	.0305
64.5	.0305
64.4	.0306
64.3	.0306
64.2	.0307
64.1	.0307
64.0	.0308
63.9	.0308
63.8	.0309
63.7	.0309
63.6	.0310
63.5	.0310
63.4	.0311
63.3	.0311
63.2	.0312
63.1	.0312
63.0	.0313
62.9	.0313
62.8	.0313
62.7	.0314
62.6	.0314
62.5	.0315
62.4	.0315
62.3	.0316
62.2	.0316
62.1	.0317

TABLE I—DECIMAL EQUIVALENTS FOR USE OF SUM OF THE YEARS-DIGITS METHOD, BASED ON REMAINING LIFE—Continued

Remaining life (years)	Decimal equivalent
62.0	.0317
61.9	.0318
61.8	.0318
61.7	.0319
61.6	.0319
61.5	.0320
61.4	.0320
61.3	.0321
61.2	.0322
61.1	.0322
61.0	.0323
60.9	.0323
60.8	.0324
60.7	.0324
60.6	.0325
60.5	.0325
60.4	.0326
60.3	.0326
60.2	.0327
60.1	.0327
60.0	.0328
59.9	.0328
59.8	.0329
59.7	.0329
59.6	.0330
59.5	.0331
59.4	.0331
59.3	.0332
59.2	.0332
59.1	.0333
59.0	.0333
58.9	.0334
58.8	.0334
58.7	.0335
58.6	.0336
58.5	.0336
58.4	.0337
58.3	.0337
58.2	.0338
58.1	.0338
58.0	.0339
57.9	.0340
57.8	.0340
57.7	.0341
57.6	.0341
57.5	.0342
57.4	.0342
57.3	.0343
57.2	.0344
57.1	.0344
57.0	.0345
56.9	.0345
56.8	.0346
56.7	.0347
56.6	.0347
56.5	.0348
56.4	.0348
56.3	.0349
56.2	.0350
56.1	.0350
56.0	.0351
55.9	.0351
55.8	.0352
55.7	.0353
55.6	.0353
55.5	.0354
55.4	.0355
55.3	.0355

TABLE I—DECIMAL EQUIVALENTS FOR USE OF SUM OF THE YEARS-DIGITS METHOD, BASED ON REMAINING LIFE—Continued

Remaining life (years)	Decimal equivalent
55.2	.0356
55.1	.0356
55.0	.0357
54.9	.0358
54.8	.0358
54.7	.0359
54.6	.0360
54.5	.0360
54.4	.0361
54.3	.0362
54.2	.0362
54.1	.0363
54.0	.0364
53.9	.0364
53.8	.0365
53.7	.0366
53.6	.0366
53.5	.0367
53.4	.0368
53.3	.0368
53.2	.0369
53.1	.0370
53.0	.0370
52.9	.0371
52.8	.0372
52.7	.0372
52.6	.0373
52.5	.0374
52.4	.0374
52.3	.0375
52.2	.0376
52.1	.0377
52.0	.0377
51.9	.0378
51.8	.0379
51.7	.0379
51.6	.0380
51.5	.0381
51.4	.0382
51.3	.0382
51.2	.0383
51.1	.0384
51.0	.0385
50.9	.0385
50.8	.0386
50.7	.0387
50.6	.0388
50.5	.0388
50.4	.0389
50.3	.0390
50.2	.0391
50.1	.0391
50.0	.0392
49.9	.0393
49.8	.0394
49.7	.0394
49.6	.0395
49.5	.0396
49.4	.0397
49.3	.0398
49.2	.0398
49.1	.0399
49.0	.0400
48.9	.0401
48.8	.0402
48.7	.0402
48.6	.0403
48.5	.0404

TABLE I—DECIMAL EQUIVALENTS FOR USE OF SUM OF THE YEARS-DIGITS METHOD, BASED ON REMAINING LIFE—Continued

Remaining life (years)	Decimal equivalent
48.4	.0405
48.3	.0406
48.2	.0406
48.1	.0407
48.0	.0408
47.9	.0409
47.8	.0410
47.7	.0411
47.6	.0411
47.5	.0412
47.4	.0413
47.3	.0414
47.2	.0415
47.1	.0416
47.0	.0417
46.9	.0418
46.8	.0418
46.7	.0419
46.6	.0420
46.5	.0421
46.4	.0422
46.3	.0423
46.2	.0424
46.1	.0425
46.0	.0426
45.9	.0426
45.8	.0427
45.7	.0428
45.6	.0429
45.5	.0430
45.4	.0431
45.3	.0432
45.2	.0433
45.1	.0434
45.0	.0435
44.9	.0436
44.8	.0437
44.7	.0438
44.6	.0439
44.5	.0440
44.4	.0440
44.3	.0441
44.2	.0442
44.1	.0443
44.0	.0444
43.9	.0445
43.8	.0446
43.7	.0447
43.6	.0448
43.5	.0449
43.4	.0450
43.3	.0451
43.2	.0452
43.1	.0453
43.0	.0455
42.9	.0456
42.8	.0457
42.7	.0458
42.6	.0459
42.5	.0460
42.4	.0461
42.3	.0462
42.2	.0463
42.1	.0464
42.0	.0465
41.9	.0466
41.8	.0467
41.7	.0468

TABLE I—DECIMAL EQUIVALENTS FOR USE OF SUM OF THE YEARS-DIGITS METHOD, BASED ON REMAINING LIFE—Continued

Remaining life (years)	Decimal equivalent
41.6	.0469
41.5	.0471
41.4	.0472
41.3	.0473
41.2	.0474
41.1	.0475
41.0	.0476
40.9	.0477
40.8	.0478
40.7	.0480
40.6	.0481
40.5	.0482
40.4	.0483
40.3	.0484
40.2	.0485
40.1	.0487
40.0	.0488
39.9	.0489
39.8	.0490
39.7	.0491
39.6	.0493
39.5	.0494
39.4	.0495
39.3	.0496
39.2	.0497
39.1	.0499
39.0	.0500
38.9	.0501
38.8	.0502
38.7	.0504
38.6	.0505
38.5	.0506
38.4	.0508
38.3	.0509
38.2	.0510
38.1	.0511
38.0	.0513
37.9	.0514
37.8	.0515
37.7	.0517
37.6	.0518
37.5	.0519
37.4	.0521
37.3	.0522
37.2	.0524
37.1	.0525
37.0	.0526
36.9	.0528
36.8	.0529
36.7	.0530
36.6	.0532
36.5	.0533
36.4	.0525
36.3	.0536
36.2	.0538
36.1	.0539
36.0	.0541
35.9	.0542
35.8	.0543
35.7	.0545
35.6	.0546
35.5	.0548
35.4	.0549
35.3	.0551
35.2	.0552
35.1	.0554
35.0	.0556
34.9	.0557
34.8	.0559
34.7	.0560
34.6	.0562
34.5	.0563
34.4	.0565
34.3	.0566
34.2	.0566
34.1	.0570
34.0	.0571
33.9	.0573
33.8	.0575
33.7	.0576
33.6	.0578
33.5	.0580
33.4	.0581
33.3	.0583
33.2	.0585
33.1	.0586
33.0	.0588
32.9	.0590
32.8	.0592
32.7	.0593
32.6	.0595
32.5	.0597
32.4	.0599
32.3	.0600
32.2	.0602
32.1	.0604
32.0	.0606
31.9	.0608
31.8	.0610
31.7	.0611
31.6	.0613
31.5	.0615
31.4	.0617
31.3	.0619
31.2	.0621
31.1	.0623
31.0	.0625
30.9	.0627
30.8	.0629
30.7	.0631
30.6	.0633
30.5	.0635
30.4	.0637
30.3	.0639
30.2	.0641
30.1	.0643
30.0	.0645
29.9	.0647
29.8	.0649
29.7	.0651
29.6	.0653
29.5	.0656
29.4	.0658
29.3	.0660
29.2	.0662
29.1	.0664
29.0	.0667
28.9	.0669
28.8	.0671
28.7	.0673
28.6	.0675
28.5	.0678
28.4	.0680
28.3	.0682
28.2	.0685
28.1	.0687

TABLE I—DECIMAL EQUIVALENTS FOR USE OF SUM OF THE YEARS-DIGITS METHOD, BASED ON REMAINING LIFE—Continued

Remaining life (years)	Decimal equivalent
28.0	.0690
27.9	.0692
27.8	.0694
27.7	.0697
27.6	.0699
27.5	.0702
27.4	.0704
27.3	.0707
27.2	.0709
27.1	.0712
27.0	.0714
26.9	.0717
26.8	.0719
26.7	.0722
26.6	.0724
26.5	.0727
26.4	.0730
26.3	.0732
26.2	.0735
26.1	.0738
26.0	.0741
25.9	.0743
25.8	.0746
25.7	.0749
25.6	.0752
25.5	.0754
25.4	.0757
25.3	.0760
25.2	.0763
25.1	.0766
25.0	.0769
24.9	.0772
24.8	.0775
24.7	.0778
24.6	.0781
24.5	.0784
24.4	.0787
24.3	.0790
24.2	.0793
24.1	.0797
24.0	.0800
23.9	.0803
23.8	.0806
23.7	.0809
23.6	.0813
23.5	.0816
23.4	.0819
23.3	.0823
23.2	.0826
23.1	.0830
23.0	.0833
22.9	.0837
22.8	.0840
22.7	.0844
22.6	.0847
22.5	.0851
22.4	.0854
22.3	.0858
22.2	.0862
22.1	.0866
22.0	.0870
21.9	.0873
21.8	.0877
21.7	.0881
21.6	.0885
21.5	.0888
21.4	.0892
21.3	.0896

TABLE I—DECIMAL EQUIVALENTS FOR USE OF SUM OF THE YEARS-DIGITS METHOD, BASED ON REMAINING LIFE—Continued

Remaining life (years)	Decimal equivalent
21.2	.0901
21.1	.0905
21.0	.0909
20.9	.0913
20.8	.0917
20.7	.0921
20.6	.0925
20.5	.0930
20.4	.0934
20.3	.0939
20.2	.0943
20.1	.0948
20.0	.0952
19.9	.0957
19.8	.0961
19.7	.0966
19.6	.0970
19.5	.0975
19.4	.0980
19.3	.0985
19.2	.0990
19.1	.0995
19.0	.1000
18.9	.1005
18.8	.1010
18.7	.1015
18.6	.1020
18.5	.1025
18.4	.1030
18.3	.1036
18.2	.1041
18.1	.1047
18.0	.1053
17.9	.1058
17.8	.1063
17.7	.1069
17.6	.1074
17.5	.1080
17.4	.1086
17.3	.1092
17.2	.1098
17.1	.1105
17.0	.1111
16.9	.1117
16.8	.1123
16.7	.1129
16.6	.1135
16.5	.1142
16.4	.1148
16.3	.1155
16.2	.1162
16.1	.1169
16.0	.1176
15.9	.1183
15.8	.1190
15.7	.1197
15.6	.1204
15.5	.1211
15.4	.1218
15.3	.1226
15.2	.1234
15.1	.1242
15.0	.1250
14.9	.1257
14.8	.1265
14.7	.1273
14.6	.1281
14.5	.1289

TABLE I—DECIMAL EQUIVALENTS FOR USE OF SUM OF THE YEARS-DIGITS METHOD, BASED ON REMAINING LIFE—Continued

TABLE I—DECIMAL EQUIVALENTS FOR USE OF SUM OF THE YEARS-DIGITS METHOD, BASED ON REMAINING LIFE—Continued

Remaining life (years)	Decimal equivalent
14.4	.1297
14.3	.1306
14.2	.1315
14.1	.1324
14.0	.1333
13.9	.1342
13.8	.1350
13.7	.1359
13.6	.1368
13.5	.1378
13.4	.1387
13.3	.1397
13.2	.1407
13.1	.1418
13.0	.1429
12.9	.1438
12.8	.1448
12.7	.1458
12.6	.1469
12.5	.1479
12.4	.1490
12.3	.1502
12.2	.1514
12.1	.1526
12.0	.1538
11.9	.1549
11.8	.1561
11.7	.1573
11.6	.1585
11.5	.1597
11.4	.1610
11.3	.1624
11.2	.1637
11.1	.1652
11.0	.1667
10.9	.1680
10.8	.1693
10.7	.1707
10.6	.1721
10.5	.1736
10.4	.1751
10.3	.1767
10.2	.1783
10.1	.1800
10.0	.1818
9.9	.1833
9.8	.1849
9.7	.1865
9.6	.1882
9.5	.1900
9.4	.1918
9.3	.1938
9.2	.1957
9.1	.1978
9.0	.2000
8.9	.2018
8.8	.2037
8.7	.2057
8.6	.2077
8.5	.2099
8.4	.2121
8.3	.2145
8.2	.2169
8.1	.2195
8.0	.2222
7.9	.2244
7.8	.2267
7.7	.2292
7.6	.2317
7.5	.2344
7.4	.2372
7.3	.2401
7.2	.2432
7.1	.2465
7.0	.2500
6.9	.2527
6.8	.2556
6.7	.2587
6.6	.2619
6.5	.2653
6.4	.2689
6.3	.2727
6.2	.2768
6.1	.2811
6.0	.2857
5.9	.2892
5.8	.2929
5.7	.2969
5.6	.3011
5.5	.3056
5.4	.3103
5.3	.3155
5.2	.3210
5.1	.3269
5.0	.3333
4.9	.3379
4.8	.3429
4.7	.3481
4.6	.3538
4.5	.3600
4.4	.3667
4.3	.3739
4.2	.3818
4.1	.3905
4.0	.4000
3.9	.4063
3.8	.4130
3.7	.4205
3.6	.4286
3.5	.4375
3.4	.4474
3.3	.4583
3.2	.4706
3.1	.4844
3.0	.5000
2.9	.5088
2.8	.5185
2.7	.5294
2.6	.5417
2.5	.5556
2.4	.5714
2.3	.5897
2.2	.6111
2.1	.6364
2.0	.6667
1.9	.6786
1.8	.6923
1.7	.7083
1.6	.7273
1.5	.7500
1.4	.7778
1.3	.8125
1.2	.8571
1.1	.9167
1.0	1.0000

NOTE: For determination of decimal equivalents of remaining lives falling between those shown in the above table, the taxpayer may use the next longest life shown in the table, interpolate from the table, or use the following formula from which the table was derived.

$D=2R/(W+2F)(W+1)$

where:

D=Decimal equivalent.
R=Remaining life.
W=Whole number of years in remaining life.
F=Fractional part of a year in remaining life.

If the taxpayer desires to carry his calculations of decimal equivalents to a greater number of decimal places than is provided in the table, he may use the formula. The procedure adopted must be consistently followed thereafter.

(b) *Applied to group, classified, or composite accounts*—(1) *General rule.* The sum of the years-digits method may be applied to group, classified, or composite accounts in accordance with the plan described in subparagraph (2) of this paragraph or in accordance with other plans as explained in subparagraph (3) of this paragraph.

(2) *Remaining life plan.* The remaining life plan as applied to a single asset is described in paragraph (a)(2) of this section. This plan may also be applied to group, classified, or composite accounts. Under this plan the allowance for depreciation is computed by applying changing fractions to the unrecovered cost or other basis of the account reduced by estimated salvage. The numerator of the fraction changes each year to a number which corresponds to the remaining useful life of the account (including the year for which the allowance is being computed), and the denominator changes each year to a number which represents the sum of the years digits corresponding to the years of estimated remaining useful life of the account. Decimal equivalents of such fractions can be obtained by use of Table I under paragraph (a)(2)(ii) of this section. The proper application of this method requires that the estimated remaining useful life of the account be determined each year. This determination, of course, may be made each year by analysis, *i.e.*, by determining the remaining lives for each of the components in the account, and averaging them. The estimated remaining life of any account, however, may also be determined arithmetically. For example, it may be computed by dividing the unrecovered cost or other basis of the account, as computed by straight line depreciation, by the gross cost or other basis of the account, and multiplying the result by the average life of the assets in the account. Salvage value is not a factor for the purpose of determining remaining life. Thus, if a group account with an average life of ten years had at January 1, 1958, a gross asset balance of $12,600 and a depreciation reserve computed on the straight line method of $9,450, the remaining life of the account at January 1, 1958, would be computed as follows:

$12,600 − $9,450÷$12,600×10 years equals 2.50 years.

Example. The use of the sum of the years-digits method with group, classified, or composite accounts under the remaining life plan is illustrated by the following example: A calendar year taxpayer maintains a group account to which a five-year life is applicable. Original investment, additions, retirements, and salvage recoveries are the same as those set forth in example (3) of paragraph (b) of § 1.167(b)–1.

DEPRECIATION COMPUTATIONS ON A GROUP ACCOUNT UNDER REMAINING LIFE PLAN

	1	2	3	4	5	6	7	8	9	10	11	12	13	14
					Straight line amount	Straight line reserve	Remaining life	Asset balance reduced by salvage	Current additions reduced by salvage	Salvage realized	Sum of the years digits depreciation			
Year	Asset balance Jan. 1	Current additions	Current retirements	Average asset balance							Accumulated reserve Jan. 1	Unrecovered Jan. 1	Rate based on Col. (7) from Table 1	Allowable depreciation
					Col. (4)÷ life	Col. (5)−Col. (3) accumulated Jan. 1	[Col. (1)−Col. (6)÷Col. (1)]× average service life	Col. (1)×(100%−6.67%)	Col (2)×(100%−6.67%)		Prior reserve+Col. (14)+Col. (10)−Col. (3)	Col. (8)−Col. (11)		Col. (12)×Col. (13)+ ½ Col. (9)×F[2]
1954	....	$12,000	....	$6,000	[1] $1,200	....	5.00	....	$11,200	....	....	....	0.3333	$1,866
1955	$12,000	....	....	12,000	2,400	$1,200	4.50	$11,200	....	....	$1,866	$9,334	.3600	3,360
1956	12,000	....	....	12,000	2,400	3,600	3.50	11,200	....	....	5,226	5,974	.4375	2,614
1957	12,000	....	$2,000	11,000	2,200	6,000	2.50	11,200	....	$200	7,840	3,360	.5556	1,867
1958	10,000	....	2,000	9,000	1,800	6,200	1.90	9,333	....	200	7,907	1,426	.6786	968
1959	8,000	10,000	4,000	11,000	2,200	6,000	1.25	7,466	9,333	400	7,075	391	.8125	1,874
1960	14,000	....	2,000	13,000	2,600	4,200	3.50	13,066	....	....	5,349	7,717	.4375	3,376
1961	12,000	....	2,000	11,000	2,200	4,800	3.00	11,200	....	....	6,725	4,475	.5000	2,238
1962	....	....	....	....	....	5,000	....	....	....	....	6,963			

[1] ½ year's amount.

[2] F=Rate based on average service life (0.3333 in this example).

(3) *Other plans for application of the sum of the years-digits method.* Taxpayers who wish to use the sum of the years-digits method in computing depreciation for group, classified, or composite accounts in accordance with a sum of the years digits plan other than the remaining life plan described herein may do so only with the consent of the Commissioner. Request for permission to use plans other than that described shall be addressed to the Commissioner of Internal Revenue, Washington, D.C. 20224.

§ 1.167(b)–4 Other methods.

(a) Under section 167(b)(4) a taxpayer may use any consistent method of computing depreciation, such as the sinking fund method, provided depreciation allowances computed in accordance with such method do not result in accumulated allowances at the end of any taxable year greater than the total of the accumulated allowances which could have resulted from the use of the declining balance method described in section 167(b)(2). This limitation applies only during the first two-thirds of the useful life of the property. For example, an asset costing $1,000 having a useful life of six years may be depreciated under the declining balance method in accordance with § 1.167(b)–2, at a rate of 33⅓ percent. During the first four years or ⅔ of its useful life, maximum depreciation allowances under the declining balance method would be as follows:

	Current depreciation	Accumulated depreciation	Balance
Cost of asset	....	....	$1,000
First year	$333	$333	667
Second year	222	555	445
Third year	148	703	297
Fourth year	99	802	198

An annual allowance computed by any other method under section 167(b)(4) could not exceed $333 for the first year, and at the end of the second year the total allowances for the two years could not exceed $555. Likewise, the total allowances for the three years could not exceed $703 and for the four years could not exceed $802. This limitation would not apply in the fifth and sixth years. See section 167(c) and § 1.167(c)–1 for restriction on the use of certain methods.

(b) It shall be the responsibility of the taxpayer to establish to the satisfaction of the Commissioner that a method of depreciation under section 167(b)(4) is both a reasonable and consistent method and that it does not produce depreciation allowances in excess of the amount permitted under the limitations provided in such section.

§ 1.167(c)–1 Limitations on methods of computing depreciation under section 167(b) (2), (3), and (4).

(a) *In general.* (1) Section 167(c) provides limitations on the use of the declining balance method described in section 167(b)(2), the sum of the years-digits method described in section 167(b)(3), and certain other methods authorized by section 167(b)(4). These methods are applicable only to tangible property having a useful life of three years or more. If construction, reconstruction, or erection by the taxpayer began before January 1, 1954, and was completed after December 31, 1953, these methods apply only to that portion of the basis of the property which is properly attributable to such construction, reconstruction, or erection after December 31, 1953. Property is considered as constructed, reconstructed, or erected by the taxpayer if the work is done for him in accordance with his specifications. The portion of the basis of such property attributable to construction, reconstruction, or erection after December 31, 1953, consists of all costs of the property allocable to the period after December 31, 1953, including the cost or other basis of materials entering into such work. It is not necessary that such materials be acquired after December 31, 1953, or that they be new in use. If construction or erection by the taxpayer began after December 31, 1953, the entire cost or other basis of such construction or erection qualifies for these methods of depreciation. In the case of reconstruction of property, these methods do not apply to any part of the adjusted basis of such property on December 31, 1953. For purposes of this section, construction, reconstruction, or erection by the taxpayer begins when physical work is started on such construction, reconstruction, or erection.

(2) If the property was not constructed, reconstructed, or erected by the taxpayer, these methods apply only if it was acquired after December 31, 1953, and if the original use of the property commences with the taxpayer and commences after December 31, 1953. For the purpose of the preceding sentence, property shall be deemed to be acquired when reduced to physical possession, or control. The term ''original use'' means the first use to which the property is put, whether or not such use corresponds to the use of such property by the taxpayer. For example, a reconditioned or rebuilt machine acquired after December 31, 1953, will not be treated as being put to original use by the taxpayer even though it is put to a different use, nor will a horse acquired for breeding purposes be treated as being put to original use by the taxpayer if prior to the purchase the horse was used for racing purposes. See §§1.167(b)–2, 1.167 (b)–3, and 1.167(b)–4 for application of the various methods.

(3) Assets having an estimated average useful life of less than three years shall not be included in a group, classified, or composite account to which the methods described in §§1.167 (b)–2, 1.167(b)–3, and 1.167(b)–4 are applicable. However, an incidental retirement of an asset from such an account prior to the expiration of a useful life of three years will not prevent the application of these methods to such an account.

(4) See section 381(c)(6) and the regulations thereunder for rules covering the use of depreciation methods by acquiring corporations in the case of certain corporate acquisitions.

(5) See §§1.1502–12(g) and 1.1502–13 for provisions dealing with depreciation of property received by a member of an affiliated group from another member of the group during a consolidated return period.

(6) Except in the cases described in subparagraphs (4) and (5) of this paragraph, the methods of depreciation described in §§1.167(b)–2, 1.167(b–(3), and 1.167(b)–4 are not applicable to property in the hands of a distributee, vendee, transferee, donee, or grantee unless the original use of the property begins with such person and the conditions required by section 167(c) and this section are otherwise met. For example, these methods of depreciation may not be used by a corporation with respect to property which it acquires from an individual or partnership in exchange for its stock. Similarly, if an individual or partnership receives property in a distribution upon dissolution of a corporation, these methods of depreciation may not be used with respect to property so acquired by such individual or partnership. As a further example, these methods of depreciation may not be used by a partnership with respect to contributed property, nor by a partner with respect to partnership property distributed to him. Moreover, where a partnership is entitled to use these depreciation methods, and the optional adjustment to basis of partnership property provided by section 743 is applicable, (i) in the case of an increase in the adjusted basis of the partnership property under such section, the transferee partner with respect to whom such adjustment is applicable shall not be entitled to use such methods with respect to such increase, and (ii) in the case of a decrease in the adjusted basis of the partnership property under such section, the transferee partner with respect to whom such adjustment is applicable shall include in his income an amount equal to the portion of the depreciation deducted by the partnership which is attributable to such decrease.

(b) *Illustrations.* (1) The application of these methods to property constructed, reconstructed, or erected by the taxpayer after December 31, 1953, may be illustrated by the following examples:

Example 1. If a building with a total cost of $100,000 is completed after December 31, 1953, and the portion attributable to construction after December 31, 1953, is determined by engineering estimates or by cost accounting records to be $30,000, the methods referred to in paragraph (a)(1) of this section are applicable only to the $30,000 portion of the total.

Example 2. In 1954, a taxpayer has an old machine with an unrecovered cost of $1,000. If he contracts to have it reconditioned, or reconditions it himself, at a cost of an additional $5,000, only the $5,000 may be depreciated under the methods referred to in paragraph (a)(1) of this section, whether or not the materials used for reconditioning are new in use.

Example 3. A taxpayer who acquired a building in 1940 makes major maintenance or repair expenditures in 1954 of a type which must be capitalized. For these expenditures the taxpayer may use a method of depreciation different from that used on the building (for example, the methods referred to in paragraph (a)(1) of this section) only if he accounts for such expenditures separately from the account which contained the original building. In such case, the unadjusted basis on any parts replaced shall be removed from the asset account and shall be charged to the appropriate depreciation reserve account. In the alternative he may capitalize such expenditures by charging them to the depreciation reserve account for the building.

(2) The application of these methods to property which was not constructed, reconstructed, or erected by the taxpayer but which was acquired after December 31, 1953, may be illustrated by the following examples:

Example 1. A taxpayer contracted in 1953 to purchase a new machine which he acquired in 1954 and put into first use in that year. He may use the methods referred to in paragraph (a)(1) of this section, in recovering the cost of the new machine.

Example 2. A taxpayer instead of reconditioning his old machine buys a "factory reconditioned" machine in 1954 to replace it. He cannot apply the methods referred to in paragraph (a)(1) of this section, to any part of the cost of the reconditioned machine since he is not the first user of the machine.

Example 3. In 1954, a taxpayer buys a house for $20,000 which had been used as a personal residence and thus had not been subject to depreciation allowances. He makes a capital addition of $5,000 and rents the property to another. The taxpayer may use the methods referred to in paragraph (a)(1) of this section, only with respect to the $5,000 cost of the addition.

(c) *Election to use methods.* Subject to the limitations set forth in paragraph (a) of this section, the methods of computing the allowance for depreciation specified in section 167(b) (2), (3), and (4) may be adopted without permission and no formal election is required. In order for a taxpayer to elect to use these methods for any property described in paragraph (a) of this section, he need only compute depreciation thereon under any of these methods for any taxable year ending after December 31, 1953, in which the property may first be depreciated by him. The election with respect to any property shall not be binding with respect to acquisitions of similar property in the same year or subsequent year which are set up in separate accounts. If a taxpayer has filed his return for a taxable year ending after December 31, 1953, for which the return is required to be filed on or before September 15, 1956, an election to compute the depreciation allowance under any of the methods specified in section 167 (b) or a change in such an election may be made in an amended return or claim for refund filed on or before September 15, 1956.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960; 25 FR 14021, Dec. 31, 1960, as amended by T.D. 7244, 37 FR 28897, Dec. 30, 1972; T.D. 8560, 59 FR 41674, Aug. 15, 1994; T.D. 8597, 60 FR 36679, July 18, 1995]

§ 1.167(d)–1 Agreement as to useful life and rates of depreciation.

After August 16, 1954, a taxpayer may, for taxable years ending after December 31, 1953, enter into an agreement with respect to the estimated useful life, method and rate of depreciation and treatment of salvage of any property which is subject to the allowance for depreciation. An application for such agreement may be made to the district director for the internal revenue district in which the taxpayer's return is required to be filed. Such application shall be filed in quadruplicate and shall contain in such detail as may be practical the following information:

(a) The character and location of the property.

(b) The original cost or other basis and date of acquisition.

(c) Proper adjustments to the basis including depreciation accumulated to the first taxable year to be covered by the agreement.

(d) Estimated useful life and estimated salvage value.

(e) Method and rate of depreciation.

(f) Any other facts and circumstances pertinent to making a reasonable estimate of the useful life of the property and its salvage value.

The agreement must be in writing and must be signed by the taxpayer and by the district director. The agreement must be signed in quadruplicate, and two of the signed copies will be returned to the taxpayer. The agreement shall set forth its effective date, the estimated remaining useful life, the estimated salvage value, and rate and method of depreciation of the property and the facts and circumstances taken into consideration in adoption of the agreement, and shall relate only to depreciation allowances for such property on and after the effective date of the agreement. Such an agreement shall be binding on both parties until such time as facts and circumstances which were not taken into account in making the agreement are shown to exist. The party wishing to modify or change the agreement shall have the responsibility of establishing the existence of such facts and circumstances. Any change in the useful life or rate specified in such agreement shall be effective only prospectively, that is, it shall be effective beginning with the taxable year in which notice of the intention to change, including facts and circumstances warranting the adjustment of useful life and rate, is sent by the party proposing the change to the other party and is sent by registered mail, if such notice is mailed before September 3, 1958, or is sent by certified mail or registered mail, if such notice is mailed after September 2, 1958. A copy of the agreement (and any modification thereof) shall be filed with the taxpayer's return for the first taxable year which is affected by the agreement (or any modification thereof). A signed copy should be retained with the permanent records of the taxpayer. For rules relating to changes in method of depreciation, see §1.167(e)–1 and section 446 and the regulations thereunder.

§ 1.167(e)–1 Change in method.

(a) *In general.* (1) Any change in the method of computing the depreciation allowances with respect to a particular account (other than a change in method permitted or required by reason of the operation of former section 167(j)(2) and §1.167(j)–3(c)) is a change in method of accounting, and such a change will be permitted only with the consent of the Commissioner, except that certain changes to the straight line method of depreciation will be permitted without consent as provided in former section 167(e)(1), (2), and (3). Except as provided in paragraphs (c) and (d) of this section, a change in method of computing depreciation will be permitted only with respect to all the assets contained in a particular account as defined in §1.167(a)–7. Any change in the percentage of the current straight line rate under the declining balance method, for example, from 200 percent of the straight line rate to any other percent of the straight line rate, or any change in the interest factor used in connection with a compound interest or sinking fund method, will constitute a change in method of depreciation. Any request for a change in method of depreciation shall be made in accordance with section 446(e) and the regulations under section 446(e). For rules covering the use of depreciation methods by acquiring corporations in the case of certain corporate acquisitions, see section 381(c)(6) and the regulations under section 381(c)(6).

(2) Paragraphs (b), (c), and (d) of this section apply to property for which depreciation is determined under section 167 (other than under section 168, section 1400I, section 1400L(c), under section 168 prior to its amendment by the Tax Reform Act of 1986 (100 Stat. 2121), or under an additional first year depreciation deduction provision (for example, section 168(k), 1400L(b), or 1400N(d))) of the Internal Revenue Code.

(b) *Declining balance to straight line.* In the case of an account to which the method described in section 167(b)(2) is applicable, a taxpayer may change without the consent of the Commissioner from the declining balance method of depreciation to the straight line method at any time during the useful life of the property under the following conditions. Such a change may not be made if a provision prohibiting such a change is contained in an agreement under section 167(d). When the change is made, the unrecovered cost or other basis (less a reasonable estimate for salvage) shall be recovered through annual allowances over the estimated remaining useful life determined in accordance with the circumstances existing at the time. With respect to any account, this change will be permitted only if applied to all the assets in the account as defined in

§ 1.167(a)–7. If the method of depreciation described in section 167(b)(2) (the declining balance method of depreciation using a rate not exceeding 200 percent of the straight line rate) is an acceptable method of depreciation with respect to a particular account, the taxpayer may elect under this paragraph to change to the straight line method of depreciation even if with respect to that particular account the declining balance method is permitted under a provision other than section 167(b)(2). Thus, for example, in the case of section 1250 property to which section 167(j)(1) is applicable, section 167(b) does not apply, but the declining balance method of depreciation using 150 percent of the straight line rate is an acceptable method of depreciation under section 167(j)(1)(B). Accordingly, the taxpayer may elect under this paragraph to change to the straight line method of depreciation with respect to such property. Similarly, if the taxpayer acquired used property before July 25, 1969, and adopted the 150 percent declining balance method of depreciation permitted with respect to such property under § 1.167(b)–0(b), the taxpayer may elect under this paragraph to change to the straight line method of depreciation with respect to such property. The taxpayer shall furnish a statement with respect to the property which is the subject of the change showing the date of acquisition, cost or other basis, amounts recovered through depreciation and other allowances, the estimated salvage value, the character of the property, the remaining useful life of the property, and such other information as may be required. The statement shall be attached to the taxpayer's return for the taxable year in which the change is made. A change to the straight line method must be adhered to for the entire taxable year of the change and for all subsequent taxable years unless, with the consent of the Commissioner, a change to another method is permitted.

(c) *Change with respect to section 1245 property.* (1) In respect of his first taxable year beginning after December 31, 1962, a taxpayer may elect, without the consent of the Commissioner, to change the method of depreciation of section 1245 property (as defined in section 1245(a)(3)) from any declining balance method or sum of the years-digits method to the straight line method. With respect to any account (as defined in § 1.167(a)–7), this change may be made notwithstanding any provision to the contrary in an agreement under section 167(d), but such change shall constitute (as of the first day of such taxable year) a termination of such agreement as to all property in such account. With respect to any account, this change will be permitted only if applied to all the section 1245 property in the account. The election shall be made by a statement on, or attached to, the return for such taxable year filed on or before the last day prescribed by law, including any extensions thereof, for filing such return.

(2) When an election under this paragraph is made in respect of section 1245 property in an account, the unrecovered cost or other basis (less a reasonable estimate for salvage) of all the section 1245 property in the account shall be recovered through annual allowances over the estimated remaining useful life determined in accordance with the circumstances existing at that time. If there is other property in such account, the other property shall be placed in a separate account and depreciated by using the same method as was used before the change permitted by this paragraph, but the estimated useful life of such property shall be redetermined in accordance with § 1.167(b)–2, or 1.167(b)–3, whichever is applicable. The taxpayer shall maintain records which permit specific identification of the section 1245 property in the account with respect to which the election is made, and any other property in such account. The records shall also show for all the property in the account the date of acquisition, cost or other basis, amounts recovered through depreciation and other allowances, the estimated salvage value, the character of the property, and the remaining useful life of the property. A change to the straight line method under this paragraph must be adhered to for the entire taxable year of the change and for all subsequent taxable years unless, with the consent of the Commissioner, a change to another method is permitted.

(d) *Change with respect to section 1250 property.* (1) In respect of his first taxable year beginning after July 24, 1969, a taxpayer may elect, without the consent of the Commissioner, to change the method of depreciation of section 1250 property (as defined in section 1250(c)) from any declining balance method or sum of the years-digits method to the straight line method. With respect to any account (as defined in §1.167(a)–7) this change may be made notwithstanding any provision to the contrary in an agreement under section 167(d), but such change will constitute (as of the first day of such taxable year) a termination of such agreement as to all property in such account. With respect to any account, this change will be permitted only if applied to all the section 1250 property in the account. The election shall be made by a statement on, or attached to, the return for such taxable year filed on or before the last day prescribed by law, including extensions thereof, for filing such return.

(2) When an election under this paragraph is made in respect of section 1250 property in an account, the unrecovered cost or other basis (less a reasonable estimate for salvage) of all the section 1250 property in the account shall be recovered through annual allowances over the estimated remaining useful life determined in accordance with the circumstances existing at that time. If there is other property in such account, the other property shall be placed in a separate account and depreciated by using the same method as was used before the change permitted by this paragraph, but the estimated useful life of such property shall be redetermined in accordance with §1.167(b)–2 or §1.167(b)–3, whichever is applicable. The taxpayer shall maintain records which permit specific identification of the section 1250 property in the account with respect to which the election is made and any other property in such account. The records shall also show for all the property in the account the date of the acquisition, cost or other basis, amounts recovered through depreciation and other allowances, the estimated salvage value, the character of the property, and the estimated remaining useful life of the property. A change to the straight line method under this paragraph must be adhered to for the entire taxable year of the change and for all subsequent taxable years unless, with the consent of the Commissioner, a change to another method is permitted.

(e) *Effective date.* This section applies on or after December 30, 2003. For the applicability of regulations before December 30, 2003, see §1.167(e)–1 in effect prior to December 30, 2003 (§1.167(e)–1 as contained in 26 CFR part 1 edition revised as of April 1, 2003).

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6832, 30 FR 8573, July 7, 1965; T.D. 7166, 37 FR 5245, Mar. 11, 1972; T.D. 9105, 69 FR 7, Jan. 2, 2004; T.D. 9307, 71 FR 78068, Dec. 28, 2006]

§ 1.167(f)–1 Reduction of salvage value taken into account for certain personal property.

(a) *In general.* For taxable years beginning after December 31, 1961, and ending after October 16, 1962, a taxpayer may reduce the amount taken into account as salvage value in computing the allowance for depreciation under section 167(a) with respect to ''personal property'' as defined in section 167(f)(2) and paragraph (b) of this section. The reduction may be made in an amount which does not exceed 10 percent of the basis of the property for determining depreciation, as of the time as of which salvage value is required to be determined (or when salvage value is redetermined), taking into account all adjustments under section 1016 other than (1) the adjustment under section 1016(a)(2) for depreciation allowed or allowable to the taxpayer, and (2) the adjustment under section 1016(a)(19) for a credit earned by the taxpayer under section 38, to the extent such adjustment is reflected in the basis for depreciation. See paragraph (c) of §1.167(a)–1 for the definition of salvage value, the time for making the determination, the redetermination of salvage value, and the general rules with respect to the treatment of salvage value. See also section 167(g) and §1.167(g)–1 for basis for depreciation. A reduction of the amount taken into account as salvage value with respect to any property shall not be binding with respect to other property. In no event shall an asset (or an account) be depreciated below a reasonable salvage value after taking into account the reduction in salvage value permitted by section 167(f) and this section.

(b) *Definitions and special rules.* The following definitions and special rules apply for purposes of section 167(f) and this section.

(1) *Personal property.* The term ''personal property'' shall include only depreciable—

(i) Tangible personal property (as defined in section 48 and the regulations thereunder) and

(ii) Intangible personal property

which has an estimated useful life (determined at the time of acquisition) of 3 years or more and which is acquired after October 16, 1962. Such term shall not include livestock. The term ''livestock'' includes horses, cattle, hogs, sheep, goats, and mink and other furbearing animals, irrespective of the use to which they are put or the purpose for which they are held. The original use of the property need not commence with the taxpayer so long as he acquired it after October 16, 1962; thus, the property may be new or used. For purposes of determining the estimated useful life, the provisions of paragraph (b) of §1.167(a)–1 shall be applied. For rules determining when property is acquired, see subparagraph (2) of this paragraph. For purposes of determining the types of intangible personal property which are subject to the allowance for depreciation, see §1.167(a)–3.

(2) *Acquired.* In determining whether property is acquired after October 16, 1962, property shall be deemed to be acquired when reduced to physical possession, or control. Property which has not been used in the taxpayer's trade or business or held for the production of income and which is thereafter converted by the taxpayer to such use shall be deemed to be acquired on the date of such conversion. In addition, property shall be deemed to be acquired if constructed, reconstructed, or erected by the taxpayer. If construction, reconstruction, or erection by the taxpayer began before October 17, 1962, and was completed after October 16, 1962, section 167(f) and this section apply only to that portion of the basis of the property which is properly attributable to such construction, reconstruction, or erection after October 16, 1962. Property is considered as constructed, reconstructed, or erected by the taxpayer if the work is done for him in accordance with his specifications. The portion of the basis of such property attributable to construction, reconstruction, or erection after October 16, 1962, consists of all costs of the property allocable to the period after October 16, 1962, including the cost or other basis of materials entering into such work. It is not necessary that such materials be acquired after October 16, 1962, or that they be new in use. If construction or erection by the taxpayer began after October 16, 1962, the entire cost or other basis of such construction or erection qualifies for the reduction provided for by section 167(f) and this section. In the case of reconstruction of property, section 167(f) and this section do not apply to any part of the adjusted basis of such property on October 16, 1962. For purposes of this section, construction, reconstruction, or erection by the taxpayer begins when physical work is started on such construction, reconstruction, or erection.

(c) *Illustrations.* The provisions of paragraphs (a) and (b) of this section may be illustrated by the following examples:

Example 1. Taxpayer A purchases a new asset for use in his business on January 1, 1963, for $10,000. The asset qualifies for the investment credit under section 38 and for the additional first-year depreciation allowance under section 179. A is entitled to an investment credit of $700 (7%×$10,000) and elects to take an additional first-year depreciation allowance of $2,000 (20%×$10,000). The basis for depreciation (determined in accordance with the provisions of section 167(g) and §1.167(g)–1) is computed as follows:

Purchase price		$10,000
Less: Adjustment required for taxable years beginning before Jan. 1, 1964, under section 1016(a)(19), for the investment credit	$700	
Adjustment required under section 1016(a)(2) for the additional first-year depreciation allowance	2,000	
	2,700	
Basis for depreciation for the taxable year 1963		7,300

However, the basis of the property for determining depreciation as of the time as of which salvage value is required to be determined is $10,000, the purchase price of the property. A files his income tax returns on a calendar year basis and uses the straight line method of depreciation. A estimates that he will use the asset in his business for 10 years after which it will have a salvage value of $500, which is less than $1,000 (10%×$10,000, the basis of the property for determining depreciation as of the time as of which salvage value is required to be determined). For the taxable year 1963 A may deduct $730 as the depreciation allowance. As of January 1, 1964, the basis of the asset is increased by $700 in accordance with paragraph (d) of §1.48–7. In computing his total depreciation allowance on the asset, A may reduce the amount taken into account as salvage value to zero and may claim depreciation deductions (including the additional first-year depreciation allowance) totaling $10,000. See paragraph (d) of §1.48–7 for the computation of depreciation for taxable years beginning after December 31, 1963, where there is an increase in basis of property subject to the investment credit.

Example 2. Assume the same facts as in example (1) except that A in a subsequent taxable year redetermines the estimate of the useful life of the asset and at the same time also redetermines the estimate of salvage value. Assume also that at such time the only reductions reflected in the basis are for depreciation allowed or allowable. Accordingly, the reduction under section 167(f) and this section will be computed with regard to the purchase price and not the unrecovered basis for depreciation at the time of the redetermination.

Example 3. Assume the same facts as in example (1) except that A estimates that the asset will have a salvage value of $1,200 at the end of its useful life. In computing his depreciation for the asset, A may reduce the amount to be taken into account as salvage value to $200 ($1,200−$1,000). Accordingly, A may claim depreciation deductions (including the additional first-year depreciation allowance) totaling $9,800, *i.e.*, the purchase price of the property ($10,000) less the amount taken into account as salvage value ($200).

Example 4. Assume the same facts as in example (1) except that the taxpayer had taken into account salvage value of only $200 but that the estimated salvage value had actually been $700. The amount of salvage value taken into account by the taxpayer is permissible since the reduction of salvage value by $500 ($700−$200) would be within the limit provided for in section 167 (f), *i.e.*, $1,000 (10%×$10,000).

Example 5. On January 1, 1963, taxpayer B, a taxicab operator, traded his old taxicab plus cash for a new one, which had an estimated useful life of three years, in a transaction qualifying as a nontaxable exchange. The old taxicab had an adjusted basis of $2,500. B was allowed $3,000 for his old taxicab and paid $1,000 in cash. The basis of the new taxicab for determining depreciation (as determined under section 167(g) and §1.167(g)–1) is the adjusted basis of the old taxicab at the time of trade-in ($2,500) plus the additional cash paid out ($1,000), or $3,500. In computing his depreciation allowance on the new taxicab, B may reduce the amount taken into account as salvage value by $350 (10% of $3,500).

Example 6. Taxpayer C purchases a new asset for use in his business on January 1, 1963, for $10,000. At the time of purchase, the asset has an estimated useful life of 10 years and an estimated salvage value of $1,500. C elects to compute his depreciation allowance for the asset by the declining balance method of depreciation, using a rate of 20% which is twice the normal straight line rate of 10% (without adjustment for salvage value). C files his income tax returns on a calendar year basis. In computing his depreciation allowance for the year 1966, C changes his method of determining the depreciation allowance for the asset from the declining balance method to the straight line method (in which salvage value is accounted for in determining the annual depreciation allowances) in accordance with the provisions of section 167(e) and paragraph (b) of §1.167(e)–1. He also wishes to reduce the amount of salvage value taken into account in accordance with the provisions of section 167(f) and this section. At the close of the year 1966, the only reductions reflected in the basis of the asset are for depreciation allowances. Thus, C may reduce the amount of salvage value taken into account by $1,000 (10%×$10,000, the basis of the asset when it was acquired), and, therefore, will account for salvage value of only $500 in computing his depreciation allowance for the asset in 1966 and subsequent years.

Example 7. Taxpayer D purchases a station wagon for his personal use on January 1, 1962, for $4,500. On January 1, 1963, D converts the use of the station wagon to his business, and at that time it has an estimated useful life of 4 years, an estimated salvage value of $500, and a basis of $3,000 (as determined under section 167 (g) and §1.167 (g)–1). Thus, for purposes of section 167 (f) and this section, D is deemed to have acquired the station wagon on January 1, 1963. D elects the straight line method of depreciation in computing the depreciation allowance for the station wagon and also wishes to reduce the amount of salvage value taken into account in accordance with the provisions of section 167(f) and this section. Accordingly, D may reduce the amount of salvage value taken into account by $300 (10% of $3,000). D files his income tax returns on a calendar year basis. His depreciation allowance for the year 1963 would be computed as follows:

Basis for depreciation		$3,000
Less:		
Salvage value	$500	
Reduction permitted by section 167(f)	300	
		200
Amount to be depreciated over the useful life		2,800

D's depreciation allowance on the station wagon for the year 1963 would be $700 ($2,800 divided by 4, the remaining useful life).

[T.D. 6712, 29 FR 3654, Mar. 24, 1964, as amended by T.D. 6838, 30 FR 9064, July 20, 1965]

§ 1.167(g)–1 Basis for depreciation.

The basis upon which the allowance for depreciation is to be computed with respect to any property shall be the adjusted basis provided in section 1011 for the purpose of determining gain on the sale or other disposition of such property. In the case of property which has not been used in the trade or business or held for the production of income and which is thereafter converted to such use, the fair market value on the date of such conversion, if less than the adjusted basis of the property at that time, is the basis for computing depreciation.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960. Redesignated, T.D. 6712, 29 FR 3653, Mar. 24, 1964]

§ 1.167(h)–1 Life tenants and beneficiaries of trusts and estates.

(a) *Life tenants.* In the case of property held by one person for life with remainder to another person, the deduction for depreciation shall be computed as if the life tenant were the absolute owner of the property so that he will be entitled to the deduction during his life, and thereafter the deduction, if any, shall be allowed to the remainderman.

(b) *Trusts.* If property is held in trust, the allowable deduction is to be apportioned between the income beneficiaries and the trustee on the basis of the trust income allocable to each, unless the governing instrument (or local law) requires or permits the trustee to maintain a reserve for depreciation in any amount. In the latter case, the deduction is first allocated to the trustee to the extent that income is set aside for a depreciation reserve, and any part of the deduction in excess of the income set aside for the reserve shall be apportioned between the income beneficiaries and the trustee on the basis of the trust income (in excess of the income set aside for the reserve) allocable to each. For example:

(1) If under the trust instrument or local law the income of a trust computed without regard to depreciation is to be distributed to a named beneficiary, the beneficiary is entitled to the deduction to the exclusion of the trustee.

(2) If under the trust instrument or local law the income of a trust is to be distributed to a named beneficiary, but the trustee is directed to maintain a reserve for depreciation in any amount, the deduction is allowed to the trustee (except to the extent that income set aside for the reserve is less than the allowable deduction). The same result would follow if the trustee sets aside income for a depreciation reserve pursuant to discretionary authority to do so in the governing instrument.

No effect shall be given to any allocation of the depreciation deduction which gives any beneficiary or the trustee a share of such deduction greater than his pro rata share of the trust income, irrespective of any provisions in the trust instrument except as otherwise provided in this paragraph when the trust instrument or local law requires or permits the trustee to maintain a reserve for depreciation.

(c) *Estates.* In the case of an estate the allowable deduction shall be apportioned between the estate and the heirs legatees, and devisees on the basis of income of the estate which is allocable to each.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960. Redesignated, T.D. 6712, 29 FR 3653, Mar. 24, 1964]

§ 1.167(i)–1 Depreciation of improvements in the case of mines, etc.

Property used in the trade or business or held for the production of income which is subject to the allowance for depreciation provided in section 611 shall be treated for all purposes of the Code as if it were property subject to the allowance for depreciation under section 167. The preceding sentence shall not limit the allowance for depreciation otherwise allowable under section 611.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960. Redesignated, T.D. 6712, 29 FR 3653, Mar. 24, 1964]

§ 1.167(l)–1 Limitations on reasonable allowance in case of property of certain public utilities.

(a) *In general*—(1) *Scope*. Section 167(l) in general provides limitations on the use of certain methods of computing a reasonable allowance for depreciation under section 167(a) with respect to ''public utility property'' (see paragraph (b) of this section) for all taxable years for which a Federal income tax return was not filed before August 1, 1969. The limitations are set forth in paragraph (c) of this section for ''pre-1970 public utility property'' and in paragraph (d) of this section for ''post-1969 public utility property.'' Under section 167(l), a taxpayer may always use a straight line method (or other ''subsection (l) method'' as defined in paragraph (f) of this section). In general, the use of a method of depreciation other than a subsection (l) method is not prohibited by section 167(l) for any taxpayer if the taxpayer uses a ''normalization method of regulated accounting'' (described in paragraph (h) of this section). In certain cases, the use of a method of depreciation other than a subsection (l) method is not prohibited by section 167(l) if the taxpayer used a ''flow-through method of regulated accounting'' described in paragraph (i) of this section) for its ''July 1969 regulated accounting period'' (described in paragraph (g) of this section) whether or not the taxpayer uses either a normalization or a flow-through method of regulated accounting after its July 1969 regulated accounting period. However, in no event may a method of depreciation other than a subsection (l) method be used in the case of pre-1970 public utility property unless such method of depreciation is the ''applicable 1968 method'' (within the meaning of paragraph (e) of this section). The normalization requirements of section 167(l) with respect to public utility property defined in section 167(l)(3)(A) pertain only to the deferral of Federal income tax liability resulting from the use of an accelerated method of depreciation for computing the allowance for depreciation under section 167 and the use of straight line depreciation for computing tax expense and depreciation expense for purposes of establishing cost of services and for reflecting operating results in regulated books of account. Regulations under section 167(l) do not pertain to other book-tax timing differences with respect to State income taxes, F.I.C.A. taxes, construction costs, or any other taxes and items. The rules provided in paragraph (h)(6) of this section are to insure that the same time period is used to determine the deferred tax reserve amount resulting from the use of an accelerated method of depreciation for cost of service purposes and the reserve amount that may be excluded from the rate base or included in no-cost capital in determining such cost of services. The formula provided in paragraph (h)(6)(ii) of this section is to be used in conjunction with the method of accounting for the reserve for deferred taxes (otherwise proper under paragraph (h)(2) of this section) in accordance with the accounting requirements prescribed or approved, if applicable, by the regulatory body having jurisdiction over the taxpayer's regulated books of account. The formula provides a method to determine the period of time during which the taxpayer will be treated as having received amounts credited or charged to the reserve account so that the disallowance of earnings with respect to such amounts through rate base exclusion or treatment as no-cost capital will take into account the factor of time for which such amounts are held by the taxpayer. The formula serves to limit the amount of such disallowance.

(2) *Methods of depreciation*. For purposes of section 167(l), in the case of a declining balance method each different uniform rate applied to the unrecovered cost or other basis of the property is a different method of depreciation. For purposes of section 167(l), a change in a uniform rate of depreciation due to a change in the useful life of the property or a change in the taxpayer's unrecovered cost or other basis for the property is not a change in the method of depreciation. The use of

''guideline lives'' or ''class lives'' for Federal income tax purposes and different lives on the taxpayer's regulated books of account is not treated for purposes of section 167(l) as a different method of depreciation. Further, the use of an unrecovered cost or other basis or salvage value for Federal income tax purposes different from the basis or salvage value used on the taxpayer's regulated books of account is not treated as a different method of depreciation.

(3) *Application of certain other provisions to public utility property.* For rules with respect to application of the investment credit to public utility property, see section 46(e). For rules with respect to the application of the class life asset depreciation range system, including the treatment of the use of ''class lives'' for Federal income tax purposes and different lives on the taxpayer's regulated books of account, see § 1.167(a)–11 and § 1.167(a)–12.

(4) *Effect on agreements under section 167(d).* If the taxpayer has entered into an agreement under section 167(d) as to any public utility property and such agreement requires the use of a method of depreciation prohibited by section 167(l), such agreement shall terminate as to such property. The termination, in accordance with this subparagraph, shall not affect any other property (whether or not public utility property) covered by the agreement.

(5) *Effect of change in method of depreciation.* If, because the method of depreciation used by the taxpayer with respect to public utility property is prohibited by section 167(l), the taxpayer changes to a method of depreciation not prohibited by section 167(l), then when the change is made the unrecovered cost or other basis shall be recovered through annual allowances over the estimated remaining useful life determined in accordance with the circumstances existing at that time.

(b) *Public utility property*—(1) *In general.* Under section 167(l)(3)(A), property is ''public utility property'' during any period in which it is used predominantly in a ''section 167(l) public utility activity''. The term ''section 167(l) public utility activity'' means the trade or business of the furnishing or sale of—

(i) Electrical energy, water, or sewage disposal services,

(ii) Gas or steam through a local distribution system,

(iii) Telephone services,

(iv) Other communication services (whether or not telephone services) if furnished or sold by the Communications Satellite Corporation for purposes authorized by the Communications Satellite Act of 1962 (47 U.S.C. 701), or

(v) Transportation of gas or steam by pipeline,

if the rates for such furnishing or sale, as the case may be, are regulated, *i.e.*, have been established or approved by a regulatory body described in section 167(l)(3)(A). The term ''regulatory body described in section 167(l)(3)(A)'' means a State (including the District of Columbia) or political subdivision thereof, any agency or instrumentality of the United States, or a public service or public utility commission or other body of any State or political subdivision thereof similar to such a commission. The term ''established or approved'' includes the filing of a schedule of rates with a regulatory body which has the power to approve such rates, even though such body has taken no action on the filed schedule or generally leaves undisturbed rates filed by the taxpayer involved.

(2) *Classification of property.* If property is not used solely in a section 167(l) public utility activity, such property shall be public utility property if its predominant use is in a section 167(l) public utility activity. The predominant use of property for any period shall be determined by reference to the proper accounts to which expenditures for such property are chargeable under the system of regulated accounts required to be used for the period for which the determination is made and in accordance with the principles of § 1.46–3(g)(4) (relating to credit for investment in certain depreciable property). Thus, for example, for purposes of determining whether property is used predominantly in the trade or business of the furnishing or sale of transportation of gas by pipeline, or furnishing or sale of gas through a local distribution system, or both, the rules prescribed in § 1.46–3(g)(4) apply,

except that accounts 365 through 371, inclusive (Transmission Plant), shall be added to the accounts enumerated in subdivision (i) of such paragraph (g)(4).

(c) *Pre-1970 public utility property*—(1) *Definition.* (i) Under section 167(l)(3)(B), the term ''pre-1970 public utility property'' means property which was public utility property at any time before January 1, 1970. If a taxpayer acquires pre-1970 public utility property, such property shall be pre-1970 public utility property in the hands of the taxpayer even though such property may have been acquired by the taxpayer in an arm's-length cash sale at fair market value or in a tax-free exchange. Thus, for example, if corporation X which is a member of the same controlled group of corporations (within the meaning of section 1563(a)) as corporation Y sells pre-1970 public utility property to Y, such property is pre-1970 public utility property in the hands of Y. The result would be the same if X and Y were not members of the same controlled group of corporations.

(ii) If the basis of public utility property acquired by the taxpayer in a transaction is determined in whole or in part by reference to the basis of any of the taxpayer's pre-1970 public utility property by reason of the application of any provision of the code, and if immediately after the transaction the adjusted basis of the property acquired is less than 200 percent of the adjusted basis of such pre-1970 public utility property immediately before the transaction, the property acquired is pre-1970 public utility property.

(2) *Methods of depreciation not prohibited.* Under section 167(l)(1), in the case of pre-1970 public utility property, the term ''reasonable allowance'' as used in section 167(a) means, for a taxable year for which a Federal income tax return was not filed before August 1, 1969, and in which such property is public utility property, an allowance (allowable without regard to section 167(l)) computed under—

(i) A subsection (l) method, or

(ii) The applicable 1968 method (other than a subsection (l) method) used by the taxpayer for such property, but only if—

(*a*) The taxpayer uses in respect of such taxable year a normalization method of regulated accounting for such property,

(*b*) The taxpayer used a flow-through method of regulated accounting for such property for its July 1969 regulated accounting period, or

(*c*) The taxpayer's first regulated accounting period with respect to such property is after the taxpayer's July 1969 regulated accounting period and the taxpayer used a flow-through method of regulated accounting for its July 1969 regulated accounting period for public utility property of the same kind (or if there is no property of the same kind, property of the most similar kind) most recently placed in service. See paragraph (e)(5) of this section for determination of same (or similar) kind.

(3) *Flow-through method of regulated accounting in certain cases.* See paragraph (e)(6) of this section for treatment of certain taxpayers with pending applications for change in method of accounting as being deemed to have used a flow-through method of regulated accounting for the July 1969 regulated accounting period.

(4) *Examples.* The provisions of this paragraph may be illustrated by the following examples:

Example 1. Corporation X, a calendar-year taxpayer subject to the jurisdiction of a regulatory body described in section 167(l)(3)(A), used the straight line method of depreciation (a subsection (l) method) for all of its public utility property for which depreciation was allowable on its Federal income tax return for 1967 (the latest taxable year for which X, prior to August 1, 1969, filed a return). Assume that under paragraph (e) of this section, X's applicable 1968 method is a subsection (l) method with respect to all of its public utility property. Thus, with respect to its pre-1970 public utility property, X may only use a straight line method (or any other subsection (l) method) of depreciation for all taxable years after 1967.

Example 2. Corporation Y, a calendar-year taxpayer subject to the jurisdiction of the Federal Power Commission, is engaged exclusively in the transportation of gas by pipeline. On its Federal income tax return for 1967 (the latest taxable year for which Y, prior to August 1, 1969, filed a return), Y used the declining balance method of depreciation using a rate of 150 percent of the straightline rate for all of its nonsection 1250 public utility property with respect to which depreciation was allowable. Assume that with respect to all of such property, Y's applicable 1968 method under paragraph (e) of this section is such 150 percent declining balance method. Assume that Y used a normalization method of regulated accounting for all relevant regulated accounting periods. If Y continues to use a normalization method of regulated accounting, Y may compute its reasonable allowance for purposes of section 167(a) using such 150 percent declining balance method for its nonsection 1250 pre-1970 public utility property for all taxable years beginning with 1968, provided the use of such method is allowable without regard to section 167(l). Y may also use a subsection (l) method for any of such pre-1970 public utility property for all taxable years beginning after 1967. However, because each different uniform rate applied to the basis of the property is a different method of depreciation, Y may not use a declining balance method of depreciation using a rate of twice the straight line rate for any of such pre-1970 public utility property for any taxable year beginning after 1967.

Example 3. Assume the same facts as in example (2) except that with respect to all of its nonsection 1250 pre-1970 public utility property accounted for in its July 1969 regulated accounting period Y used a flow-through method of regulated accounting for such period. Assume further that such property is the property on the basis of which the applicable 1968 method is established for pre-1970 public utility property of the same kind, but having a first regulated accounting period after the taxpayer's July 1969 regulated accounting period. Beginning with 1968, with respect to such property Y may compute its reasonable allowance for purposes of section 167(a) using the declining balance method of depreciation and a rate of 150 percent of the straight line rate, whether it uses a normalization or flow-through method of regulated accounting after its July 1969 regulated accounting period, provided the use of such method is allowable without regard to section 167(l).

(d) *Post-1969 public utility property*—(1) *In general.* Under section 167(l)(3)(C), the term "post-1969 public utility property" means any public utility property which is not pre-1970 public utility property.

(2) *Methods of depreciation not prohibited.* Under section 167(l)(2), in the case of post-1969 public utility property, the term "reasonable allowance" as used in section 167(a) means, for a taxable year, an allowance (allowable without regard to section 167(l)) computed under—

(i) A subsection (l) method,

(ii) A method of depreciation otherwise allowable under section 167 if, with respect to the property, the taxpayer uses in respect of such taxable year a normalization method of regulated accounting, or

(iii) The taxpayer's applicable 1968 method (other than a subsection (l) method) with respect to the property in question, if the taxpayer used a flow-through method of regulated accounting for its July 1969 regulated accounting period for the property of the same (or similar) kind most recently placed in service, provided that the property in question is not property to which an election under section 167(l)(4)(A) applies. See §1.167(l)(2) for rules with respect to an election under section 167(l)(4)(A). See paragraph (e)(5) of this section for definition of same (or similar) kind.

(3) *Examples.* The provisions of this paragraph may be illustrated by the following examples:

Example 1. Corporation X is engaged exclusively in the trade or business of the transportation of gas by pipeline and is subject to the jurisdiction of the Federal Power Commission. With respect to all its public utility property, X's applicable 1968 method (as determined under paragraph (e) of this section) is the straight line method of depreciation. X may determine its reasonable allowance for depreciation under section 167(a) with respect to its post-1969 public utility property under a straight line method (or other subsection (l) method) or, if X uses a normalization method of regulated accounting, any other method of depreciation, provided that the use of such other method is allowable under section 167 without regard to section 167(l).

Example 2. Assume the same facts as in example (1) except that with respect to all of X's post-1969 public utility property the applicable 1968 method (as determined under paragraph (e) of this section) is the declining balance method using a rate of 150 percent of the straight line rate. Assume further that all of X's pre-1970 public utility property was accounted for in its July 1969 regulated accounting period, and that X used a flow-through method of regulated accounting for such period. X may determine its reasonable allowance for depreciation under section 167 with respect to its post-1969 public utility property by using the straight line method of depreciation (or any other subsection (l) method), by using any method otherwise allowable under section 167 (such as a declining balance method) if X uses a normalization method of regulated accounting, or, by using the declining balance method using a rate of 150 percent of the straight line rate, whether or not X uses a normalization or a flow-through method of regulated accounting.

(e) *Applicable 1968 method*—(1) *In general*. Under section 167(l)(3)(D), except as provided in subparagraphs (3) and (4) of this paragraph, the term ''applicable 1968 method'' means with respect to any public utility property—

(i) The method of depreciation properly used by the taxpayer in its Federal income tax return with respect to such property for the latest taxable year for which a return was filed before August 1, 1969,

(ii) If subdivision (i) of this subparagraph does not apply, the method of depreciation properly used by the taxpayer in its Federal income tax return for the latest taxable year for which a return was filed before August 1, 1969, with respect to public utility property of the same kind (or if there is no property of the same kind, property of the most similar kind) most recently placed in service before the end of such latest taxable year, or

(iii) If neither subdivision (i) nor (ii) of this subparagraph applies, a subsection (l) method.

If, on or after August 1, 1969, the taxpayer files an amended return for the taxable year referred to in subdivisions (i) and (ii) of this subparagraph, such amended return shall not be taken into consideration in determining the applicable 1968 method. The term ''applicable 1968 method'' if such new method results to any public utility property, for the year of change and subsequent years, a method of depreciation otherwise allowable under section 167 to which the taxpayer changes from an applicable 1968 method if such new method results in a lesser allowance for depreciation for such property under section 167 in the year of change and the taxpayer secures the Commissioner's consent to the change in accordance with the procedures of section 446(e) and §1.446–1.

(2) *Placed in service*. For purposes of this section, property is placed in service on the date on which the period for depreciation begins under section 167. See, for example, §1.167(a)–10(b) and §1.167(a)–11(c)(2). If under an averaging convention property which is placed in service (as defined in §1.46–3(d)(ii)) by the taxpayer on different dates is treated as placed in service on the same date, then for purposes of section 167(l) the property shall be treated as having been placed in service on the date the period for depreciation with respect to such property would begin under section 167 absent such averaging convention. Thus, for example, if, except for the fact that the averaging convention used assumes that all additions and retirements made during the first half of the year were made on the first day of the year, the period of depreciation for two items of public utility property would begin on January 10 and March 15, respectively, then for purposes of determining the property of the same (or similar) kind most recently placed in service, such items of property shall be treated as placed in service on January 10 and March 15, respectively.

(3) *Certain section 1250 property*. If a taxpayer is required under section 167(j) to use a method of depreciation other than its applicable 1968 method with respect to any section 1250 property, the term ''applicable 1968 method'' means the method of depreciation allowable under section 167(j) which is the most nearly comparable method to the applicable 1968 method determined under subparagraph (1) of this paragraph. For example, if the applicable 1968 method on new section 1250 property is the declining balance method using 200 percent of the straight line rate, the most nearly comparable method allowable for new section 1250 property under section 167(j) would be the declining balance method using 150 percent of the straight line rate. If the applicable 1968 method determined under subparagraph (1) of this paragraph is the sum of the years-digits method, the term ''most nearly comparable method'' refers to any method of depreciation allowable under section 167(j).

(4) *Applicable 1968 method in certain cases*. (i)(*a*) Under section 167(l)(3)(E), if the taxpayer evidenced within the time

and manner specified in (*b*) of this subdivision (i) the intent to use a method of depreciation under section 167 (other than its applicable 1968 method as determined under subparagraph (1) or (3) of this paragraph or a subsection (l) method) with respect to any public utility property, such method of depreciation shall be deemed to be the taxpayer's applicable 1968 method with respect to such public utility property and public utility property of the same (or most similar) kind subsequently placed in service.

(*b*) Under this subdivision (i), the intent to use a method of depreciation under section 167 is evidenced—

(*1*) By a timely application for permission for a change in method of accounting filed by the taxpayer before August 1, 1969, or

(*2*) By the use of such method of depreciation in the computation by the taxpayer of its tax expense for purposes of reflecting operating results in its regulated books of account for its July 1969 regulated accounting period, as established in the manner prescribed in paragraph (g)(1) (i), (ii), or (iii) of this section.

(ii)(*a*) If public utility property is acquired in a transaction in which its basis in the hands of the transferee is determined in whole or in part by reference to its basis in the hands of the transferor by reason of the application of any provision of the Code, or in a transfer (including any purchase for cash or in exchange) from a related person, then in the hands of the transferee the applicable 1968 method with respect to such property shall be determined by reference to the treatment in respect of such property in the hands of the transferor.

(*b*) For purposes of this subdivision (ii), the term ''related person'' means a person who is related to another person if either immediately before or after the transfer—

(*1*) The relationship between such persons would result in a disallowance of losses under section 267 (relating to disallowance of losses, etc., between related taxpayers) or section 707(b) (relating to losses disallowed, etc., between partners and controlled partnerships) and the regulations thereunder, or

(*2*) Such persons are members of the same controlled group of corporations, as defined in section 1563(a) (relating to definition of controlled group of corporations), except that ''more than 50 percent'' shall be substituted for ''at least 80 percent'' each place it appears in section 1563(a) and the regulations thereunder.

(5) *Same or similar*. The classification of property as being of the same (or similar) kind shall be made by reference to the function of the public utility to which the primary use of the property relates. Property which performs the identical function in the identical manner shall be treated as property of the same kind. The determination that property is of a similar kind shall be made by reference to the proper account to which expenditures for the property are chargeable under the system of regulated accounts required to be used by the taxpayer for the period in which the property in question was acquired. Property, the expenditure for which is chargeable to the same account, is property of the most similar kind. Property, the expenditure for which is chargeable to an account for property which serves the same general function, is property of a similar kind. Thus, for example, if corporation X, a natural gas company, subject to the jurisdiction of the Federal Power Commission, had property properly chargeable to account 366 (relating to transmission plant structures and improvements) acquired an additional structure properly chargeable to account 366, under the uniform system of accounts prescribed for natural gas companies (class A and class B) by the Federal Power Commission, effective September 1, 1968, the addition would constitute property of the same kind if it performed the identical function in the identical manner. If, however, the addition did not perform the identical function in the identical manner, it would be property of the most similar kind.

(6) *Regulated method of accounting in certain cases.* Under section 167(l)(4)(B), if with respect to any pre-1970 public utility property the taxpayer filed a timely application for change in method of accounting referred to in subparagraph (4)(i)(*b*)(*1*) of this paragraph and

with respect to property of the same (or similar) kind most recently placed in service the taxpayer used a flow-through method of regulated accounting for its July 1969 regulated accounting period, then for purposes of section 167(l)(1)(B) and paragraph (c) of this section the taxpayer shall be deemed to have used a flow-through method of regulated accounting with respect to such pre-1970 public utility property.

(7) *Examples.* The provisions of this paragraph may be illustrated by the following examples:

Example 1. Corporation X is a calendar-year taxpayer. On its Federal income tax return for 1967 (the latest taxable year for which X, prior to August 1, 1969, filed a return) X used a straight line method of depreciation with respect to certain public utility property placed in service before 1965 and used the declining balance method of depreciation using 200 percent of the straight line rate (double declining balance) with respect to the same kind of public utility property placed in service after 1964. In 1968 and 1970, X placed in service additional public utility property of the same kind. The applicable 1968 method with respect to the above described public utility property is shown in the following chart:

Property held in 1970	Placed in service	Method on 1967 return	Applicable 1968 method
Group 1	Before 1965	Straight line ..	Straight line.
Group 2	After 1964 and before 1968.	Double declining balance.	Double declining balance.
Group 3	After 1967 and before 1969.	....	Do.
Group 4	After 1968	....	Do.

Example 2. Corporation Y is a calendar-year taxpayer engaged exclusively in the trade or business of the furnishing of electrical energy. In 1954, Y placed in service hydroelectric generators and for all purposes Y has taken straight line depreciation with respect to such generators. In 1960, Y placed in service fossil fuel generators and for all purposes since 1960 has used the declining balance method of depreciation using a rate of 150 percent of the straight line rate (computed without reduction for salvage) with respect to such generators. After 1960 and before 1970 Y did not place in service any generators. In 1970, Y placed in service additional hydroelectric generators. The applicable 1968 method with respect to the hydroelectric generators placed in service in 1970 would be the straight line method because it was the method used by Y on its return for the latest taxable year for which Y filed a return before August 1, 1969, with respect to property of the same kind (*i.e.*, hydroelectric generators) most recently placed in service.

Example 3. Assume the same facts as in example (2), except that the generators placed in service in 1970 were nuclear generators. The applicable 1968 method with respect to such generators is the declining balance method using a rate of 150 percent of the straight line rate because, with respect to property of the most similar kind (fossil fuel generators) most recently placed in service, Y used such declining balance method on its return for the latest taxable year for which it filed a return before August 1, 1969.

(f) *Subsection (l) method.* Under section 167(l)(3)(F), the term ''subsection (l) method'' means a reasonable and consistently applied ratable method of computing depreciation which is allowable under section 167(a), such as, for example, the straight line method or a unit of production method or machine-hour method. The term ''subsection (l) method'' does not include any declining balance method (regardless of the uniform rate applied), sum of the years-digits method, or method of depreciation which is allowable solely by reason of section 167(b)(4) or (j)(1)(C).

(g) *July 1969 regulated accounting period*—(1) *In general.* Under section 167(l)(3)(I), the term ''July 1969 regulated accounting period'' means the taxpayer's latest accounting period ending before August 1, 1969, for which the taxpayer regularly computed, before January 1, 1970, its tax expense for purposes of reflecting operating results in its regulated books of account. The computation by the taxpayer of such tax expense may be established by reference to the following:

(i) The most recent periodic report of a period ending before August 1, 1969, required by a regulatory body described in section 167(l)(3)(A) having jurisdiction over the taxpayer's regulated books of account which was filed with such body before January 1, 1970 (whether or not such body has jurisdiction over rates).

(ii) If subdivision (i) of this subparagraph does not apply, the taxpayer's most recent report to its shareholders for a period ending before August 1, 1969, but only if such report was distributed to the shareholders before January 1, 1970, and if the taxpayer's stocks or securities are traded in an established securities market during such period. For purposes of this subdivision, the term ''established securities market'' has the meaning assigned to such term in §1.453–3(d)(4).

(iii) If subdivisions (i) and (ii) of this subparagraph do not apply, entries made to the satisfaction of the district director before January 1, 1970, in its regulated books of account for its most recent accounting period ending before August 1, 1969.

(2) *July 1969 method of regulated accounting in certain acquisitions.* If public utility property is acquired in a transaction in which its basis in the hands of the transferee is determined in whole or in part by reference to its basis in the hands of the transferor by reason of the application of any provision of the Code, or in a transfer (including any purchase for cash or in exchange) from a related person, then in the hands of the transferee the method of regulated accounting for such property's July 1969 regulated accounting period shall be determined by reference to the treatment in respect of such property in the hands of the transferor. See paragraph (e)(4)(ii) of this section for definition of ''related person''.

(3) *Determination date.* For purposes of section 167(l), any reference to a method of depreciation under section 167(a), or a method of regulated accounting, taken into account by the taxpayer in computing its tax expense for its July 1969 regulated accounting period shall be a reference to such tax expense as shown on the periodic report or report to shareholders to which subparagraph (1) (i) or (ii) of this paragraph applies or the entries made on the taxpayer's regulated books of account to which subparagraph (1)(iii) of this paragraph applies. Thus, for example, assume that regulatory body A having jurisdiction over public utility property with respect to X's regulated books of account requires X to reflect its tax expense in such books using the same method of depreciation which regulatory body B uses for determining X's cost of service for ratemaking purposes. If in 1971, in the course of approving a rate change for X, B retroactively determines X's cost of service for ratemaking purposes for X's July 1969 regulated accounting period using a method of depreciation different from the method reflected in X's regulated books of account as of January 1, 1970, the method of depreciation used by X for its July 1969 regulated accounting period would be determined without reference to the method retroactively used by B in 1971.

(h) *Normalization method of accounting*—(1) *In general.* (i) Under section 167(l), a taxpayer uses a normalization method of regulated accounting with respect to public utility property—

(*a*) If the same method of depreciation (whether or not a subsection (l) method) is used to compute both its tax expense and its depreciation expense for purposes of establishing cost of service for ratemaking purposes and for reflecting operating results in its regulated books of account, and

(*b*) If to compute its allowance for depreciation under section 167 it uses a method of depreciation other than the method it used for purposes described in (*a*) of this subdivision, the taxpayer makes adjustments consistent with subparagraph (2) of this paragraph to a reserve to reflect the total amount of the deferral of Federal income tax liability resulting from the use with respect to all of its public utility property of such different methods of depreciation.

(ii) In the case of a taxpayer described in section 167(l) (1) (B) or (2) (C), the reference in subdivision (i) of this subparagraph shall be a reference only to such taxpayer's ''qualified public utility property''. See §1.167(l)–2(b) for definition of ''qualified public utility property''.

(iii) Except as provided in this subparagraph, the amount of Federal income tax liability deferred as a result of the use of different method of depreciation under subdivision (i) of this subparagraph is the excess (computed without regard to credits) of the amount the tax liability would have been had a subsection (l) method been used over the amount of the actual tax liability. Such amount shall be taken into account for the taxable year in which such different methods of depreciation are used. If, however, in respect of any taxable year the use of a method of depreciation other than a subsection (l) method for purposes of determining the taxpayer's reasonable allowance under section 167(a) results in a net operating loss carryover (as determined under section 172) to a year succeeding such taxable year which would not have arisen (or an increase in such carryover which would not have arisen) had the taxpayer determined his reasonable allowance under section 167(a) using a subsection (l) method, then the amount and time of the deferral of tax liability shall be taken into account in such appropriate time and manner as is satisfactory to the district director.

(2) *Adjustments to reserve.* (i) The taxpayer must credit the amount of deferred Federal income tax determined under subparagraph (1)(i) of this paragraph for any taxable year to a reserve for deferred taxes, a depreciation reserve, or other reserve account. The taxpayer need not establish a separate reserve account for such amount but the amount of deferred tax determined under subparagraph (1) (i) of this paragraph must be accounted for in such a manner so as to be readily identifiable. With respect to any account, the aggregate amount allocable to deferred tax under section 167(l) shall not be reduced except to reflect the amount for any taxable year by which Federal income taxes are greater by reason of the prior use of different methods of depreciation under subparagraph (1)(i) of this paragraph. An additional exception is that the aggregate amount allocable to deferred tax under section 167(l) may be properly adjusted to reflect asset retirements or the expiration of the period for depreciation used in determining the allowance for depreciation under section 167(a).

(ii) The provisions of this subparagraph may be illustrated by the following examples:

Example 1. Corporation X is exclusively engaged in the transportation of gas by pipeline subject to the jurisdiction of the Federal Power Commission. With respect to its post-1969 public utility property, X is entitled under section 167(l)(2)(B) to use a method of depreciation other than a subsection (l) method if it uses a normalization method of regulated accounting. With respect to such property, X has not made any election under §1.167(a)–11 (relating to depreciation based on class lives and asset depreciation ranges). In 1972, X places in service public utility property with an unadjusted basis of $2 million, and an estimated useful life of 20 years. X uses the declining balance method of depreciation with a rate twice the straight line rate. If X uses a normalization method of regulated accounting, the amount of depreciation allowable under section 167(a) with respect to such property for 1972 computed under the double declining balance method would be $200,000. X computes its tax expense and depreciation expense for purposes of determining its cost of service for rate-making purposes and for reflecting operating results in its regulated books of account using the straight line method of depreciation (a subsection (l) method). A depreciation allowance computed in this manner is $100,000. The excess of the depreciation allowance determined under the double declining balance method ($200,000) over the depreciation expense computed using the straight line method ($100,000) is $100,000. Thus, assuming a tax rate of 48 percent, X used a normalization method of regulated accounting for 1972 with respect to property placed in service that year if for 1972 it added to a reserve $48,000 as taxes deferred as a result of the use by X of a method of depreciation for Federal income tax purposes different from that used for establishing its cost of service for rate-making purposes and for reflecting operating results in its regulated books of account.

Example 2. Assume the same facts as in example (1), except that X elects to apply §1.167(a)–11 with respect to all eligible property placed in service in 1972. Assume further that all property X placed in service in 1972 is eligible property. One hudnred percent of the asset guideline period for such property is 22 years and the asset depreciation range is from 17.5 years to 26.5 years. X uses the double declining balance method of depreciation, selects an asset depreciation period of 17.5 years, and applies the half-year convention (described in §1.167(a)–11(c)(2)(iii)). In 1972, the depreciation allowable under section 167(a) with respect to property placed in service in 1972 is $114,285 (determined without regard to the normalization requirements in §1.167(a)–11(b)(6) and in section 167(l)). X computes its tax expense for purposes of determining its cost of service for ratemaking purposes and for reflecting operating results in its regulated books of account using the straight line method of depreciation (a subsection (l) method), an estimated useful life of 22 years (that is, 100 percent of the asset guideline period), and the half-year convention. A depreciation allowance computed in this manner is $45,454. Assuming a tax rate of 48 percent, the amount that X must add to a reserve for 1972 with respect to property placed in service that year in order to qualify as using a normalization method of regulated accounting under section 167(l) (3) (G) is $27,429 and the amount in order to satisfy the normalization requirements of §1.167(a)–11(b)(6) is $5,610. X determined such amounts as follows:

(1) Depreciation allowance on tax return (determined without regard to section 167(l) and § 1.167(a)–11(b) (6))	$114,285
(2) Line (1), recomputed using a straight line method	57,142
(3) Difference in depreciation allowance attributable to different methods (line (1) minus line (2))	$57,143
(4) Amount to add to reserve under this paragraph (48 percent of line (3))	27,429
(5) Amount in line (2)	$57,142
(6) Line (5), recomputed by using an estimated useful life of 22 years and the half-year convention	45,454
(7) Difference in depreciation allowance attributable to difference in depreciation periods	$11,688
(8) Amount to add to reserve under § 1.167(a)–11(b) (6) (ii) (48 percent of line (7))	5,610

If, for its depreciation expense for purposes of determining its cost of service for ratemaking purposes and for reflecting operating results in its regulated books of account, X had used a period in excess of the asset guideline period of 22 years, the total amount in lines (4) and (8) in this example would not be changed.

Example 3. Corporation Y, a calendar-year taxpayer which is engaged in furnishing electrical energy, made the election provided by section 167(l) (4) (a) with respect to its ''qualified public utility property'' (as defined in §1.167(l)–2(b)). In 1971, Y placed in service qualified public utility property which had an adjusted basis of $2 million, estimated useful life of 20 years, and no salvage value. With respect to property of the same kind most recently placed in service, Y used a flow-through method of regulated accounting for its July 1969 regulated accounting period and the applicable 1968 method is the declining balance method of depreciation using 200 percent of the straight line rate. The amount of depreciation allowable under the double declining balance method with respect to the qualified public utility property would be $200,000. Y computes its tax expense and depreciation expense for purposes of determining its cost of service for ratemaking purposes and for reflecting operating results in its regulated books of account using the straight line method of depreciation. A depreciation allowance with respect to the qualified public utility property determined in this manner is $100,000. The excess of the depreciation allowance determined under the double declining balance method ($200,000) over the depreciation expense computed using the straight line method ($100,000) is $100,000. Thus, assuming a tax rate of 48 percent, Y used a normalization method of regulated accounting for 1971 if for 1971 it added to a reserve $48,000 as tax deferred as a result of the use by Y of a method of depreciation for Federal income tax purposes with respect to its qualified public utility property which method was different from that used for establishing its cost of service for ratemaking purposes and for reflecting operating results in its regulated books of account for such property.

Example 4. Corporation Z, exclusively engaged in a public utility activity did not use a flow-through method of regulated accounting for its July 1969 regulated accounting period. In 1971, a regulatory body having jurisdiction over all of Z's property issued an order applicable to all years beginning with 1968 which provided, in effect, that Z use an accelerated method of depreciation for purposes of section 167 and for determining its tax expenses for purposes of reflecting operating results in its regulated books of account. The order further provided that Z normalize 50 percent of the tax deferral resulting from the use of the accelerated method of depreciation and that Z flow-through 50 percent of the tax deferral resulting therefrom. Under section 167(l), the method of accounting provided in the order would not be a normalization method of regulated accounting because Z would not be permitted to normalize 100 percent of the tax deferral resulting from the use of an accelerated method of depreciation. Thus, with respect to its public utility property for purposes of section 167, Z may only use a subsection (l) method of depreciation.

Example 5. Assume the same facts as in example (4) except that the order of the regulatory body provided, in effect, that Z normalize 100 percent of the tax deferral with respect to 50 percent of its public utility property and flow-through the tax savings with respect to the other 50 percent of its property. Because the effect of such an order would allow Z to flow-through a portion of the tax savings resulting from the use of an accelerated method of depreciation, Z would not be using a normalization method of regulated accounting with respect to any of its properties. Thus, with respect to its public utility property for purposes of section 167, Z may only use a subsection (l) method of depreciation.

(3) *Establishing compliance with normalization requirements in respect of operating books of account.* The taxpayer may establish compliance with the requirement in subparagraph (1)(i) of this paragraph in respect of reflecting operating results, and adjustments to a reserve, in its operating books of account by reference to the following:

(i) The most recent periodic report for a period beginning before the end of the taxable year, required by a regulatory body described in section 167(l)(3)(A) having jurisdiction over the taxpayer's regulated operating books of account which was filed with such body before the due date (determined with regard to extensions) of the taxpayer's Federal income tax return for such taxable year (whether or not such body has jurisdiction over rates).

(ii) If subdivision (i) of this subparagraph does not apply, the taxpayer's most recent report to its shareholders for the taxable year but only if (*a*) such report was distributed to the shareholders before the due date (determined with regard to extensions) of the taxpayer's Federal income tax return for the taxable year and (*b*) the taxpayer's stocks or securities are traded in an established securities market during such taxable year. For purposes of this subdivision, the term ''established securities market'' has the meaning assigned to such term in §1.453–3(d)(4).

(iii) If neither subdivision (i) nor (ii) of this subparagraph applies, entries made to the satisfaction of the district director before the due date (determined with regard to extensions) of the taxpayer's Federal income tax return for the taxable year in its regulated books of account for its most recent period beginning before the end of such taxable year.

(4) *Establishing compliance with normalization requirements in computing cost of service for ratemaking purposes.* (i) In the case of a taxpayer which used a flow-through method of regulated accounting for its July 1969 regulated accounting period or thereafter, with respect to all or a portion of its pre-1970 public utility property, if a regulatory body having jurisdiction to establish the rates of such taxpayer as to such property (or a court which has jurisdiction over such body) issues an order of general application (or an order of specific application to the taxpayer) which states that such regulatory body (or court) will permit a class of taxpayers of which such taxpayer is a member (or such taxpayer) to use the normalization method of regulated accounting to establish cost of service for ratemaking purposes with respect to all or a portion of its public utility property, the taxpayer will be presumed to be using the same method of depreciation to compute both its tax expense and its depreciation expense for purposes of establishing its cost of service for ratemaking purposes with respect to the public utility property to which such order applies. In the event that such order is in any way conditional, the preceding sentence shall not apply until all of the conditions contained in such order which are applicable to the taxpayer have been fulfilled. The taxpayer shall establish to the satisfaction of the Commissioner or his delegate that such conditions have been fulfilled.

(ii) In the case of a taxpayer which did not use the flow-through method of regulated accounting for its July 1969 regulated accounting period or thereafter (including a taxpayer which used a subsection (l) method of depreciation to compute its allowance for depreciation under section 167(a) and to compute its tax expense for purposes of reflecting operating results in its regulated books of account), with respect to any of its public utility property, it will be presumed that such taxpayer is using the same method of depreciation to compute both its tax expense and its depreciation expense for purposes of establishing its cost of service for ratemaking purposes with respect to its post-1969 public utility property. The presumption described in the preceding sentence shall not apply in any case where there is (*a*) an expression of intent (regardless of the manner in which such expression of intent is indicated) by the regulatory body (or bodies), having jurisdiction to establish the rates of such taxpayer, which indicates that the policy of such regulatory body is in any way inconsistent with the use of the normalization method of regulated accounting by such taxpayer or by a class of taxpayers of which such taxpayer is a member, or (*b*) a decision by a court having jurisdiction over such regulatory body which decision is in any way inconsistent with the use of the normalization method of regulated accounting by such taxpayer or a class of taxpayers of which such taxpayer is a member. The presumption shall be applicable on January 1, 1970, and shall, unless rebutted, be effective until an inconsistent expression of intent is indicated by such regulatory body or by such court. An example of such an inconsistent expression of intent is the case of a regulatory body which has, after the July 1969 regulated accounting period and before January 1, 1970, directed public utilities subject to its ratemaking jurisdiction to use a flow-through method of regulated accounting, or has issued an order of general application which states that such agency will direct a class of public utilities of which the taxpayer is a member to use a flow-through method of regulated accounting. The presumption described in this subdivision may be rebutted by evidence that the flow-through method of regulated accounting is being used by the taxpayer with respect to such property.

(iii) The provisions of this subparagraph may be illustrated by the following examples:

Example 1. Corporation X is a calendar-year taxpayer and its ''applicable 1968 method'' is a straight line method of depreciation. Effective January 1, 1970, X began collecting rates which were based on a sum of the years-digits method of depreciation and a normalization method of regulated accounting which rates had been approved by a regulatory body having jurisdiction over X. On October 1, 1971, a court of proper jurisdiction annulled the rate order prospectively, which annulment was not appealed, on the basis that the regulatory body had abused its discretion by determining the rates on the basis of a normalization method of regulated accounting. As there was no inconsistent expression of intent during 1970 or prior to the due date of X's return for 1970, X's use of the sum of the years-digits method of depreciation for purposes of section 167 on such return was proper. For 1971, the presumption is in effect through September 30. During 1971, X may use the sum of the years-digits method of depreciation for purposes of section 167 from January 1 through September 30, 1971. After September 30, 1971, and for taxable years after 1971, X must use a straight line method of depreciation until the inconsistent court decision is no longer in effect.

Example 2. Assume the same facts as in example (1), except that pursuant to the order of annulment, X was required to refund the portion of the rates attributable to the use of the normalization method of regulated accounting. As there was no inconsistent expression of intent during 1970 or prior to the due date of X's return for 1970, X has the benefit of the presumption with respect to its use of the sum of the years-digits method of depreciation for purposes of section 167, but because of the retroactive nature of the rate order X must file an amended return for 1970 using a straight line method of depreciation. As the inconsistent decision by the court was handed down prior to the due date of X's Federal income tax return for 1971, for 1971 and thereafter the presumption of subdivision (ii) of this subparagraph does not apply. X must file its Federal income tax returns for such years using a straight line method of depreciation.

Example 3. Assume the same facts as in example (2), except that the annulment order was stayed pending appeal of the decision to a court of proper appellate jurisdiction, X has the benefit of the presumption as described in example (2) for the year 1970, but for 1971 and thereafter the presumption of subdivision (ii) of this subparagraph does not apply. Further, X must file an amended return for 1970 using a straight line method of depreciation and for 1971 and thereafter X must file its returns using a straight line method of depreciation unless X and the district director have consented in writing to extend the time for assessment of tax for 1970 and thereafter with respect to the issue of normalization method of regulated accounting for as long as may be necessary to allow for resolution of the appeal with respect to the annulment of the rate order.

(5) *Change in method of regulated accounting.* The taxpayer shall notify the district director of a change in its method of regulated accounting, an order by a regulatory body or court that such method be changed, or an interim or final rate determination by a regulatory body which determination is inconsistent with the method of regulated accounting used by the taxpayer immediately prior to the effective date of such rate determination. Such notification shall be made within 90 days of the date that the change in method, the order, or the determination is effective. In the case of a change in the method of regulated accounting, the taxpayer shall recompute its tax liability for any affected taxable year and such recomputation shall be made in the form of an amended return where necessary unless the taxpayer and the district director have consented in writing to extend the time for assessment of tax with respect to the issue of normalization method of regulated accounting.

(6) *Exclusion of normalization reserve from rate base.* (i) Notwithstanding the provisions of subparagraph (1) of this paragraph, a taxpayer does not use a normalization method of regulated accounting if, for ratemaking purposes,

the amount of the reserve for deferred taxes under section 167(l) which is excluded from the base to which the taxpayer's rate of return is applied, or which is treated as no-cost capital in those rate cases in which the rate of return is based upon the cost of capital, exceeds the amount of such reserve for deferred taxes for the period used in determining the taxpayer's tax expense in computing cost of service in such ratemaking.

(ii) For the purpose of determining the maximum amount of the reserve to be excluded from the rate base (or to be included as no-cost capital) under subdivision (i) of this subparagraph, if solely an historical period is used to determine depreciation for Federal income tax expense for ratemaking purposes, then the amount of the reserve account for the period is the amount of the reserve (determined under subparagraph (2) of this paragraph) at the end of the historical period. If solely a future period is used for such determination, the amount of the reserve account for the period is the amount of the reserve at the beginning of the period and a pro rata portion of the amount of any projected increase to be credited or decrease to be charged to the account during such period. If such determination is made by reference both to an historical portion and to a future portion of a period, the amount of the reserve account for the period is the amount of the reserve at the end of the historical portion of the period and a pro rata portion of the amount of any projected increase to be credited or decrease to be charged to the account during the future portion of the period. The pro rata portion of any increase to be credited or decrease to be charged during a future period (or the future portion of a part-historical and part-future period) shall be determined by multiplying any such increase or decrease by a fraction, the numerator of which is the number of days remaining in the period at the time such increase or decrease is to be accrued, and the denominator of which is the total number of days in the period (or future portion).

(iii) The provisions of subdivision (i) of this subparagraph shall not apply in the case of a final determination of a rate case entered on or before May 31, 1973. For this purpose, a determination is final if all rights to request a review, a rehearing, or a redetermination by the regulatory body which makes such determination have been exhausted or have lapsed. The provisions of subdivision (ii) of this subparagraph shall not apply in the case of a rate case filed prior to June 7, 1974 for which a rate order is entered by a regulatory body having jurisdiction to establish the rates of the taxpayer prior to September 5, 1974, whether or not such order is final, appealable, or subject to further review or reconsideration.

(iv) The provisions of this subparagraph may be illustrated by the following examples:

Example 1. Corporation X is exclusively engaged in the transportation of gas by pipeline subject to the jurisdiction of the Z Power Commission. With respect to its post-1969 public utility property, X is entitled under section 167(l)(2)(B) to use a method of depreciation other than a subsection (l) method if it uses a normalization method of regulated accounting. With respect to X the Z Power Commission for purposes of establishing cost of service uses a recent consecutive 12-month period ending not more than 4 months prior to the date of filing a rate case adjusted for certain known changes occurring within a 9-month period subsequent to the base period. X's rate case is filed on January 1, 1975. The year 1974 is the recorded test period for X's rate case and is the period used in determining X's tax expense in computing cost of service. The rates are contemplated to be in effect for the years 1975, 1976, and 1977. The adjustments for known changes relate only to wages and salaries. X's rate base at the end of 1974 is $145,000,000. The amount of the reserve for deferred taxes under section 167(l) at the end of 1974 is $1,300,000, and the reserve is projected to be $4,400,000 at the end of 1975, $6,500,000 at the end of 1976, and $9,800,000 at the end of 1977. X does not use a normalization method of regulated accounting if the Z Power Commission excludes more than $1,300,000 from the rate base to which X's rate of return is applied. Similarly, X does not use a normalization method of regulated accounting if, instead of the above, the Z Power Commission, in determining X's rate of return which is applied to the rate base, assigns to no-cost capital an amount that represents the reserve account for deferred tax that is greater than $1,300,000.

Example 2. Assume the same facts as in example (1) except that the adjustments for known changes in cost of service made by the Z Power Commission include an additional depreciation expense that reflects the installation of new equipment put into service on January 1, 1975. Assume further that the reserve for deferred taxes under section 167(l) at the end of 1974 is $1,300,000 and that the monthly net increases for the first 9 months of 1975 are projected to be:

January 1–31	$310,000
February 1–28	300,000
March 1–31	300,000
April 1–30	280,000
May 1–31	270,000
June 1–30	260,000
July 1–31	260,000
August 1–31	250,000
September 1–30	240,000
	$2,470,000

For its regulated books of account X accrues such increases as of the last day of the month but as a matter of convenience credits increases or charges decreases to the reserve account on the 15th day of the month following the whole month for which such increase or decrease is accrued. The maximum amount that may be excluded from the rate base is $2,470,879 (the amount in the reserve at the end of the historical portion of the period ($1,300,000) and a pro rata portion of the amount of any projected increase for the future portion of the period to be credited to the reserve ($1,170,879)). Such pro rata portion is computed (without regard to the date such increase will actually be posted to the account) as follows:

$310,000×243/273 =	$275,934
300,000×215/273 =	236,264
300,000×184/273 =	202,198
280,000×154/273 =	157,949
270,000×123/273 =	121,648
260,000×93/273 =	88,571
260,000×62/273 =	59,048
250,000×31/273 =	28,388
240,000×1/273=	879
	$1,170,879

Example 3. Assume the same facts as in example (1) except that for purposes of establishing cost of service the Z Power Commission uses a future test year (1975). The rates are contemplated to be in effect for 1975, 1976, and 1977. Assume further that plant additions, depreciation expense, and taxes are projected to the end of 1975 and that the reserve for deferred taxes under section 167(l) is $1,300,000 for 1974 and is projected to be $4,400,000 at the end of 1975. Assume also that the Z Power Commission applies the rate of return to X's 1974 rate base of $145,000,000. X and the Z Power Commission through negotiation arrive at the level of approved rates. X uses a normalization method of regulated accounting only if the settlement agreement, the rate order, or record of the proceedings of the Z Power Commission indicates that the Z Power Commission did not exclude an amount representing the reserve for deferred taxes from X's rate base ($145,000,000) greater than $1,300,000 plus a pro rata portion of the projected increases and decreases that are to be credited or charged to the reserve account for 1975. Assume that for 1975 quarterly net increases are projected to be:

1st quarter	$910,000
2nd quarter	810,000
3rd quarter	750,000
4th quarter	630,000
Total	$3,100,000

For its regulated books of account X will accrue such increases as of the last day of the quarter but as a matter of convenience will credit increases or charge decreases to the reserve account on the 15th day of the month following the last month of the quarter for which such increase or decrease will be accrued. The maximum amount that may be excluded from the rate base is $2,591,480 (the amount of the reserve at the beginning of the period ($1,300,000) plus a pro rata portion ($1,291,480) of the $3,100,000 projected increase to be credited to the reserve during the period). Such portion is computed (without regard to the date such increase will actually be posted to the account) as follows:

$910,000×276/365=	$688,110
810,000×185/365=	410,548
750,000×93/365=	191,096
630,000×1/365=	1,726
	$1,291,480

(i) *Flow-through method of regulated accounting.* Under section 167(l)(3)(H), a taxpayer uses a flow-through method of regulated accounting with respect to public utility property if it uses the same method of depreciation (other than a subsection (l) method) to compute its allowance for depreciation under section 167 and to compute its tax expense for purposes of reflecting operating results in its regulated books of account unless such method is the same method used by the taxpayer to determine its depreciation expense for purposes of reflecting operating results in its regulated books of account. Except as provided in the preceding sentence, the method of depreciation used by a taxpayer with respect to public utility property for purposes of determining cost of service for ratemaking purposes or rate base for ratemaking purposes shall not be considered in determining whether the taxpayer used a flow-through method of regulated accounting. A taxpayer may establish use of a flow-through method of regulated accounting in the same manner that compliance with normalization requirements in respect of operating books of account may be established under paragraph (h)(4) of this section.

[T.D. 7315, 39 FR 20195, June 7, 1974]

§ 1.167(l)–2 Public utility property; election as to post-1969 property representing growth in capacity.

(a) *In general.* Section 167(l)(2) prescribes the methods of depreciation which may be used by a taxpayer with respect to its post-1969 public utility property. Under section 167(l)(2) (A) and (B) the taxpayer may use a subsection (l) method of depreciation (as defined in section 167(l)(3)(F)) or any other method of depreciation which is otherwise allowable under section 167 if, in conjunction with the use of such other method, such taxpayer uses the normalization method of accounting (as defined in section 167(l)(3)(G)). Paragraph (2)(C) of section 167(l) permits a taxpayer which used the flow-through method of accounting for its July 1969 accounting period (as these terms are defined in section 167(l)(3) (H) and (I), respectively) to use its applicable 1968 method of depreciation with respect to certain property. Section 167(l)(3)(D) describes the term ''applicable 1968 method''. Accordingly, a regulatory agency is not precluded by section 167(l) from requiring such a taxpayer subject to its jurisdiction to continue to use the flow-through method of accounting unless the taxpayer makes the election pursuant to section 167(l)(4)(A) and this section. Whether or not the election is made, if such a regulatory agency permits the taxpayer to change from the flow-through method of accounting, subsection (l)(2) (A) or (B) would apply and such taxpayer could, subject to the provisions of section 167(e) and the regulations thereunder (relating to change in method), use a subsection (l) method of depreciation or, if the taxpayer uses the normalization method of accounting, any other method of depreciation otherwise allowable under section 167.

(1) *Election.* Under subparagraph (A) of section 167(l)(4), if the taxpayer so elects, the provisions of paragraph (2)(C) of section 167(l) shall not apply to its qualified public utility property (as such term is described in paragraph (b) of this section). In such case the taxpayer making the election shall use a method of depreciation prescribed by section 167(l)(2) (A) or (B) with respect to such property.

(2) *Property to which election shall apply.* (i) Except as provided in subdivision (ii) of this subparagraph the election provided by section 167(l)(4)(A) shall apply to all of the qualified public utility property of the taxpayer.

(ii) In the event that the taxpayer wishes the election provided by section 167(l)(4)(A) to apply to only a portion of its qualified public utility property, it must clearly identify the property to be subject to the election in the statement of election described in paragraph (e) of this section. Where all property which performs a certain function is included within the election, the election shall apply to all future acquisitions of qualified public utility property which perform the same function. Where only certain property within a functional group of property is included within the election, the election shall apply only to property which is of the same kind as the included property.

(iii) The provisions of subdivision (ii) of this subparagraph may be illustrated by the following examples:

Example 1. Corporation *A*, an electric utility company, wishes to have the election provided by section 167(l)(4)(A) apply only with respect to its production plant. A statement that the election shall apply only with respect to production plant will be sufficient to include within the election all of the taxpayer's qualified production plant of any kind. All public utility property of the taxpayer other than production plant will not be subject to the election.

Example 2. Corporation *B*, an electric utility company, wishes to have the election provided by section 167(l)(4)(A) apply only with respect to nuclear production plant. A statement which clearly indicates that only nuclear production plant will be included in the election will be sufficient to exclude from the election all public utility property other than nuclear production plant.

(b) *Qualified public utility property*—(1) *Definition.* For purposes of this section the term ''qualified public utility property'' means post-1969 public utility property to which section 167(l)(2)(C) applies, or would apply if the election described in section 167(l)(4)(A) had not been made, to the extent that such property constitutes property which increases the productive or operational capacity of the taxpayer with respect to the goods or services described in section 167(l)(3)(A) and does not represent the replacement of existing capacity. In the event that particular assets which are post-1969 public utility property both replace existing public utility property and increase the productive or operational capacity of the taxpayer, only that portion of each such asset which is properly allocable, pursuant to the provisions of subparagraph (3)(v) of this paragraph or paragraph (c)(2) of this section (as the case may be), to increasing the productive or operational capacity of the taxpayer shall be qualified public utility property.

(2) *Limitation on use of formula method.* A taxpayer which makes the election with respect to all of its post-1969 public utility property may determine the amount of its qualified public utility property by using the formula method described in paragraph (c) of this section or, where the taxpayer so chooses, it may use any other method based on engineering data which is satisfactory to the Commissioner. A taxpayer which chooses to include only a portion of its post-1969 public utility property in the election described in paragraph (a)(1) of this section shall, in a manner satisfactory to the Commissioner and consistent with the provisions of subparagraph (3) of this paragraph, use a method based on engineering data. If a taxpayer uses the formula method described in paragraph (c) of this section, it must continue to use such method with respect to additions made in subsequent taxable years. The taxpayer may change from an engineering method to the formula method described in paragraph (c) of this section by filing a statement described in paragraph (h) of this section if it could have used such formula method for the prior taxable year.

(3) *Measuring capacity under an engineering method in the case of a general election.* (i) The provisions of this subparagraph apply in the case of an election made with respect to all of the post-1969 public utility property of the taxpayer.

(ii) A taxpayer which uses a method based on engineering data to determine the portion of its additions for a taxable year which constitutes qualified public utility property shall make such determination with reference to its ''adjusted capacity'' as of the first day of the taxable year during which such additions are placed in service. For purposes of this subparagraph, the term ''adjusted capacity'' means the taxpayer's capacity as of January 1, 1970, adjusted upward in the manner described in subdivision (iii) of this subparagraph for each taxable year ending after December 31, 1969, and before the first day of the taxable year during which the additions described in the preceding sentence are placed in service.

(iii) The adjustment described in this subdivision for each taxable year shall be equal to the number of units of capacity by which additions for the taxable year of public utility property with respect to which the election had been made exceed the number of units of capacity of retirements for such taxable year of public utility property with respect to which the flow-through method of accounting was being used at the time of their retirement. If for any taxable year the computation in the preceding sentence results in a negative amount, such negative amount shall be taken into account as a reduction in the amount of the adjustment (computed without regard to this sentence) in succeeding taxable years.

(iv) The provisions of this subparagraph may be illustrated by the following table which assumes that the taxpayer's adjusted capacity as of January 1, 1970, was 5,000 units:

1	2	3	4	5	6	7
Year	Additions	Flow-through retirements	Net additions	Adjusted capacity [1]	Actual capacity	Units of qualified additions [1,2]
1970	1000	700	300	5000	5300	300
1971	300	500	(200)	5300	5100	
1972	500	200	300	5300	5400	100

1	2	3	4	5	6	7
Year	Additions	Flow-through retirements	Net additions	Adjusted capacity [1]	Actual capacity	Units of qualified additions [1,2]
1973	400	800	(400)	5400	5000	
1974	600	400	200	5400	5200	
1975	800	300	500	5400	5700	300

[1] Capacity as of Jan. 1, 1970, plus amounts in column 7 for years prior to the year for which determination is being made.
[2] Column 6 minus column 5.

(v) The qualified portion of the basis for depreciation (as defined in section 167(g)) of each asset or group of assets (if group or composite accounting is used by the taxpayer) subject to the election shall be determined using the following ratio:

Qualified portion of basis of asset ÷ Total basis of asset = Units of qualified additions computed in column 7 on chart ÷ Units of capacity of additions computed in column 2 on chart.

(c) *Formula method of determining amount of property subject to election*—(1) *In general*. The following formula method may be used to determine the amount of qualified public utility property:

Step 1. Find the total cost (within the meaning of section 1012) to the taxpayer of additions during the taxable year of all post-1969 public utility property with respect to which section 167(l)(2)(C) would apply if the election had not been made.

Step 2. Aggregate the cost (within the meaning of section 1012) to the taxpayer of all retirements during the taxable year of public utility property with respect to which the flow-through method of accounting was being used at the time of their retirement.

Step 3. Subtract the figure reached in step 2 from the figure reached in step 1.

In the event that the figure reached in step 2 exceeds the figure reached in step 1 such excess shall be carried forward to the next taxable year and shall be aggregated with the cost (within the meaning of section 1012) to the taxpayer of all retirements referred to in step 2 for such next taxable year.

(2) *Allocation of bases*. The amount of qualified public utility property as determined in accordance with the formula method described in subparagraph (1) of this paragraph shall be allocated to the basis for depreciation (as defined in section 167(g)) of each asset or group of assets (if group or composite accounting is used by the taxpayer) subject to the election using the following ratio:

Amount of qualified additions computed in step 3 ÷ Amount of total additions computed in step 1 = Qualified portion of basis of asset ÷ Total basis of asset.

(d) *Examples*. The provisions of this section may be illustrated by the following examples:

Example 1. Corporation *A*, a telephone company subject to the jurisdiction of the Federal Communications Commission, elected, pursuant to the provisions of section 167(l)(4)(A) and this section, with respect to all of its qualified post-1969 public utility property to have the provisions of paragraph (2) (C) of section 167(l) not apply. In 1971 the Corporation added new underground cable with a cost (within the meaning of section 1012) to it of $4 million to its underground cable account. In the same year it retired public utility property with a cost (within the meaning of section 1012) to Corporation *A* of $1.5 million. The flow-through method of accounting was being used with respect to all of the retired property at the time of retirement. Using the formula method described in paragraph (c) of this section, the amount of qualified underground cable would be determined as follows:

	Million
Step 1. Aggregate cost of flow-through additions	$4.0
Step 2. Cost of all flow-through retirements	1.5
Step 3. Figure reached in step 1 less figure reached in step 2	2.5

The amount of qualified public utility property to which section 167(l)(2)(C) will not apply is $2.5 million. Pursuant to the provisions of paragraph (c)(2) of this section, the amount of qualified public utility property would be allocated to the basis for depreciation (as defined in section 167(g)) of an asset with a total basis for depreciation of $2 million as follows:

$2.5 million (figure in step 3)/$4 million (figure in step 1) = Qualified portion of basis of asset/$2 million Qualified portion of basis of asset =$1.25 million.

Example 2. In 1972 Corporation *A* (the corporation described in example (1)) added underground cable with a cost (within the meaning of section 1012) to it of $1 million. In the same year the cost (within the meaning of section 1012) to the corporation of retirements of public utility property with respect to which the flow-through method of accounting was being used was $3 million. There were no other additions or retirements. The amount of qualified public utility property would be determined as follows:

	Million
Step 1. Aggregate cost of flow-through additions	$1.0
Step 2. Cost of all flow-through retirements	3.0
Step 3. Figure reached in step 1 less figure reached in step 2	(2.0)

Since retirements of flow-through public utility property for the year 1972 exceeded additions made during such year, the excess retirements, $2.0 million, must be carried forward to be aggregated with retirements for 1973.

Example 3. Corporation *B*, a gas pipeline company subject to the jurisdiction of the Federal Power Commission, made the election provided by section 167(l)(4)(A) and this section with respect to all of its post-1969 public utility property. Corporation *B* chose to use an engineering data method of determining which property was subject to the election provided by this section. In 1970, the corporation replaced a portion of its pipeline with respect to which the flow-through method of accounting was being used at the time of its retirement which had a peak capacity on January 1, 1970, of 100,000 thousand cubic feet (M c.f.) per day at a pressure of 14.73 pounds per square inch absolute (p.s.i.a.) with pipe with a capacity of 125,000 M c.f. per day at 14.73 p.s.i.a. Assuming that there were no other additions or retirements, using an engineering data method one-fifth of the new pipeline would be property subject to the election of this section effective for its taxable year beginning on January 1, 1971.

Example 4. In 1970 Corporation *C* (with the same characteristics as the corporation described in example (3)) extended its pipeline 5 miles further than it extended on January 1, 1970. Assuming that there were no other additions or retirements, the entire extension would be property subject to the election provided by this section effective for its taxable year beginning on January 1, 1971.

Example 5. As a result of a change of service areas between two corporations, in 1970 Corporation *D* (with the same characteristics as the corporation described in example (3)) retired a pipeline running north and south and replaced it with a pipeline of equal length and capacity running east and west. No part of the pipeline running east and west is property subject to the election.

(e) *Manner of making election.* The election described in paragraph (a) of this section shall be made by filing, in duplicate, with the Commissioner of Internal Revenue, Washington, D.C. 20224, Attention, T:I:E, a statement of such election.

(f) *Content of statement.* The statement described in paragraph (e) of this section shall indicate that an election is being made under section 167(l) of the Internal Revenue Code of 1954, and it shall contain the following information:

(1) The name, address, and taxpayer identification number of the taxpayer,

(2) Whether the taxpayer will use the formula method of determining the amount of its qualified public utility property described in paragraph (c) of this section, or an engineering method, and

(3) Where the taxpayer wishes to include only a portion of its public utility property in the election pursuant to the provisions of paragraph (a)(2) of this section, a description sufficient to clearly identify the property to be included.

(g) *Time for making election.* The election permitted by this section shall be made by filing the statement described in paragraph (e) of this section not later than Monday, June 29, 1970.

(h) *Change of method of determining amount of qualified property.* Where a taxpayer which has elected pursuant to the provisions of section 167(l)(4)(A) wishes to change, pursuant to the provisions of paragraph (b)(2) of this section, from an engineering data method of determining which of its property is qualified public utility property to the formula method described in paragraph (c) of this section, it may do so by filing a statement to that effect at the time that it files its income tax return, with the district director or director of the regional service center, with whom the taxpayer's income tax return is required to be filed.

(i) *Revocability of election.* An election made under section 167(l) shall be irrevocable.

(j) *Effective date.* The election prescribed by section 167(l)(4)(A) and this section shall be effective for taxable years beginning after December 31, 1970.

[T.D. 7045, 35 FR 8933, June 10, 1970. Redesignated by T.D. 7315, 39 FR 20195, June 7, 1974]

§ 1.167(l)–3 Multiple regulation, asset acquisitions, reorganizations, etc.

(a) *Property not entirely subject to jurisdiction of one regulatory body*—(1) *In general*. If a taxpayer which uses a method of depreciation other than a subsection (l) method of depreciation is required by a regulatory body having jurisdiction over less than all of its property to use, or not to use, a method of regulated accounting (*i.e.*, normalization or flow-through), such taxpayer shall be considered as using, or not using, such method of regulated accounting only with respect to property subject to the jurisdiction of such regulatory body. In the case of property which is contained in a multiple asset account, the provisions of §1.167(a)–7(c) and §1.167 (a)–11(c)(1)(iv) apply to prohibit depreciating a single account by two or more different methods.

(2) *Jurisdiction of regulatory body*. For purposes of this paragraph, a regulatory body is considered to have jurisdiction over property of a taxpayer if expenses with respect to the property are included in cost of service as determined by the regulatory body for ratemaking purposes or for reflecting operating results in its regulated books of account. For example, if regulatory body A, having jurisdiction over 60 percent of an item of X corporation's public utility property, required X to use the flow-through method of regulated accounting in circumstances which would bar X from using a method of depreciation under section 167(a) other than a subsection (l) method, and if regulatory body B, having jurisdiction over the remaining 40 percent of such item of property does not so require X to use the flow-through method of regulated accounting (or if the remaining 40 percent is not subject to the jurisdiction of any regulatory body), then with respect to 60 percent of the adjusted basis of the property X is prohibited from using a method of depreciation for purposes of section 167(a) other than a subsection (l) method. If in such example, A, having jurisdiction over 60 percent of X's public utility property, had jurisdiction over 100 percent of a particular generator, then with respect to the generator X would be prohibited from using a method of depreciation other than a subsection (l) method.

(3) *Public utility property subject to more than one regulatory body*. If a regulatory body having jurisdiction over public utility property with respect to the taxpayer's regulated books of account requires the taxpayer to reflect its tax expense in such books in the manner used by the regulatory body having jurisdiction over the public utility property for purposes of determining the taxpayer's cost of service for ratemaking purposes, the rules of subparagraphs (1) and (2) of this paragraph shall apply.

(b) *Leasing transactions*—(1) *Leased property*. Public utility property as defined in paragraph (b) of §1.167(l)–1 includes property which is leased by a taxpayer where the leasing of such property is part of the lessor's section 167(l) public utility activity. Thus, such leased property qualifies as public utility property even though the predominant use of such property by the lessee is in other than a section 167(l) public utility activity. Further, leased property qualifies as public utility property under section 167(l) even though the leasing is not part of the lessor's public utility activity if the predominant use of such property by the lessee or any sublessee is in a section 167(l) public utility activity. However, the limitations of section 167(l) apply to a taxpayer only if such taxpayer is subject to the jurisdiction of a regulatory body described in a section 167(l)(3)(A). For example, if a financial institution purchases property which it then leases to a lessee which uses such property predominantly in a section 167(l) public utility activity, the property qualifies as public utility property. However, because the financial institution's rates for leasing the property are not subject to the jurisdiction of a regulatory body described in section 167(l)(3)(A), the provisions of section 167(l) do not apply to the depreciation deductions taken with respect to the property by the financial institution. For possible application of section 167(l) to the lessee, see subparagraph (2) of this paragraph.

(2) *Certain rental payments.* Under section 167(l)(5), if a taxpayer leases property which is public utility property and the regulatory body having jurisdiction over such property for purposes of determining the taxpayer's operating results in its regulated books of account or for ratemaking purposes allows only an amount of such lessee's expenses with respect to the lease which is less than the amount which the taxpayer deducts for purposes of its Federal income tax liability, then a portion of the difference between such amounts shall not be allowed as a deduction by the taxpayer for purposes of its Federal income tax liability in such manner and time as the Commissioner or his delegate may determine consistent with the principles of §1.167(l)–1 and this section applicable as to when a method of depreciation other than a subsection (1) method may be used for purposes of section 167(a).

(c) *Certain partnership arrangements.* Under section 167(l)(5), if property held by a partnership is not public utility property in the hands of the partnership but would be public utility property if an election was made under section 761 to be excluded from partnership treatment, then section 167(l) shall be applied by treating the partners as directly owning the property in proportion to their partnership interests.

(d) *Cross reference.* See §1.167(l)–1(c)(1) for treatment of certain property as ''pre-1970 public utility property'' and §1.167(l)–1(e)(4)(ii) for applicable 1968 method in the case of property acquired in certain transactions.

[T.D. 7315, 39 FR 20202, June 7, 1974]

§1.167(l)–4 Public utility property; election to use asset depreciation range system.

(a) *Application of section 167(l) to certain property subject to asset depreciation range system.* If the taxpayer elects to compute depreciation under the asset depreciation range system described in §1.167(a)–11 with respect to certain public utility property placed in service after December 31, 1970, see §1.167(a)–11(b) (6).

(Sec. 167 of the Internal Revenue Code of 1954 (26 U.S.C. 167) and sec. 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 7805))

[T.D. 7128, 36 FR 11939, June 23, 1971. Redesignated by T.D. 7315, 39 FR 20203, June 7, 1974]

§1.167(m)–1 Class lives.

(a) For rules regarding the election to use the class life system authorized by section 167(m), see the provisions of §1.167(a)–11.

(Sec. 167(m), 85 Stat. 508 (26 U.S.C. 167))

[T.D. 7272, 38 FR 9986, Apr. 23, 1973]

§1.168–5 Special rules.

(a) *Retirement-replacement-betterment (RRB) property*—(1) *RRB replacement property placed in service before January 1, 1985.* (i) Except as provided in paragraph (a)(1)(ii) of this section, the recovery deduction for the taxable year for retirement-replacement-betterment (RRB) replacement property (as defined in paragraph (a)(3) of this section) placed in service before January 1, 1985, shall be (in lieu of the amount determined under section 168(b)) an amount determined by applying to the unadjusted basis (as defined in section 168(d)(1) and the regulations thereunder) of such property the applicable percentage determined in accordance with the following table:

If the recovery year is:	And the year the property is placed in service is:			
	1981	1982	1983	1984
	The applicable percentage is:			
1	100	50	33	25
2	....	50	45	38
3	....	....	22	25
4	....	....	....	12

(ii) The provisions of paragraph (a)(1)(i) of this section do not apply to any taxpayer who did not use the RRB method of depreciation under section 167 as of December 31, 1980. In such case, RRB replacement property placed in service by the taxpayer after December 31, 1980, shall be treated as other 5-year recovery property under section 168.

(2) *RRB replacement property placed in service after December 31, 1984.* RRB replacement property placed in service

after December 31, 1984, is treated as other 5-year recovery property under section 168.

(3) *RRB replacement property defined.* RRB replacement property, for purposes of section 168, means replacement track material (including rail, ties, other track material, and ballast) installed by a railroad (including a railroad switching or terminal company) if—

(i) The replacement is made pursuant to a scheduled program for replacement.

(ii) The replacement is made pursuant to observations by maintenance-of-way personnel of specific track material needing replacement.

(iii) The replacement is made pursuant to the detection by a rail-test car of specific track material needing replacement, or

(iv) The replacement is made as a result of a casualty.

Replacements made as a result of a casualty shall be RRB replacement property only to the extent that, in the case of each casualty, the replacement cost with respect to the replacement track material exceeds $50,000.

(4) *Recovery of adjusted basis of RRB property as of December 31, 1980.* The taxpayer shall recover the adjusted basis of RRB property (as defined in section 168(g)(6)) as of December 31, 1980, over a period of not less than 5 years and not more than 50 years, using a rate of recovery consistent with any method described in section 167(b), including the method described in section 167(b)(2), switching to the method described in section 167(b)(3) at a time to maximize the deduction. For purposes of determining the recovery allowance under this subparagraph, salvage value shall be disregarded and, in the case of a taxpayer that depreciated RRB property placed in service before January 1, 1981, using the RRB method consistently for all periods after February 28, 1913, the adjusted basis of RRB property is the adjusted basis for purposes of determining the deduction for retirements under the RRB method, with no adjustment for depreciation sustained prior to March 1, 1913.

(5) *RRB property (which is not RRB replacement property) placed in service after December 31, 1980.* Property placed in service by the taxpayer after December 31, 1980, which is not RRB replacement property and which, under the taxpayer's method of depreciation as of December 31, 1980, would have been depreciated by the taxpayer under the RRB method, is treated as other property under section 168.

(b)–(f) [Reserved]

[T.D. 8116, 51 FR 46619, Dec. 24, 1986]

§ 1.168(a)–1 Modified accelerated cost recovery system.

(a) Section 168 determines the depreciation allowance for tangible property that is of a character subject to the allowance for depreciation provided in section 167(a) and that is placed in service after December 31, 1986 (or after July 31, 1986, if the taxpayer made an election under section 203(a)(1)(B) of the Tax Reform Act of 1986; 100 Stat. 2143). Except for property excluded from the application of section 168 as a result of section 168(f) or as a result of a transitional rule, the provisions of section 168 are mandatory for all eligible property. The allowance for depreciation under section 168 constitutes the amount of depreciation allowable under section 167(a). The determination of whether tangible property is property of a character subject to the allowance for depreciation is made under section 167 and the regulations under section 167.

(b) This section is applicable on and after February 27, 2004.

[T.D. 9314, 72 FR 9248, Mar. 1, 2007]

§ 1.168(b)–1 Definitions.

(a) *Definitions.* For purposes of section 168 and the regulations under section 168, the following definitions apply:

(1) *Depreciable property* is property that is of a character subject to the allowance for depreciation as determined under section 167 and the regulations under section 167.

(2) *MACRS property* is tangible, depreciable property that is placed in service after December 31, 1986 (or after July 31, 1986, if the taxpayer made an election under section 203(a)(1)(B) of the Tax Reform Act of 1986; 100 Stat. 2143) and subject to section 168, except

for property excluded from the application of section 168 as a result of section 168(f) or as a result of a transitional rule.

(3) *Unadjusted depreciable basis* is the basis of property for purposes of section 1011 without regard to any adjustments described in section 1016(a)(2) and (3). This basis reflects the reduction in basis for the percentage of the taxpayer's use of property for the taxable year other than in the taxpayer's trade or business (or for the production of income), for any portion of the basis the taxpayer properly elects to treat as an expense under section 179, section 179C, or any similar provision, and for any adjustments to basis provided by other provisions of the Internal Revenue Code and the regulations under the Code (other than section 1016(a)(2) and (3)) (for example, a reduction in basis by the amount of the disabled access credit pursuant to section 44(d)(7)). For property subject to a lease, see section 167(c)(2).

(4) *Adjusted depreciable basis* is the unadjusted depreciable basis of the property, as defined in §1.168(b)–1(a)(3), less the adjustments described in section 1016(a)(2) and (3).

(b) *Effective date*. This section is applicable on or after February 27, 2004.

[T.D. 9314, 72 FR 9248, Mar. 1, 2007]

§ 1.168(d)–0 Table of contents for the applicable convention rules.

This section lists the major paragraphs in §1.168(d)–1.

§1.168(d)–1 Applicable conventions—Half-year and mid-quarter conventions.

[T.D. 8444, 57 FR 48981, Oct. 29, 1992]

§ 1.168(d)–1 Applicable conventions—half-year and mid-quarter conventions.

(a) *In general*. Under section 168(d), the half-year convention applies to depreciable property (other than certain real property described in section 168(d)(2)) placed in service during a taxable year, unless the mid-quarter convention applies to the property. Under section 168(d)(3)(A), the mid-quarter convention applies to depreciable property (other than certain real property described in section 168(d)(2)) placed in service during a taxable year if the aggregate basis of property placed in service during the last three months of the taxable year exceeds 40 percent of the aggregate basis of property placed in service during the taxable year (''the 40-percent test''). Thus, if the depreciable property is placed in service during a taxable year that consists of three months or less, the mid-quarter convention applies to the property. Under section 168(d)(3)(b)(i), the depreciable basis of nonresidential real property, residential rental property, and any railroad grading or tunnel bore is disregarded in applying the 40-percent test. For rules regarding property that is placed in service and disposed of in the same taxable year, see paragraph (b)(3) of this section. For the definition of ''aggregate basis of property,'' see paragraph (b)(4) if this section.

(b) *Additional rules for determining whether the mid-quarter convention applies and for applying the applicable convention*—(1) *Property described in section 168(f)*. In determining whether the 40-percent test is testified for a taxable year, the depreciable basis of property described in section 168(f) (property to which section 168 does not apply) is not taken into account.

(2) *Listed property*. The depreciable basis of listed property (as defined in section 280F(d)(4) and the regulations thereunder) placed in service during a taxable year is taken into account (unless otherwise excluded) in applying the 40-percent test.

(3) *Property placed in service and disposed of in the same taxable year*. (i) Under section 168(d)(3)(B)(ii), the depreciable basis of property placed in service and disposed of in the same taxable

year is not taken into account in determining whether the 40-percent test is satisfied. However, the depreciable basis of property placed in service, disposed of, subsequently reacquired, and again placed in service, by the taxpayer in the same taxable year must be taken into account in applying the 40-percent test, but the basis of the property is only taken into account on the later of the dates that the property is placed in service by the taxpayer during the taxable year. Further, see §§1.168(i)–6(c)(4)(v)(B) and 1.168(i)–6(f) for rules relating to property placed in service and exchanged or involuntarily converted during the same taxable year.

(ii) The applicable convention, as determined under this section, applies to all depreciable property (except nonresidential real property, residential rental property, and any railroad grading or tunnel bore) placed in service by the taxpayer during the taxable year, excluding property placed in service and disposed of in the same taxable year. However, see §§1.168(i)–6(c)(4)(v)(A) and 1.168(i)–6(f) for rules relating to MACRS property that has a basis determined under section 1031(d) or section 1033(b). No depreciation deduction is allowed for property placed in service and disposed of during the same taxable year. However, see §1.168(k)–1(f)(1) for rules relating to qualified property or 50-percent bonus depreciation property, and §1.1400L(b)–1(f)(1) for rules relating to qualified New York Liberty Zone property, that is placed in service by the taxpayer in the same taxable year in which either a partnership is terminated as a result of a technical termination under section 708(b)(1)(B) or the property is transferred in a transaction described in section 168(i)(7).

(4) *Aggregate basis of property.* For purposes of the 40-percent test, the term ''aggregate basis of property'' means the sum of the depreciable bases of all items of depreciable property that are taken into account in applying the 40-percent test. ''Depreciable basis'' means the basis of depreciable property for purposes of determining gain under sections 1011 through 1024. The depreciable basis for the taxable year the property is placed in service reflects the reduction in basis for—

(i) Any portion of the basis the taxpayer properly elects to treat as an expense under section 179;

(ii) Any adjustment to basis under section 48(q); and

(iii) The percentage of the taxpayer's use of the property for the taxable year other than in the taxpayer's trade or business (or for the production of income), but is determined before any reduction for depreciation under section 167(a) for that taxable year.

(5) *Special rules for affiliated groups*—(i) In the case of a consolidated group (as defined in §1.1502–1(h)), all members of the group that are included on the consolidated return are treated as one taxpayer for purposes of applying the 40-percent test. Thus, the depreciable bases of all property placed in service by members of a consolidated group during a consolidated return year are taken into account (unless otherwise excluded) in applying the 40-percent test to determine whether the mid-quarter convention applies to property placed in service by the members during the consolidated return year. The 40-percent test is applied separately to the depreciable bases of property placed in service by any member of an affiliated group that is not included in a consolidated return of the taxable year in which the property is placed in service.

(ii) In the case of a corporation formed by a member or members of a consolidated group and that is itself a member of the consolidated group (''newly-formed subsidiary''), the depreciable bases of property placed in service by the newly-formed subsidiary in the consolidated return year in which it is formed is included with the depreciable bases of property placed in service during the consolidated return year by the other members of the consolidated group in applying the 40-percent test. If depreciable property is placed in service by a newly-formed subsidiary during the consolidated return year in which it was formed, the newly-formed subsidiary is considered as being in existence for the entire consolidated return year for purposes of applying the applicable convention to determine when the recovery period begins.

(iii) The provisions of paragraph (b)(5)(ii) of this section are illustrated by the following example.

Example. Assume a member of a consolidated group that files its return on a calendar-year basis forms a subsidiary on August 1. The subsidiary places depreciable property in service on August 5. If the mid-quarter convention applies to property placed in service by the members of the consolidated group (including the newly-formed subsidiary), the property placed in service by the subsidiary on August 5 is deemed placed in service on the mid-point of the third quarter of the consolidated return year (*i.e.*, August 15). If the mid-quarter convention does not apply, the property is deemed placed in service on the mid-point of the consolidated return year (*i.e.*, July 1).

(iv) In the case of a corporation that joins or leaves a consolidated group, the depreciable bases of property placed in service by the corporation joining or leaving the group during the portion of the consolidated return year that the corporation is a member of the consolidated group is included with the depreciable bases of property placed in service during the consolidated return year by the other members in applying the 40-percent test. The depreciable bases of property placed in service by the joining or leaving member in the taxable year before it joins or after it leaves the consolidated group is not taken into account by the consolidated group in applying the 40-percent test for the consolidated return year. If a corporation leaves a consolidated group and joins another consolidated group, each consolidated group takes into account, in applying the 40-percent test, the depreciable bases of property placed in service by the corporation while a member of the group.

(v) The provisions of paragraph (b)(5)(iv) of this section are illustrated by the following example.

Example. Assume Corporations A and B file a consolidated return on a calendar-year basis. Corporation C, also a calendar-year taxpayer, enters the consolidated group on July 1 and is included on the consolidated return for that taxable year. The depreciable bases of property placed in service by C during the period of July 1 to December 31 is included with the depreciable bases of property placed in service by A and B during the entire consolidated return year in applying the 40-percent test. The depreciable bases of property placed in service by C from January 1 to June 30 is not taken into account by the consolidated group in applying the 40-percent test. If C was a member of another consolidated group during the period from January 1 to June 30, that consolidated group would include the depreciable bases of property placed in service by C during that period.

(vi) A corporation that joins or leaves a consolidated group during a consolidated year is considered as being a member of the consolidated group for the entire consolidated return year for purposes of applying the applicable convention to determine when the recovery period begins for depreciable property placed in service by the corporation during the portion of the consolidated return year that the corporation is a member of the group.

(vii) If depreciable property is placed in service by a corporation in the taxable year ending immediately before it joins a consolidated group or beginning immediately after it leaves a consolidated group, the applicable convention is applied to the property under either the full taxable year rules or the short taxable year rules, as applicable.

(viii) The provisions of paragraphs (d)(5)(vi) and (vii) of this section are illustrated by the following example.

Example. Assume that on July 1, C, a calendar-return corporation, joins a consolidated group that files a return on a calendar-year basis. The short taxable year rules apply to C for the period of January 1 to June 30. However, in applying the applicable convention to determine when the recovery period begins for depreciable property placed in service for the period of July 1 to December 31, C is considered as being a member of the consolidated group for the entire consolidated return year. Thus, if the half-year convention applies to depreciable property placed in service by the consolidated group (taking into account the depreciable bases of property placed in service by C after June 30), the property is deemed placed in service on the mid-point of the consolidated return year (*i.e.*, July 1, if the group did not have a short taxable year).

(ix) In the case of a transfer of depreciable property between members of a consolidated group, the following special rules apply for purposes of applying the 40-percent test. Property that is placed in service by one member of a consolidated group and transferred to another member of the same group is considered as placed in service on the date that it is placed in service by the transferor member, and the date it is placed in service by the transferee member is disregarded. In the case of multiple transfers of property between members of a consolidated group, the property is considered as placed in service on the date that the first member places the property in service, and the dates it is placed in service by other members are disregarded. The depreciable basis of the transferred property that is taken into account in applying the 40-percent test is the depreciable basis of the property in the hands of the transferor member (as determined under paragraph (b)(4) of this section), or, in the case of multiple transfers of property between members, the depreciable basis in the hands of the first member that placed the property in service.

(x) The provisions of paragraph (b)(5)(ix) of this section are illustrated by the following example.

Example. Assume the ABC consolidated group files its return on a calendar-year basis. A, a member of the consolidated group, purchases depreciable property costing $50,000 and places the property in service on January 5, 1991. On December 1, 1991, the property is transferred for $75,000 to B, another member of the consolidated group. In applying the 40-percent test to the members of the consolidated group for 1991, the property is considered as placed in service on January 5, the date that A placed the property in service, and the depreciable basis of the property that is taken into account is $50,000.

(6) *Special rule for partnerships and S corporations.* In the case of property placed in service by a partnership or an S corporation, the 40-percent test is generally applied at the partnership or corporate level. However, if a partnership or an S corporation is formed or availed of for the principal purpose of either avoiding the application of the mid-quarter convention or having the mid-quarter convention apply where it otherwise would not, the 40-percent test is applied at the partner, shareholder, or other appropriate level.

(7) *Certain nonrecognition transaction*—(i) Except as provided in paragraph (b)(6) of this section, if depreciable property is transferred in a transaction described in section 168(i)(7)(B)(i) (other than in a transaction between members of a consolidated group) in the same taxable year that the property is placed in service by the transferor, the 40-percent test is applied by treating the transferred property as placed in service by the transferee on the date of transfer. Thus, if the aggregate basis of property (including the transferred property) placed in service by the transferee during the last three months of its taxable year exceeds 40 percent of the aggregate basis of property (including the transferred property) placed in service by the transferee during the taxable year, the mid-quarter convention applies to the transferee's depreciable property, including the transferred property. The depreciable basis of the transferred property is not taken into account by the transferor in applying the 40-percent test for the taxable year that the transferor placed the property in service.

(ii) In applying the applicable convention to determine when the recovery period for the transferred property begins, the date on which the transferor placed the property in service must be used. Thus, for example, if the mid-quarter convention applies, the recovery period for the transferred property begins on the mid-point of the quarter of the taxable year that the transferor placed the property in service. If the transferor placed the transferred property in service in a short taxable year, then for purposes of applying the applicable convention and allocating the depreciation deduction between the transferor and the transferee, the transferor is treated as having a full 12-month taxable year commencing on the first day of the short taxable year. The depreciation deduction for the transferor's taxable year in which the property was placed in service is allocated between the transferor and the transferee based on the number of months in the transferor's taxable year that each party held the property in service. For purposes of allocating the depreciation deduction, the transferor takes into account the month in which the property was placed in service but does not take into account the month in which the property was transferred. The transferee is allocated the remaining portion of the depreciation deduction for the transferor's taxable year in which the property was transferred. For the remainder of the transferee's current taxable year (if the transferee has a different taxable year than the transferor) and for subsequent taxable years, the depreciation deduction for the transferee is calculated by allocating to the transferee's taxable year the depreciation attributable to each recovery year, or portion thereof, that falls within the transferee's taxable year.

(iii) If the applicable convention for the transferred property has not been determined by the time the transferor files its income tax return for the year of transfer because the transferee's taxable year has not ended, the transferor may use either the mid-quarter or the half-year convention in determining the depreciation deduction for the property. However, the transferor must specify on the depreciation form filed for the taxable year that the applicable convention has not been determined for the property. If the transferee determines that a different convention applies to the transferred property, the transferor should redetermine the depreciation deduction on the property, and, within the period of limitation, should file an amended income tax return for the taxable year and pay any additional tax due plus interest.

(iv) The provisions of the paragraph (b)(7) are illustrated by the following example.

Example. (i) During 1991, C, a calendar-year taxpayer, purchases satellite equipment costing $100,000, and computer equipment costing $15,000. The satellite equipment is placed in service in January, and the computer equipment in February. On October 1, C transfers the computer equipment to Z Partnership in a transaction described in section 721. During 1991, Z, a calendar-year partnership, purchases 30 office desks for a total of $15,000. The desks are placed in service in June. These are the only items of depreciable property placed in service by C and Z during 1991.

(ii) In applying the 40-percent test, because C transferred the computer equipment in a transaction described in section 168(i)(7)(B)(i) in the same taxable year that C placed it in service, the computer equipment is treated as placed in service by the transferee, Z, on the date of transfer, October 1. The 40-percent test is satisfied with respect to Z, because the computer equipment is placed in service during the last three months of Z's taxable year and its basis ($15,000) exceeds 40 percent of the aggregate basis of property placed in service by Z during the taxable year (desks and computer equipment with an aggregate basis of $30,000).

(iii) In applying the mid-quarter convention to determine when the computer equipment is deemed to be placed in service, the date on which C placed the property in service is used. Accordingly, because C placed the computer equipment in service during the first quarter of its taxable year, the computer equipment is deemed placed in service on February 15, 1991, the mid-point of the first quarter of C's taxable year. The depreciation deduction allowable for C's 1991 taxable year, $5,250 ($15,000×40 percent×10.5⁄12), is allocated between C and Z based on the number of months in C's taxable year that C and Z held the property in service. Thus, because the property was in service for 11 months during C's 1991 taxable year and C held it for 8 of those 11 months, C is allocated $3,818 (8⁄11×$5,250). Z is allocated $1,432, the remaining 3⁄11 of the $5,250 depreciation deduction for C's 1991 taxable year. For 1992, Z's depreciation deduction for the computer equipment is $3,900, the sum of the remaining 1.5 months of depreciation deduction for the first recovery year and 10.5 months of depreciation deduction for the second recovery year (($15,000×40 percent×1.5⁄12)+($9,000×40 [percent×10.5⁄12)).

(c) *Disposition of property subject to the half-year or mid-quarter convention*—(1) *In general.* If depreciable property is subject to the half-year (or mid-quarter) convention in the taxable year in which it is placed in service, it also is subject to the half-year (or mid-quarter) convention in the taxable year in which it is disposed of.

(2) *Example.* The provisions of paragraph (c)(1) of this section are illustrated by the following example.

Example. In October 1991, B, a calendar-year taxpayer, purchases and places in service a light general purpose truck costing $10,000. B does not elect to expense any part of the cost of the truck, and this is the only item of depreciable property placed in service by B during 1991. The 40-percent test is satisfied and the mid-quarter convention applies, because the truck is placed in service during the last three months of the taxable year and no other assets are placed in service in that year. In April 1993 (prior to the end of the truck's recovery period), B sells the truck. The mid-quarter convention applies in determining the depreciation deduction for the truck in 1993, the year of disposition.

(d) *Effective dates*—(1) *In general*. This section applies to depreciable property placed in service in taxable years ending after January 30, 1991. For depreciable property placed in service after December 31, 1986, in taxable years ending on or before January 30, 1991, a taxpayer may use a method other than the method provided in this section in applying the 40-percent test and the applicable convention, provided the method is reasonable and is consistently applied to the taxpayer's property.

(2) *Qualified property, 50-percent bonus depreciation property, or qualified New York Liberty Zone property*. This section also applies to qualified property under section 168(k)(2) or qualified New York Liberty Zone property under section 1400L(b) acquired by a taxpayer after September 10, 2001, and to 50-percent bonus depreciation property under section 168(k)(4) acquired by a taxpayer after May 5, 2003.

(3) *Like-kind exchanges and involuntary conversions*. The last sentence in paragraph (b)(3)(i) and the second sentence in paragraph (b)(3)(ii) of this section apply to exchanges to which section 1031 applies, and involuntary conversions to which section 1033 applies, of MACRS property for which the time of disposition and the time of replacement both occur after February 27, 2004.

[T.D. 8444, 57 FR 48981, Oct. 29, 1992, as amended by T.D. 9091, 68 FR 52991, Sept. 8, 2003; T.D. 9115, 69 FR 9533, Mar. 1, 2004; T.D. 9283, 71 FR 51737, Aug. 31, 2006; T.D. 9314, 72 FR 9248, Mar. 1, 2007]

§ 1.168(f)(8)–1T Safe-harbor lease information returns concerning qualified mass commuting vehicles (temporary).

In general. Form 6793, Safe Harbor Lease Information Return, is obsolete for safe harbor lease agreements executed after June 30, 1985. The parties to a safe harbor lease agreement under section 168(f)(8) executed after June 30, 1985 must file with their timely filed (including extensions) Federal income tax returns for the taxable year during which the lease term begins a statement containing the following information:

(a) The name, address, and taxpayer identification number of the lessor and the lessee;

(b) A description of the property with respect to which safe-harbor lease treatment is claimed;

(c) The date on which the lessee places the property in service, the date on which the lease begins, and the term of the lease;

(d) The recovery property class of the leased property under section 168(c)(2) (for example, 5-year);

(e) The terms of the payments between the parties to the lease transaction;

(f) The unadjusted basis of the property as defined in section 168(d)(1) and its adjusted basis as determined under § 5c.168(f)(8)–6(b)(3); and

(g) If the lessor is a partnership or grantor trust, the name, address, and taxpayer identification number of the partners or beneficiaries and the service center at which the income tax return of each partner or beneficiary is filed.

The lessor's failure to file the above-described statement shall void such agreement as a safe-harbor lease under section 168(f)(8) as of the date of the execution of the lease agreement. For rules regarding extensions of time for filing elections, see § 1.9100–1.

[T.D. 8033, 50 FR 27224, July 2, 1985]

§ 1.168(h)–1 Like-kind exchanges involving tax-exempt use property.

(a) *Scope*. (1) This section applies with respect to a direct or indirect transfer of property among related persons, including transfers made through a qualified intermediary (as defined in § 1.1031(k)–1(g)(4)) or other unrelated person, (a transfer) if—

(i) Section 1031 applies to any party to the transfer or to any related transaction; and

(ii) A principal purpose of the transfer or any related transaction is to avoid or limit the application of the alternative depreciation system (within the meaning of section 168(g)).

(2) For purposes of this section, a person is related to another person if they bear a relationship specified in section 267(b) or section 707(b)(1).

(b) *Allowable depreciation deduction for property subject to this section*—(1) *In general.* Property (tainted property) transferred directly or indirectly to a taxpayer by a related person (related party) as part of, or in connection with, a transaction in which the related party receives tax-exempt use property (related tax-exempt use property) will, if the tainted property is subject to an allowance for depreciation, be treated in the same manner as the related tax-exempt use property for purposes of determining the allowable depreciation deduction under section 167(a). Under this paragraph (b), the tainted property is depreciated by the taxpayer over the remaining recovery period of, and using the same depreciation method and convention as that of, the related tax-exempt use property.

(2) *Limitations*—(i) *Taxpayer's basis in related tax-exempt use property.* The rules of this paragraph (b) apply only with respect to so much of the taxpayer's basis in the tainted property as does not exceed the taxpayer's adjusted basis in the related tax-exempt use property prior to the transfer. Any excess of the taxpayer's basis in the tainted property over its adjusted basis in the related tax-exempt use property prior to the transfer is treated as property to which this section does not apply. This paragraph (b)(2)(i) does not apply if the related tax-exempt use property is not acquired from the taxpayer (e.g., if the taxpayer acquires the tainted property for cash but section 1031 nevertheless applies to the related party because the transfer involves a qualified intermediary).

(ii) *Application of section 168(i)(7).* This section does not apply to so much of the taxpayer's basis in the tainted property as is subject to section 168(i)(7).

(c) *Related tax-exempt use property.* (1) For purposes of paragraph (b) of this section, related tax-exempt use property includes—

(i) Property that is tax-exempt use property (as defined in section 168(h)) at the time of the transfer; and

(ii) Property that does not become tax-exempt use property until after the transfer if, at the time of the transfer, it was intended that the property become tax-exempt use property.

(2) For purposes of determining the remaining recovery period of the related tax-exempt use property in the circumstances described in paragraph (c)(1)(ii) of this section, the related tax-exempt use property will be treated as having, prior to the transfer, a lease term equal to the term of any lease that causes such property to become tax-exempt use property.

(d) *Examples.* The following examples illustrate the application of this section. The examples do not address common law doctrines or other authorities that may apply to recharacterize or alter the effects of the transactions described therein. Unless otherwise indicated, parties to the transactions are not related to one another.

Example 1. (i) X owns all of the stock of two subsidiaries, B and Z. X, B and Z do not file a consolidated federal income tax return. On May 5, 1995, B purchases an aircraft (*FA*) for $1 million and leases it to a foreign airline whose income is not subject to United States taxation and which is a tax-exempt entity as defined in section 168(h)(2). On the same date, Z owns an aircraft (*DA*) with a fair market value of $1 million, which has been, and continues to be, leased to an airline that is a United States taxpayer. Z's adjusted basis in DA is $0. The next day, at a time when each aircraft is still worth $1 million, B transfers FA to Z (subject to the lease to the foreign airline) in exchange for DA (subject to the lease to the airline that is a United States taxpayer). Z realizes gain of $1 million on the exchange, but that gain is not recognized pursuant to section 1031(a) because the exchange is of like-kind properties. Assume that a principal purpose of the transfer of DA to B or of FA to Z is to avoid the application of the alternative depreciation system. Following the exchange, Z has a $0 basis in FA pursuant to section 1031(d). B has a $1 million basis in DA.

(ii) B has acquired property from Z, a related person; Z's gain is not recognized pursuant to section 1031(a); Z has received tax-exempt use property as part of the transaction; and a principal purpose of the transfer of DA to B or of FA to Z is to avoid the application of the alternative depreciation system. Accordingly, the transaction is within the scope of this section. Pursuant to paragraph (b) of this section, B must recover its $1 million basis in DA over the remaining recovery period of, and using the same depreciation method and convention as that of, FA, the related tax-exempt use property.

(iii) If FA did not become tax-exempt use property until after the exchange, it would still be related tax-exempt use property and paragraph (b) of this section would apply if, at the time of the exchange, it was intended that FA become tax-exempt use property.

Example 2. (i) X owns all of the stock of two subsidiaries, B and Z. X, B and Z do not file a consolidated federal income tax return. B and Z each own identical aircraft. B's aircraft (*FA*) is leased to a tax-exempt entity as defined in section 168(h)(2) and has a fair market value of $1 million and an adjusted basis of $500,000. Z's aircraft (*DA*) is leased to a United States taxpayer and has a fair market value of $1 million and an adjusted basis of $10,000. On May 1, 1995, B and Z exchange aircraft, subject to their respective leases. B realizes gain of $500,000 and Z realizes gain of $990,000, but neither person recognizes gain because of the operation of section 1031(a). Moreover, assume that a principal purpose of the transfer of DA to B or of FA to Z is to avoid the application of the alternative depreciation system.

(ii) As in *Example 1*, B has acquired property from Z, a related person; Z's gain is not recognized pursuant to section 1031(a); Z has received tax-exempt use property as part of the transaction; and a principal purpose of the transfer of DA to B or of FA to Z is to avoid the application of the alternative depreciation system. Thus, the transaction is within the scope of this section even though B has held tax-exempt use property for a period of time and, during that time, has used the alternative depreciation system with respect to such property. Pursuant to paragraph (b) of this section, B, which has a substituted basis determined pursuant to section 1031(d) of $500,000 in DA, must depreciate the aircraft over the remaining recovery period of FA, using the same depreciation method and convention. Z holds tax-exempt use property with a basis of $10,000, which must be depreciated under the alternative depreciation system.

(iii) Assume the same facts as in paragraph (i) of this *Example 2*, except that B and Z are members of an affiliated group that files a consolidated federal income tax return. Of B's $500,000 basis in DA, $10,000 is subject to section 168(i)(7) and therefore not subject to this section. The remaining $490,000 of basis is subject to this section. But see §1.1502–80(f) making section 1031 inapplicable to intercompany transactions occurring in consolidated return years beginning on or after July 12, 1995.

(e) *Effective date.* This section applies to transfers made on or after April 20, 1995.

[T.D. 8667, 61 FR 18676, Apr. 29, 1996]

§1.168(i)–0 Table of contents for the general asset account rules.

This section lists the major paragraphs contained in §1.168(i)–1.

[T.D. 8566, 59 FR 51371, Oct. 11, 1994, as amended by T.D. 9115, 69 FR 9534, Mar. 1, 2004; T.D. 9132, 69 FR 33842, June 17, 2004; T.D. 9314, 72 FR 9249, Mar. 1, 2007; T.D. 9564, 76 FR 81085, Dec. 27, 2011; 77 FR 75016, Dec. 19, 2012]

§ 1.168(i)–0T Table of contents for the general asset account rules (temporary).

This section lists the major paragraphs contained in §1.168(i)–1T.

§ 1.168(i)–1T General asset accounts (temporary).

[T.D. 9564, 76 FR 81086, Dec. 27, 2011]

§ 1.168(i)–1 General asset accounts.

(a) through (l)(1) [Reserved] For further guidance, see §1.168(i)–1T(a) through (l)(1).

(l)(2) *Time for making election.* The election to apply this section shall be made on the taxpayer's timely filed (including extensions) income tax return for the taxable year in which the assets included in the general asset account are placed in service by the taxpayer.

(3) *Manner of making election.* In the year of election, a taxpayer makes the election under this section by typing or legibly printing at the top of the Form 4562, ''GENERAL ASSET ACCOUNT ELECTION MADE UNDER SECTION 168(i)(4),'' or in the manner provided for on Form 4562 and its instructions. The taxpayer shall maintain records (for example, ''General Asset Account #1—all 1995 additions in asset class 00.11 for Salt Lake City, Utah facility'') that identify the assets included in each general asset account, that establish the unadjusted depreciable basis and depreciation reserve of the general asset account, and that reflect the amount realized during the taxable year upon dispositions from each general asset account. (But see section 179(c) and §1.179–5 for the recordkeeping requirements for section 179

property.) The taxpayer's recordkeeping practices should be consistently applied to the general asset accounts. If Form 4562 is revised or renumbered, any reference in this section to that form shall be treated as a reference to the revised or renumbered form.

(m) [Reserved] For further guidance, see §1.168(i)–1T(m).

[T.D. 8566, 59 FR 51371, Oct. 11, 1994; 59 FR 64849, Dec. 16, 1994, as amended by T.D. 9115, 69 FR 9534, Mar. 1, 2004; T.D. 9132, 69 FR 33842, June 17, 2004; T.D. 9314, 72 FR 9249, Mar. 1, 2007; T.D. 9564, 76 FR 81086, Dec. 27, 2011; 77 FR 75016, Dec. 19, 2012]

§ 1.168(i)–1T General asset accounts (temporary).

(a) *Scope.* This section provides rules for general asset accounts under section 168(i)(4). The provisions of this section apply only to assets for which an election has been made under paragraph (l) of this section.

(b) *Definitions.* For purposes of this section, the following definitions apply:

(1) *Unadjusted depreciable basis* has the same meaning given such term in §1.168(b)–1(a)(3).

(2) *Unadjusted depreciable basis of the general asset account* is the sum of the unadjusted depreciable bases of all assets included in the general asset account.

(3) *Adjusted depreciable basis of the general asset account* is the unadjusted depreciable basis of the general asset account less the adjustments to basis described in section 1016(a)(2) and (3).

(4) *Expensed cost* is the amount of any allowable credit or deduction treated as a deduction allowable for depreciation or amortization for purposes of section 1245 (for example, a credit allowable under section 30 or a deduction allowable under section 179, 179A, or 190). Expensed cost does not include any additional first year depreciation deduction.

(5) *Mass assets* is a mass or group of individual items of depreciable assets—

(i) That are not necessarily homogenous;

(ii) Each of which is minor in value relative to the total value of the mass or group;

(iii) Numerous in quantity;

(iv) Usually accounted for only on a total dollar or quantity basis;

(v) With respect to which separate identification is impracticable; and

(vi) Placed in service in the same taxable year.

(6) *Remaining adjusted depreciable basis of the general asset account* is the unadjusted depreciable basis of the general asset account less the amount of the additional first year depreciation deduction allowed or allowable, whichever is greater, for the general asset account.

(c) *Establishment of general asset accounts*—(1) *Assets eligible for general asset accounts*—(i) *General rules.* Assets that are subject to either the general depreciation system of section 168(a) or the alternative depreciation system of section 168(g) may be accounted for in one or more general asset accounts. An asset is included in a general asset account only to the extent of the asset's unadjusted depreciable basis. However, an asset is not to be included in a general asset account if the asset is used both in a trade or business (or for the production of income) and in a personal activity at any time during the taxable year in which the asset is placed in service by the taxpayer or if the asset is placed in service and disposed of during the same taxable year.

(ii) *Special rules for assets generating foreign source income.* (A) Assets that generate foreign source income, both United States and foreign source income, or combined gross income of a FSC (as defined in former section 922), DISC (as defined in section 992(a)), or possessions corporation (as defined in section 936) and its related supplier, may be included in a general asset account if the requirements of paragraph (c)(2)(i) of this section are satisfied. If, however, the inclusion of these assets in a general asset account results in a substantial distortion of income, the Commissioner may disregard the general asset account election and make any reallocations of income or expense necessary to clearly reflect income.

(B) A general asset account shall be treated as a single asset for purposes of applying the rules in §1.861–9T(g)(3) (relating to allocation and apportionment of interest expense under the asset method). A general asset account that generates income in more than one grouping of income (statutory and residual) is a multiple category asset (as defined in §1.861–9T(g)(3)(ii)), and the income yield from the general asset account must be determined by applying the rules for multiple category assets as if the general asset account were a single asset.

(2) *Grouping assets in general asset accounts*—(i) *General rules.* If a taxpayer makes the election under paragraph (l) of this section, assets that are subject to the election are grouped into one or more general asset accounts. Assets that are eligible to be grouped into a single general asset account may be divided into more than one general asset account. Each general asset account must include only assets that—

(A) Have the same applicable depreciation method;

(B) Have the same applicable recovery period;

(C) Have the same applicable convention; and

(D) Are placed in service by the taxpayer in the same taxable year.

(ii) *Special rules.* In addition to the general rules in paragraph (c)(2)(i) of this section, the following rules apply when establishing general asset accounts—

(A) Assets subject to the mid-quarter convention may only be grouped into a general asset account with assets that are placed in service in the same quarter of the taxable year;

(B) Assets subject to the mid-month convention may only be grouped into a general asset account with assets that are placed in service in the same month of the taxable year;

(C) Passenger automobiles for which the depreciation allowance is limited under section 280F(a) must be grouped into a separate general asset account;

(D) Assets not eligible for any additional first year depreciation deduction (including assets for which the taxpayer elected not to deduct the additional first year depreciation) provided by, for example, section 168(k) through (n), 1400L(b), or 1400N(d), must be grouped into a separate general asset account;

(E) Assets eligible for the additional first year depreciation deduction may only be grouped into a general asset account with assets for which the taxpayer claimed the same percentage of the additional first year depreciation (for example, 30 percent, 50 percent, or 100 percent);

(F) Except for passenger automobiles described in paragraph (c)(2)(ii)(C) of this section, listed property (as defined in section 280F(d)(4)) must be grouped into a separate general asset account;

(G) Assets for which the depreciation allowance for the placed-in-service year is not determined by using an optional depreciation table (for further guidance, see section 8 of Rev. Proc. 87–57, 1987–2 CB 687, 693 (see §601.601(d)(2) of this chapter)) must be grouped into a separate general asset account;

(H) Mass assets that are or will be subject to paragraph (j)(2)(iii) of this section (disposed of or converted mass asset is identified by a mortality dispersion table) must be grouped into a separate general asset account; and

(I) Assets subject to paragraph (h)(3)(iii)(A) of this section (change in use results in a shorter recovery period or a more accelerated depreciation method) for which the depreciation allowance for the year of change (as defined in §1.168(i)–4(a)) is not determined by using an optional depreciation table must be grouped into a separate general asset account.

(3) *Examples.* The following examples illustrate the application of this paragraph (c):

Example 1. In 2012, J, a proprietorship with a calendar year-end, purchases and places in service one item of equipment that costs $550,000. This equipment is section 179 property and also is 5-year property under section 168(e). On its Federal income tax return for 2012, J makes an election under section 179 to expense $500,000 of the equipment's cost and makes an election under paragraph (l) of this section to include the equipment in a general asset account. As a result, the unadjusted depreciable basis of the equipment is $50,000. In accordance with paragraph (c)(1) of this section, J must include only $50,000 of the equipment's cost in the general asset account.

Example 2. The facts are the same as in *Example 1*, except that J also places in service 99 other items of equipment in 2012. On its Federal income tax return for 2012, J does not make an election under section 179 to expense the cost of any of the 100 items of equipment and does make an election under paragraph (l) of this section to include the

100 items of equipment in a general asset account. All of the 100 items of equipment placed in service in 2012 are 5-year property under section 168(e), are not listed property, and are not eligible for any additional first year depreciation deduction. J depreciates its 5-year property placed in service in 2012 using the optional depreciation table that corresponds with the general depreciation system, the 200-percent declining balance method, a 5-year recovery period, and the half-year convention. In accordance with paragraph (c)(2) of this section, J includes all of the 100 items of equipment in one general asset account.

Example 3. The facts are the same as in *Example 2,* except that J decides not to include all of the 100 items of equipment in one general asset account. Instead and in accordance with paragraph (c)(2) of this section, J establishes 100 general asset accounts and includes one item of equipment in each general asset account.

Example 4. K, a calendar-year corporation, is a wholesale distributer. In 2012, K places in service the following properties for use in its wholesale distribution business: computers, automobiles, and forklifts. On its federal income tax return for 2012, K does not make an election under section 179 to expense the cost of any of these items of equipment and does make an election under paragraph (l) of this section to include all of these items of equipment in a general asset account. All of these items are 5-year property under section 168(e) and are not eligible for any additional first year depreciation deduction. The computers are listed property, and the automobiles are listed property and are subject to section 280F(a). K depreciates its 5-year property placed in service in 2012 using the optional depreciation table that corresponds with the general depreciation system, the 200-percent declining balance method, a 5-year recovery period, and the half-year convention. Although the computers, automobiles, and forklifts are 5-year property, K cannot include all of them in one general asset account because the computers and automobiles are listed property. Further, even though the computers and automobiles are listed property, K cannot include them in one general asset account because the automobiles also are subject to section 280F(a). In accordance with paragraph (c)(2) of this section, K establishes three general asset accounts: One for the computers, one for the automobiles, and one for the forklifts.

Example 5. L, a fiscal-year corporation with a taxable year ending June 30, purchases and places in service ten items of new equipment in October 2011, and purchases and places in service five other items of new equipment in February 2012. On its federal income tax return for the taxable year ending June 30, 2012, L does not make an election under section 179 to expense the cost of any of these items of equipment and does make an election under paragraph (l) of this section to include all of these items of equipment in a general asset account. All of these items of equipment are 7-year property under section 168(e), are not listed property, and are not property described in section 168(k)(2)(B) or (C). All of the ten items of equipment placed in service in October 2011 are eligible for the 100-percent additional first year depreciation deduction provided by section 168(k)(5). All of the five items of equipment placed in service in February 2012 are eligible for the 50-percent additional first year depreciation deduction provided by section 168(k)(1). L depreciates its 7-year property placed in service for the taxable year ending June 30, 2012, using the optional depreciation table that corresponds with the general depreciation system, the 200-percent declining balance method, a 7-year recovery period, and the half-year convention. Although the 15 items of equipment are depreciated using the same depreciation method, recovery period, and convention, L cannot include all of them in one general asset account because they are eligible for different percentages of the additional first year depreciation deduction. In accordance with paragraph (c)(2) of this section, L establishes two general asset accounts: one for the ten items of equipment eligible for the 100-percent additional first year depreciation deduction, and one for the five items of equipment eligible for the 50-percent additional first year depreciation deduction.

(d) *Determination of depreciation allowance*—(1) *In general.* Depreciation allowances are determined for each general asset account. The depreciation allowances must be recorded in a depreciation reserve account for each general asset account. The allowance for depreciation under this section constitutes the amount of depreciation allowable under section 167(a).

(2) *Assets in general asset account are eligible for additional first year depreciation deduction.* If all the assets in a general asset account are eligible for the additional first year depreciation deduction, the taxpayer first must determine the allowable additional first year depreciation deduction for the general asset account for the placed-in-service year and then must determine the amount otherwise allowable as a depreciation deduction for the general asset account for the placed-in-service year and any subsequent taxable year. The allowable additional first year depreciation deduction for the general asset account for the placed-in-service

year is determined by multiplying the unadjusted depreciable basis of the general asset account by the additional first year depreciation deduction percentage applicable to the assets in the account (for example, 30 percent, 50 percent, or 100 percent). The remaining adjusted depreciable basis of the general asset account then is depreciated using the applicable depreciation method, recovery period, and convention for the assets in the account.

(3) *No assets in general asset account are eligible for additional first year depreciation deduction.* If none of the assets in a general asset account are eligible for the additional first year depreciation deduction, the taxpayer must determine the allowable depreciation deduction for the general asset account for the placed-in-service year and any subsequent taxable year by using the applicable depreciation method, recovery period, and convention for the assets in the account.

(4) *Special rule for passenger automobiles.* For purposes of applying section 280F(a), the depreciation allowance for a general asset account established for passenger automobiles is limited for each taxable year to the amount prescribed in section 280F(a) multiplied by the excess of the number of automobiles originally included in the account over the number of automobiles disposed of during the taxable year or in any prior taxable year in a transaction described in paragraphs (e)(3)(iii) (disposition of an asset in a qualifying disposition), (e)(3)(iv) (transactions subject to section 168(i)(7)), (e)(3)(v) (transactions subject to section 1031 or 1033), (e)(3)(vi) (technical termination of a partnership), (e)(3)(vii) (anti-abuse rule), (g) (assets subject to recapture), (h)(1) (conversion to personal use), or (h)(2) (business or income-producing use percentage changes) of this section.

(e) *Disposition of an asset from a general asset account*—(1) *Scope.* This paragraph (e) provides rules applicable to dispositions of assets included in a general asset account. For purposes of this paragraph (e), an asset in a general asset account is disposed of when ownership of the asset is transferred or when the asset is permanently withdrawn from use either in the taxpayer's trade or business or in the production of income. A disposition includes the sale, exchange, retirement, physical abandonment, or destruction of an asset. A disposition also occurs when an asset is transferred to a supplies, scrap, or similar account. A disposition also includes the retirement of a structural component (as defined in §1.48–1(e)(2)) of a building (as defined in §1.48–1(e)(1)).

(2) *General rules for a disposition*—(i) *No immediate recovery of basis.* Except as provided in paragraph (e)(3) of this section, immediately before a disposition of any asset in a general asset account, the asset is treated as having an adjusted depreciable basis (as defined in §1.168(b)–1(a)(4)) of zero for purposes of section 1011. Therefore, no loss is realized upon the disposition of an asset from the general asset account. Similarly, where an asset is disposed of by transfer to a supplies, scrap, or similar account, the basis of the asset in the supplies, scrap, or similar account will be zero.

(ii) *Treatment of amount realized.* Any amount realized on a disposition is recognized as ordinary income (notwithstanding any other provision of subtitle A of the Internal Revenue Code) to the extent the sum of the unadjusted depreciable basis of the general asset account and any expensed cost (as defined in paragraph (b)(4) of this section) for assets in the account exceeds any amounts previously recognized as ordinary income upon the disposition of other assets in the account. The recognition and character of any excess amount realized are determined under other applicable provisions of the Internal Revenue Code (other than sections 1245 and 1250 or provisions of the Internal Revenue Code that treat gain on a disposition as subject to section 1245 or 1250).

(iii) *Effect of disposition on a general asset account.* The unadjusted depreciable basis and the depreciation reserve of the general asset account are not affected as a result of a disposition of an asset from the general asset account.

(iv) *Coordination with nonrecognition provisions.* For purposes of determining the basis of an asset acquired in a transaction, other than a transaction described in paragraphs (e)(3)(iv) (pertaining to transactions subject to section 168(i)(7)), (e)(3)(v) (pertaining to transactions subject to section 1031 or 1033), and (e)(3)(vi) (pertaining to technical terminations of partnerships) of this section, to which a nonrecognition section of the Internal Revenue Code applies (determined without regard to this section), the amount of ordinary income recognized under this paragraph (e)(2) is treated as the amount of gain recognized on the disposition.

(v) *Manner of disposition.* The manner of disposition of an asset in a general asset account (for example, normal retirement, abnormal retirement, ordinary retirement, or extraordinary retirement) is not taken into account in determining whether a disposition occurs or gain or loss is recognized.

(vi) *Disposition by transfer to a supplies account.* If a taxpayer made an election under §1.162–3T(d) to treat the cost of any material and supply as a capital expenditure subject to the allowance for depreciation and also made an election under paragraph (l) of this section to include that material and supply in a general asset account, the taxpayer can dispose of the material and supply by transferring it to a supplies account only if the taxpayer has obtained the consent of the Commissioner to revoke the §1.162–3T(d) election. See §1.162–3T(d)(3) for the procedures for revoking a §1.162–3T(d) election.

(vii) *Leasehold improvements.* The rules of paragraph (e) of this section also apply to—

(A) A lessor of leased property that made an improvement to that property for the lessee of the property, has a depreciable basis in the improvement, made an election under paragraph (l) of this section to include the improvement in a general asset account, and disposes of the improvement before or upon the termination of the lease with the lessee. *See* section 168(i)(8)(B); and

(B) A lessee of leased property that made an improvement to that property, has a depreciable basis in the improvement, made an election under paragraph (l) of this section to include the improvement in a general asset account, and disposes of the improvement before or upon the termination of the lease.

(viii) *Determination of asset disposed of*—(A) *In general.* For purposes of applying paragraph (e) of this section to the disposition of an asset in a general asset account (instead of the disposition of the general asset account), the facts and circumstances of each disposition are considered in determining what is the appropriate asset disposed of. Except as provided in paragraph (e)(2)(viii)(B) of this section, the asset cannot be larger than the unit of property as determined under §1.263(a)–3T(e)(2), (e)(3), and (e)(5) or as otherwise determined in published guidance in the FEDERAL REGISTER or in the Internal Revenue Bulletin (see, for example, Rev. Proc. 2011–38, 2011–18 IRB 743, for units of property for wireless network assets (see §601.601(d)(2)(ii)(*b*) of this chapter)).

(B) *Exceptions.* For purposes of applying paragraph (e) of this section to the disposition of an asset in a general asset account (instead of the disposition of the general asset account):

(*1*) Each building (not including its structural components) is the asset except as provided in §1.1250–1(a)(2)(ii) or in paragraph (e)(2)(viii)(B)(*2*) or (*5*) of this section.

(*2*) If a building has two or more condominium or cooperative units, each condominium or cooperative unit (not including its structural components) is the asset except as provided in §1.1250–1(a)(2)(ii) or in paragraph (e)(2)(viii)(B)(*5*) of this section.

(*3*) Each structural component (including all components thereof) of a building, condominium unit, or cooperative unit is the asset.

(*4*) If a taxpayer properly includes an item in one of the asset classes 00.11 through 00.4 of Rev. Proc. 87–56 (1987–2 CB 674) (see §601.601(d)(2)(ii)(*b*) of this chapter) or properly classifies an item in one of the categories under section 168(e)(3) (except for a category that includes buildings or structural components; for example, retail motor fuels outlet, qualified leasehold improvement property, qualified restaurant property, and qualified retail improvement property), each item is the asset provided it is not larger than the unit of property as determined under §1.263(a)–3T(e)(3) or (e)(5) or as otherwise determined in published guidance in the FEDERAL REGISTER or in the Internal Revenue Bulletin (see §601.601(d)(2)(ii)(*b*) of this chapter), or provided paragraph (e)(2)(viii)(B)(*5*) of this section does not apply to the item. For example, each desk is the asset, each computer is the asset, and each qualified smart electric meter is the asset (assuming these assets are not larger than the unit of property as determined under §1.263(a)–3T(e)(3) or (e)(5) or as otherwise determined in published guidance in the FEDERAL REGISTER or in the Internal Revenue Bulletin (see §601.601(d)(2)(ii)(*b*) of this chapter)).

(*5*) If the taxpayer places in service an improvement or addition to an asset after the taxpayer placed the asset in service, the improvement or addition is a separate asset provided it is not larger than the unit of property as determined under §1.263(a)–3T(e)(3) or (e)(5) or as otherwise determined in published guidance in the FEDERAL REGISTER or in the Internal Revenue Bulletin (see §601.601(d)(2)(ii)(*b*) of this chapter).

(*6*) If an asset is not described in one of the asset classes 00.11 through 00.4 of Rev. Proc. 87–56 (1987–2 CB 674) (see §601.601(d)(2)(ii)(*b*) of this chapter) or in one of the categories under section 168(e)(3), a taxpayer also may use any reasonable, consistent method to treat each of the asset's components as the asset.

(ix) *Examples*. The following examples illustrate the application of this paragraph (e)(2):

Example 1. A, a calendar-year partnership, maintains one general asset account for one office building that cost $10 million. A discovers a leak in the roof of this building and, after consulting with a contractor, decides to replace the entire roof. The retirement of the roof, which is a structural component of the building, is a disposition under paragraph (e)(1) of this section. However, this roof has an unadjusted depreciable basis of zero pursuant to paragraph (e)(2)(i) of this section. Accordingly, A does not recognize any loss upon the retirement of the roof. Instead, the unadjusted depreciable basis of the general asset account for the office building is not affected by the retirement of the roof and, as a result, A continues to depreciate the $10 million cost of this general asset account.

Example 2. B, a calendar-year commercial airline company, maintains one general asset account for five aircrafts that cost a total of $500 million. B replaces the existing engines on one of the aircrafts with new engines and treats each engine of an aircraft as a major component of the aircraft. Assume each aircraft is a unit of property as determined under §1.263(a)–3T(e)(3). However, for disposition purposes of general asset accounts, B consistently treats each major component of an aircraft as the asset. Thus, the retirement of these replaced engines is a disposition under paragraph (e)(1) of this section. However, the engines have an unadjusted depreciable basis of zero pursuant to paragraph (e)(2)(i) of this section. Accordingly, B does not recognize any loss upon the retirement of the engines. Instead, the unadjusted depreciable basis of the general asset account for the five aircrafts is not affected by the retirement of the engines and, as a result, B continues to depreciate the $500 million cost of this general asset account.

Example 3. (i) R, a calendar-year corporation, maintains one general asset account for ten machines. The machines cost a total of $10,000 and are placed in service in June 2012. Of the ten machines, one machine costs $8,200 and nine machines cost a total of $1,800. Assume R depreciates this general asset account using the optional depreciation table that corresponds with the general depreciation system, the 200-percent declining balance method, a 5-year recovery period, and a half-year convention. R does not make a section 179 election for any of the machines, and all of the machines are not eligible for any additional first year depreciation deduction. As of January 1, 2013, the depreciation reserve of the account is $2,000 [$10,000 × 20 percent].

(ii) On February 8, 2013, R sells the machine that cost $8,200 to an unrelated party for $9,000. Under paragraph (e)(2)(i) of this section, this machine has an adjusted depreciable basis of zero.

(iii) On its 2013 tax return, R recognizes the amount realized of $9,000 as ordinary income because such amount does not exceed the unadjusted depreciable basis of the general asset account ($10,000), plus any expensed cost for assets in the account ($0), less amounts previously recognized as ordinary income ($0). Moreover, the unadjusted depreciable basis and depreciation reserve of the account are not affected by the disposition of the machine. Thus, the depreciation allowance for the account in 2013 is $3,200 ($10,000 × 32 percent).

Example 4. (i) The facts are the same as in *Example 3*. In addition, on June 4, 2014, R sells seven machines to an unrelated party for a total of $1,100. In accordance with paragraph (e)(2)(i) of this section, these machines have an adjusted depreciable basis of zero.

(ii) On its 2014 tax return, R recognizes $1,000 as ordinary income (the unadjusted depreciable basis of $10,000, plus the expensed cost of $0, less the amount of $9,000 previously recognized as ordinary income). The recognition and character of the excess amount realized of $100 ($1,100 − $1,000) are determined under applicable provisions of the Internal Revenue Code other than section 1245 (such as section 1231). Moreover, the unadjusted depreciable basis and depreciation reserve of the account are not affected by the disposition of the machines. Thus, the depreciation allowance for the account in 2014 is $1,920 ($10,000 × 19.2 percent).

(3) *Special rules*—(i) *In general*. This paragraph (e)(3) provides the rules for terminating general asset account treatment upon certain dispositions. While the rules under paragraphs (e)(3)(ii) and (iii) of this section are optional rules, the rules under paragraphs (e)(3)(iv), (v), (vi), and (vii) of this section are mandatory rules. A taxpayer elects to apply paragraph (e)(3)(ii) or (iii) of this section by reporting the gain, loss, or other deduction on the taxpayer's timely filed original Federal income tax return (including extensions) for the taxable year in which the disposition occurs. A taxpayer may revoke the election to apply paragraph (e)(3)(ii) or (iii) of this section only by filing a request for a private letter ruling and obtaining the Commissioner's consent to revoke the election. The Commissioner may grant a request to revoke this election if the taxpayer can demonstrate good cause for the revocation. The election to apply paragraph (e)(3)(ii) or (iii) of this section may not be made or revoked through the filing of an application for change in accounting method. For purposes of applying paragraph (e)(3)(iii) through (vii) of this section, see paragraph (j) of this section for identifying an asset disposed of and its unadjusted depreciable basis.

(ii) *Disposition of all assets remaining in a general asset account*—(A) *Optional termination of a general asset account*. Upon the disposition of all of the assets, or the last asset, in a general asset account, a taxpayer may apply this paragraph (e)(3)(ii) to recover the adjusted depreciable basis of the general asset account (rather than having paragraph (e)(2) of this section apply). Under this paragraph (e)(3)(ii), the general asset account terminates and the amount of gain or loss for the general asset account is determined under section 1001(a) by taking into account the adjusted depreciable basis of the general asset account at the time of the disposition (as determined under the applicable convention for the general asset account). The recognition and character of the gain or loss are determined under other applicable provisions of the Internal Revenue Code, except that the amount of gain subject to section 1245 (or section 1250) is limited to the excess of the depreciation allowed or allowable for the general asset account, including any expensed cost (or the excess of the additional depreciation allowed or allowable for the general asset account), over any amounts previously recognized as ordinary income under paragraph (e)(2) of this section.

(B) *Examples*. The following examples illustrate the application of this paragraph (e)(3)(ii):

Example 1. (i) T, a calendar-year corporation, maintains a general asset account for 1,000 calculators. The calculators cost a total of $60,000 and are placed in service in 2012. Assume T depreciates this general asset account using the optional depreciation table that corresponds with the general depreciation system, the 200-percent declining balance method, a 5-year recovery period, and a half-year convention. T does not make a section 179 election for any of the calculators, and all of the calculators are not eligible for any additional first year depreciation deduction. In 2013, T sells 200 of the calculators to an unrelated party for a total of $10,000 and recognizes the $10,000 as ordinary income in accordance with paragraph (e)(2) of this section.

(ii) On March 26, 2014, T sells the remaining calculators in the general asset account to an unrelated party for $35,000. T elects to apply paragraph (e)(3)(ii) of this section. As a result, the account terminates and gain or loss is determined for the account.

(iii) On the date of disposition, the adjusted depreciable basis of the account is $23,040 (unadjusted depreciable basis of $60,000 less the depreciation allowed or allowable of $36,960). Thus, in 2014, T recognizes gain of $11,960 (amount realized of $35,000 less the adjusted depreciable basis of $23,040). The gain of $11,960 is subject to section 1245 to the extent of the depreciation allowed or allowable for the account (plus the expensed cost for assets in the account) less the amounts previously recognized as ordinary income ($36,960 + $0 − $10,000 = $26,960). As a result, the entire gain of $11,960 is subject to section 1245.

Example 2. (i) J, a calendar-year corporation, maintains a general asset account for one item of equipment. This equipment costs $2,000 and is placed in service in 2012. Assume J depreciates this general asset account using the optional depreciation table that corresponds with the general depreciation system, the 200-percent declining balance method, a 5-year recovery period, and a half-year convention. J does not make a section 179 election for the equipment, and it is not eligible for any additional first year depreciation deduction. In June 2014, J sells the equipment to an unrelated party for $1,000. J elects to apply paragraph (e)(3)(ii) of this section. As a result, the account terminates and gain or loss is determined for the account.

(ii) On the date of disposition, the adjusted depreciable basis of the account is $768 (unadjusted depreciable basis of $2,000 less the depreciation allowed or allowable of $1,232). Thus, in 2014, J recognizes gain of $232 (amount realized of $1,000 less the adjusted depreciable basis of $768). The gain of $232 is subject to section 1245 to the extent of the depreciation allowed or allowable for the account (plus the expensed cost for assets in the account) less the amounts previously recognized as ordinary income ($1,232 + $0 − $0 = $1,232). As a result, the entire gain of $232 is subject to section 1245.

(iii) *Disposition of an asset in a qualifying disposition*—(A) *Optional determination of the amount of gain, loss, or other deduction.* In the case of a qualifying disposition of an asset (described in paragraph (e)(3)(iii)(B) of this section), a taxpayer may elect to apply this paragraph (e)(3)(iii) (rather than having paragraph (e)(2) of this section apply). Under this paragraph (e)(3)(iii), general asset account treatment for the asset terminates as of the first day of the taxable year in which the qualifying disposition occurs, and the amount of gain, loss, or other deduction for the asset is determined under §1.168(i)–8T by taking into account the asset's adjusted depreciable basis at the time of the disposition. The adjusted depreciable basis of the asset at the time of the disposition (as determined under the applicable convention for the general asset account in which the asset was included) equals the unadjusted depreciable basis of the asset less the depreciation allowed or allowable for the asset, computed by using the depreciation method, recovery period, and convention applicable to the general asset account in which the asset was included and by including the portion of the additional first year depreciation deduction claimed for the general asset account that is attributable to the asset disposed of. The recognition and character of the gain, loss, or other deduction are determined under other applicable provisions of the Internal Revenue Code, except that the amount of gain subject to section 1245 (or section 1250) is limited to the lesser of—

(*1*) The depreciation allowed or allowable for the asset, including any expensed cost (or the additional depreciation allowed or allowable for the asset); or

(*2*) The excess of—

(*i*) The original unadjusted depreciable basis of the general asset account plus, in the case of section 1245 property originally included in the general asset account, any expensed cost; over

(*ii*) The cumulative amounts of gain previously recognized as ordinary income under either paragraph (e)(2) of this section or section 1245 (or section 1250).

(B) *Qualifying dispositions.* A *qualifying disposition* is a disposition that does not involve all the assets, or the last asset, remaining in a general asset account and that is not described in paragraphs (e)(3)(iv) (pertaining to transactions subject to section 168(i)(7)), (v) (pertaining to transactions subject to section 1031 or 1033), (vi) (pertaining to technical terminations of partnerships), or (vii) (anti-abuse rule) of this section.

(C) *Effect of a qualifying disposition on a general asset account.* If the taxpayer elects to apply this paragraph (e)(3)(iii) to a qualifying disposition of an asset, then—

(*1*) The asset is removed from the general asset account as of the first day of the taxable year in which the qualifying disposition occurs. For that taxable year, the taxpayer accounts for the asset in a single asset account in accordance with the rules under §1.168(i)–7T(b);

(*2*) The unadjusted depreciable basis of the general asset account is reduced by the unadjusted depreciable basis of the asset as of the first day of the taxable year in which the disposition occurs;

(*3*) The depreciation reserve of the general asset account is reduced by the depreciation allowed or allowable for the asset as of the end of the taxable year immediately preceding the year of disposition, computed by using the depreciation method, recovery period, and convention applicable to the general asset account in which the asset was included and by including the portion of the additional first year depreciation deduction claimed for the general asset account that is attributable to the asset disposed of; and

(*4*) For purposes of determining the amount of gain realized on subsequent dispositions that is subject to ordinary income treatment under paragraph (e)(2)(ii) of this section, the amount of any expensed cost with respect to the asset is disregarded.

(D) *Example.* The following example illustrates the application of this paragraph (e)(3)(iii):

Example. (i) Z, a calendar-year corporation, maintains one general asset account for 12 machines. Each machine costs $15,000 and is placed in service in 2012. Of the 12 machines, nine machines that cost a total of $135,000 are used in Z's Kentucky plant, and three machines that cost a total of $45,000 are used in Z's Ohio plant. Assume Z depreciates this general asset account using the optional depreciation table that corresponds with the general depreciation system, the 200-percent declining balance method, a 5-year recovery period, and the half-year convention. Z does not make a section 179 election for any of the machines, and all of the machines are not eligible for any additional first year depreciation deduction. As of January 1, 2014, the depreciation reserve for the account is $93,600.

(ii) On May 27, 2014, Z sells its entire manufacturing plant in Ohio to an unrelated party. The sales proceeds allocated to each of the three machines at the Ohio plant is $5,000. Because this transaction is a qualifying disposition under paragraph (e)(3)(iii)(B) of this section, Z elects to apply paragraph (e)(3)(iii) of this section.

(iii) For Z's 2014 return, the depreciation allowance for the account is computed as follows. As of December 31, 2013, the depreciation allowed or allowable for the three machines at the Ohio plant is $23,400. Thus, as of January 1, 2014, the unadjusted depreciable basis of the account is reduced from $180,000 to $135,000 ($180,000 less the unadjusted depreciable basis of $45,000 for the three machines), and the depreciation reserve of the account is decreased from $93,600 to $70,200 ($93,600 less the depreciation allowed or allowable of $23,400 for the three machines as of December 31, 2013). Consequently, the depreciation allowance for the account in 2014 is $25,920 ($135,000 × 19.2 percent).

(iv) For Z's 2014 return, gain or loss for each of the three machines at the Ohio plant is determined as follows. The depreciation allowed or allowable in 2014 for each machine is $1,440 [($15,000 × 19.2 percent)/2]. Thus, the adjusted depreciable basis of each machine under section 1011 is $5,760 (the adjusted depreciable basis of $7,200 removed from the account less the depreciation allowed or allowable of $1,440 in 2014). As a result, the loss recognized in 2014 for each machine is $760 ($5,000 − $5,760), which is subject to section 1231.

(iv) *Transactions subject to section 168(i)(7)*—(A) *In general.* If a taxpayer transfers one or more assets in a general asset account in a transaction described in section 168(i)(7)(B) (pertaining to treatment of transferees in certain nonrecognition transactions), the taxpayer (the transferor) and the transferee must apply this paragraph (e)(3)(iv) to the asset (instead of applying paragraph (e)(2), (e)(3)(ii), or (e)(3)(iii) of this section). The transferee is bound by the transferor's election under paragraph (l) of this section for the portion of the transferee's basis in the asset that does not exceed the transferor's adjusted depreciable basis of the general asset account or the asset, as applicable (as determined under paragraph (e)(3)(iv)(B)(*2*) or (e)(3)(iv)(C)(*2*) of this section, as applicable).

(B) *All assets remaining in general asset account are transferred.* If a taxpayer transfers all the assets, or the last asset, in a general asset account in a transaction described in section 168(i)(7)(B)—

(*1*) The taxpayer (the transferor) must terminate the general asset account on the date of the transfer. The allowable depreciation deduction for the general asset account for the transferor's taxable year in which the section 168(i)(7)(B) transaction occurs is computed by using the depreciation method, recovery period, and convention applicable to the general asset account. This allowable depreciation deduction is allocated between the transferor and the transferee on a monthly basis. This allocation is made in accordance with the rules in § 1.168(d)–1(b)(7)(ii) for allocating the depreciation deduction between the transferor and the transferee;

(*2*) The transferee must establish a new general asset account for all the assets, or the last asset, in the taxable year in which the section 168(i)(7)(B) transaction occurs for the portion of its basis in the assets that does not exceed the transferor's adjusted depreciable basis of the general asset account in which all the assets, or the last asset, were included. The transferor's adjusted depreciable basis of this general asset account is equal to the adjusted depreciable basis of that account as of the beginning of the transferor's taxable year in which the transaction occurs, decreased by the amount of depreciation allocable to the transferor for the year of the transfer (as determined under paragraph (e)(3)(iv)(B)(*1*) of this section). The transferee is treated as the transferor for purposes of computing the allowable depreciation deduction for the new general asset account under section 168. The new general asset account must be established in accordance with the rules in paragraph (c) of this section, except that the unadjusted depreciable bases of all the assets or the last asset, and the greater of the depreciation allowed or allowable for all the assets or the last asset (including the amount of depreciation for the transferred assets that is allocable to the transferor for the year of the transfer), are included in the newly established general asset account. Consequently, this general asset account in the year of the transfer will have a beginning balance for both the unadjusted depreciable basis and the depreciation reserve of the general asset account; and

(*3*) For purposes of section 168 and this section, the transferee treats the portion of its basis in the assets that exceeds the transferor's adjusted depreciable basis of the general asset account in which all the assets, or the last asset, were included (as determined under paragraph (e)(3)(iv)(B)(*2*) of this section) as a separate asset that the transferee placed in service on the date of the transfer. The transferee accounts for this asset under § 1.168(i)–7T or may make an election under paragraph (l) of this section to include the asset in a general asset account.

(C) *Not all assets remaining in general asset account are transferred.* If a taxpayer transfers an asset in a general asset account in a transaction described in section 168(i)(7)(B) and if paragraph (e)(3)(iv)(B) of this section does not apply to this asset—

(*1*) The taxpayer (the transferor) must remove the transferred asset from the general asset account in which the asset is included, as of the first day of the taxable year in which the section 168(i)(7)(B) transaction occurs. In addition, the adjustments to the general asset account described in paragraph (e)(3)(iii)(C)(*2*) through (*4*) of this section must be made. The allowable depreciation deduction for the asset for the transferor's taxable year in which the section 168(i)(7)(B) transaction occurs is computed by using the depreciation method, recovery period, and convention applicable to the general asset account in which the asset was included. This allowable depreciation deduction is allocated between the transferor and the transferee on a monthly basis. This allocation is made in accordance with the rules in § 1.168(d)–1(b)(7)(ii) for allocating the depreciation deduction between the transferor and the transferee;

(*2*) The transferee must establish a new general asset account for the asset in the taxable year in which the section 168(i)(7)(B) transaction occurs for the portion of its basis in the asset that does not exceed the transferor's adjusted depreciable basis of the asset. The transferor's adjusted depreciable basis of this asset is equal to the adjusted depreciable basis of the asset as of the beginning of the transferor's taxable year in which the transaction occurs, decreased by the amount of depreciation allocable to the transferor for the year of the transfer (as determined under paragraph (e)(3)(iv)(C)(*1*) of this section). The transferee is treated as the transferor for purposes of computing the allowable depreciation deduction for the new general asset account under section 168. The new general asset account must be established in accordance with the rules in paragraph (c) of this section, except that the unadjusted depreciable basis of the asset, and the greater of the depreciation allowed or allowable for the asset (including the amount of depreciation for the transferred asset that is allocable to the transferor for the year of the transfer), are included in the newly established general asset account. Consequently, this general asset account in the year of the transfer will have a beginning balance for both the unadjusted depreciable basis and the depreciation reserve of the general asset account; and

(*3*) For purposes of section 168 and this section, the transferee treats the portion of its basis in the asset that exceeds the transferor's adjusted depreciable basis of the asset (as determined under paragraph (e)(3)(iv)(C)(*2*) of this section) as a separate asset that the transferee placed in service on the date of the transfer. The transferee accounts for this asset under §1.168(i)–7T or may make an election under paragraph (l) of this section to include the asset in a general asset account.

(v) *Transactions subject to section 1031 or section 1033*—(A) *Like-kind exchange or involuntary conversion of all assets remaining in a general asset account.* If all the assets, or the last asset, in a general asset account are transferred by a taxpayer in a like-kind exchange (as defined under §1.168–6(b)(11)) or in an involuntary conversion (as defined under §1.168–6(b)(12)), the taxpayer must apply this paragraph (e)(3)(v)(A) (instead of applying paragraph (e)(2), (e)(3)(ii), or (e)(3)(iii) of this section). Under this paragraph (e)(3)(v)(A), the general asset account terminates as of the first day of the year of disposition (as defined in §1.168(i)–6(b)(5)) and—

(*1*) The amount of gain or loss for the general asset account is determined under section 1001(a) by taking into account the adjusted depreciable basis of the general asset account at the time of disposition (as defined in §1.168(i)–6(b)(3)). The depreciation allowance for the general asset account in the year of disposition is determined in the same manner as the depreciation allowance for the relinquished MACRS property (as defined in §1.168(i)–6(b)(2)) in the year of disposition is determined under §1.168(i)–6. The recognition and character of gain or loss are determined in accordance with paragraph (e)(3)(ii)(A) of this section (notwithstanding that paragraph (e)(3)(ii) of this section is an optional rule); and

(*2*) The adjusted depreciable basis of the general asset account at the time of disposition is treated as the adjusted depreciable basis of the relinquished MACRS property.

(B) *Like-kind exchange or involuntary conversion of less than all assets remaining in a general asset account.* If an asset in a general asset account is transferred by a taxpayer in a like-kind exchange or in an involuntary conversion and if paragraph (e)(3)(v)(A) of this section does not apply to this asset, the taxpayer must apply this paragraph (e)(3)(v)(B) (instead of applying paragraph (e)(2), (e)(3)(ii), or (e)(3)(iii) of this section). Under this paragraph (e)(3)(v)(B), general asset account treatment for the asset terminates as of the first day of the year of disposition (as defined in §1.168(i)–6(b)(5)), and—

(*1*) The amount of gain or loss for the asset is determined by taking into account the asset's adjusted depreciable basis at the time of disposition (as defined in §1.168(i)–6(b)(3)). The adjusted depreciable basis of the asset at the time of disposition equals the unadjusted depreciable basis of the asset less the depreciation allowed or allowable for the asset, computed by using the depreciation method, recovery period, and convention applicable to the general asset account in which the asset was included and by including the portion of the additional first year depreciation deduction claimed for the general asset account that is attributable to the relinquished asset. The depreciation allowance for the asset in the year of disposition is determined in the same manner as the depreciation allowance for the relinquished MACRS property (as defined in §1.168(i)–6(b)(2)) in the year of disposition is determined under §1.168(i)–6. The recognition and character of the gain or loss are determined in accordance with paragraph (e)(3)(iii)(A) of this section (notwithstanding that paragraph (e)(3)(iii) of this section is an optional rule); and

(*2*) As of the first day of the year of disposition, the taxpayer must remove the relinquished asset from the general asset account and make the adjustments to the general asset account described in paragraph (e)(3)(iii)(C)(*2*) through (*4*) of this section.

(vi) *Technical termination of a partnership.* In the case of a technical termination of a partnership under section 708(b)(1)(B), the terminated partnership must apply this paragraph (e)(3)(vi) (instead of applying paragraph (e)(2), (e)(3)(ii), or (e)(3)(iii) of this section). Under this paragraph (e)(3)(vi), all of the terminated partnership's general asset accounts terminate as of the date of its termination under section 708(b)(1)(B). The terminated partnership computes the allowable depreciation deduction for each of its general asset accounts for the taxable year in which the technical termination occurs by using the depreciation method, recovery period, and convention applicable to the general asset account. The new partnership is not bound by the terminated partnership's election under paragraph (l) of this section.

(vii) *Anti-abuse rule*—(A) *In general.* If an asset in a general asset account is disposed of by a taxpayer in a transaction described in paragraph (e)(3)(vii)(B) of this section, general asset account treatment for the asset terminates as of the first day of the taxable year in which the disposition occurs. Consequently, the taxpayer must determine the amount of gain, loss, or other deduction attributable to the disposition in the manner described in paragraph (e)(3)(iii)(A) of this section (notwithstanding that paragraph (e)(3)(iii)(A) of this section is an optional rule) and must make the adjustments to the general asset account described in paragraph (e)(3)(iii)(C)(*1*) through (*4*) of this section.

(B) *Abusive transactions.* A transaction is described in this paragraph (e)(3)(vii)(B) if the transaction is not described in paragraph (e)(3)(iv), (e)(3)(v), or (e)(3)(vi) of this section, and if the transaction is entered into, or made, with a principal purpose of achieving a tax benefit or result that would not be available absent an election under this section. Examples of these types of transactions include—

(*1*) A transaction entered into with a principal purpose of shifting income or deductions among taxpayers in a manner that would not be possible absent an election under this section in order to take advantage of differing effective tax rates among the taxpayers; or

(*2*) An election made under this section with a principal purpose of disposing of an asset from a general asset account in order to utilize an expiring net operating loss or credit if the transaction is not a bona fide disposition. The fact that a taxpayer with a net operating loss carryover or a credit carryover transfers an asset to a related person or transfers an asset pursuant to an arrangement where the asset continues to be used (or is available for use) by the taxpayer pursuant to a lease (or otherwise) indicates, absent strong evidence to the contrary, that the transaction is described in this paragraph (e)(3)(vii)(B).

(f) *Assets generating foreign source income*—(1) *In general.* This paragraph (f) provides the rules for determining the source of any income, gain, or loss recognized, and the appropriate section 904(d) separate limitation category or categories for any foreign source income, gain, or loss recognized on a disposition (within the meaning of paragraph (e)(1) of this section) of an asset in a general asset account that consists of assets generating both United States and foreign source income. These rules apply only to a disposition to which paragraphs (e)(2) (general disposition rules), (e)(3)(ii) (disposition of all assets remaining in a general asset account), (e)(3)(iii) (disposition of an asset in a qualifying disposition), (e)(3)(v) (transactions subject to section 1031 or 1033), or (e)(3)(vii) (anti-abuse rule) of this section applies.

(2) *Source of ordinary income, gain, or loss*—(i) *Source determined by allocation and apportionment of depreciation allowed.* The amount of any ordinary income, gain, or loss that is recognized on the disposition of an asset in a general asset account must be apportioned between United States and foreign

sources based on the allocation and apportionment of the—

(A) Depreciation allowed for the general asset account as of the end of the taxable year in which the disposition occurs if paragraph (e)(2) of this section applies to the disposition;

(B) Depreciation allowed for the general asset account as of the time of disposition if the taxpayer applies paragraph (e)(3)(ii) of this section to the disposition of all assets, or the last asset, in the general asset account, or if all the assets, or the last asset, in the general asset account are disposed of in a transaction described in paragraph (e)(3)(v)(A) of this section; or

(C) Depreciation allowed for the asset disposed of for only the taxable year in which the disposition occurs if the taxpayer applies paragraph (e)(3)(iii) of this section to the disposition of the asset in a qualifying disposition, if the asset is disposed of in a transaction described in paragraph (e)(3)(v)(B) of this section (like-kind exchange or involuntary conversion), or if the asset is disposed of in a transaction described in paragraph (e)(3)(vii) of this section (anti-abuse rule).

(ii) *Formula for determining foreign source income, gain, or loss.* The amount of ordinary income, gain, or loss recognized on the disposition that shall be treated as foreign source income, gain, or loss must be determined under the formula in this paragraph (f)(2)(ii). For purposes of this formula, the allowed depreciation deductions are determined for the applicable time period provided in paragraph (f)(2)(i) of this section. The formula is:

Foreign Source Income, Gain, or Loss from the Disposition of an Asset.	=	Total Ordinary Income, Gain, or Loss from the Disposition of an Asset.	×	Allowed Depreciation Deductions Allocated and Apportioned to Foreign Source Income/Total Allowed Depreciation Deductions for the General Asset Account or for the Asset Disposed of (as applicable).

(3) *Section 904(d) separate categories.* If the assets in the general asset account generate foreign source income in more than one separate category under section 904(d)(1) or another section of the Internal Revenue Code (for example, income treated as foreign source income under section 904(g)(10)), or under a United States income tax treaty that requires the foreign tax credit limitation to be determined separately for specified types of income, the amount of ‘‘foreign source income, gain, or loss from the disposition of an asset’’ (as determined under the formula in paragraph (f)(2)(ii) of this section) must be allocated and apportioned to the applicable separate category or categories under the formula in this paragraph (f)(3). For purposes of this formula, the allowed depreciation deductions are determined for the applicable time period provided in paragraph (f)(2)(i) of this section. The formula is:

Foreign Source Income, Gain, or Loss in a Separate Category.	=	Foreign Source Income, Gain, or Loss from The Disposition of an Asset.	×	Allowed Depreciation Deductions Allocated and Apportioned to a Separate Category Total/Allowed Depreciation Deductions and Apportioned to Foreign Source Income.

(g) *Assets subject to recapture.* If the basis of an asset in a general asset account is increased as a result of the recapture of any allowable credit or deduction (for example, the basis adjustment for the recapture amount under section 30(d)(2), 50(c)(2), 168(l)(7), 168(n)(4), 179(d)(10), 179A(e)(4), or 1400N(d)(5)), general asset account treatment for the asset terminates as of the first day of the taxable year in which the recapture event occurs. Consequently, the taxpayer must remove the asset from the general asset account as of that day and must make the adjustments to the general asset account described in paragraph (e)(3)(iii)(C)(*2*) through (*4*) of this section.

(h) *Changes in use*—(1) *Conversion to personal use.* An asset in a general asset account becomes ineligible for general asset account treatment if a taxpayer uses the asset in a personal activity during a taxable year. Upon a conversion to personal use, the taxpayer must remove the asset from the general asset account as of the first day of the taxable year in which the change in use occurs (the year of change) and must make the adjustments to the general asset account described in paragraph (e)(3)(iii)(C)(*2*) through (*4*) of this section.

(2) *Business or income-producing use percentage changes.* If, after the placed-in-service year, a taxpayer uses an asset in a general asset account both in a trade or business (or for the production of income) and in a personal activity, general asset account treatment for the asset terminates as of the first day of the taxable year in which the business (or income-producing) use percentage decreases. Consequently, the taxpayer must remove the asset from the general asset account as of that day and must make the adjustments to the general asset account described in paragraph (e)(3)(iii)(C)(*2*) through (*4*) of this section.

(3) *Change in use results in a different recovery period or depreciation method*—(i) *No effect on general asset account election.* A change in the use described in §1.168(i)–4(d) (change in use results in a different recovery period or depreciation method) of an asset in a general asset account shall not cause or permit the revocation of the election made under this section.

(ii) *Asset is removed from the general asset account.* Upon a change in the use described in §1.168(i)–4(d), the taxpayer must remove the asset from the general asset account as of the first day of the year of change (as defined in §1.168(i)–4(a)) and must make the adjustments to the general asset account described in paragraphs (e)(3)(iii)(C)(*2*) through (*4*) of this section. If, however, the result of the change in use is described in §1.168(i)–4(d)(3) (change in use results in a shorter recovery period or a more accelerated depreciation method) and the taxpayer elects to treat the asset as though the change in use had not occurred pursuant to §1.168(i)–4(d)(3)(ii), no adjustment is made to the general asset account upon the change in use.

(iii) *New general asset account is established*—(A) *Change in use results in a shorter recovery period or a more accelerated depreciation method.* If the result of the change in use is described in §1.168(i)–4(d)(3) (change in use results in a shorter recovery period or a more accelerated depreciation method) and adjustments to the general asset account are made pursuant to paragraph (h)(3)(ii) of this section, the taxpayer must establish a new general asset account for the asset in the year of change in accordance with the rules in paragraph (c) of this section, except that the adjusted depreciable basis of the asset as of the first day of the year of change is included in the general asset account. For purposes of paragraph (c)(2) of this section, the applicable depreciation method, recovery period, and convention are determined under §1.168(i)–4(d)(3)(i).

(B) *Change in use results in a longer recovery period or a slower depreciation method.* If the result of the change in use is described in §1.168(i)–4(d)(4) (change in use results in a longer recovery period or a slower depreciation method), the taxpayer must establish a separate general asset account for the asset in the year of change in accordance with the rules in paragraph (c) of this section, except that the unadjusted depreciable basis of the asset, and the greater of the depreciation of the asset allowed or allowable in accordance with section 1016(a)(2), as of the first day of the year of change are included in the newly established general asset account. Consequently, this general asset account as of the first day of the year of change will have a beginning balance for both the unadjusted depreciable basis and the depreciation reserve of the general asset account. For purposes of paragraph (c)(2) of this section, the applicable depreciation method, recovery period, and convention are determined under §1.168(i)–4(d)(4)(ii).

(i) *Redetermination of basis.* If, after the placed-in-service year, the unadjusted depreciable basis of an asset in a general asset account is redetermined due to a transaction other than that described in paragraph (g) of this section (for example, due to contingent purchase price or discharge of indebtedness), the taxpayer's election under paragraph (l) of this section for the asset also applies to the increase or decrease in basis resulting from the redetermination. For the taxable year in which the increase or decrease in basis occurs, the taxpayer must establish a new general asset account for the amount of the increase or decrease in basis in accordance with the rules in paragraph (c) of this section. For purposes of paragraph (c)(2) of this section, the applicable recovery period for the increase or decrease in basis is the recovery period of the asset remaining as of the beginning of the taxable year in which the increase or decrease in basis occurs, the applicable depreciation method and applicable convention for the increase or decrease in basis are the same depreciation method and convention applicable to the asset that applies for the taxable year in which the increase or decrease in basis occurs, and the increase or decrease in basis is deemed to be placed in service in the same taxable year as the asset.

(j) *Identification of disposed of or converted asset*—(1) *In general.* The rules of this paragraph (j) apply when an asset in a general asset account is disposed of or converted in a transaction described in paragraphs (e)(3)(iii) (disposition of an asset in a qualifying disposition), (e)(3)(iv)(B) (transactions subject to section 168(i)(7)), (e)(3)(v)(B) (transactions subject to section 1031 or 1033), (e)(3)(vii) (anti-abuse rule), (g) (assets subject to recapture), (h)(1) (conversion to personal use), or (h)(2) (business or income-producing use percentage changes) of this section.

(2) *Identifying which asset is disposed of or converted.* For purposes of identifying which asset in a general asset account is disposed of or converted, a taxpayer must identify the disposed of or converted asset by using—

(i) The specific identification method of accounting. Under this method of accounting, the taxpayer can determine the particular taxable year in which the disposed of or converted asset was placed in service by the taxpayer;

(ii) A first-in, first-out method of accounting if the taxpayer can readily determine from its records the total dispositions of assets with the same recovery period during the taxable year but the taxpayer cannot readily determine from its records the unadjusted depreciable basis of the disposed of or converted asset. Under this method of accounting, the taxpayer identifies the general asset account with the earliest placed-in-service year that has the same recovery period as the disposed of or converted asset and that has assets at the beginning of the taxable year of the disposition or conversion, and the taxpayer treats the disposed of or converted asset as being from that general asset account. To determine which general asset account has assets at the beginning of the taxable year of the disposition or conversion, the taxpayer reduces the number of assets originally included in the account by the number of assets disposed of or converted in any prior taxable year in a transaction to which this paragraph (j) applies;

(iii) A modified first-in, first-out method of accounting if the taxpayer can readily determine from its records the total dispositions of assets with the same recovery period during the taxable year and the unadjusted depreciable basis of the disposed of or converted asset. Under this method of accounting, the taxpayer identifies the general asset account with the earliest placed-in-service year that has the same recovery period as the disposed of or converted asset and that has assets at the beginning of the taxable year of the disposition or conversion with the same unadjusted depreciable basis as the disposed of or converted asset, and the taxpayer treats the disposed of or converted asset as being from that general asset account. To determine which general asset account has assets at the beginning of the taxable year of the disposition or conversion, the taxpayer reduces the number of assets originally included in the account by the number of assets disposed of or converted in any prior taxable year in a transaction to which this paragraph (j) applies;

(iv) A mortality dispersion table if the asset is a mass asset accounted for in a separate general asset account in accordance with paragraph (c)(2)(ii)(H) of this section and if the taxpayer can readily determine from its records the total dispositions of assets with the same recovery period during the taxable year. The mortality dispersion table must be based upon an acceptable sampling of the taxpayer's actual disposition and conversion experience for mass assets or other acceptable statistical or engineering techniques. To use a mortality dispersion table, the taxpayer must adopt recordkeeping practices consistent with the taxpayer's prior practices and consonant with good accounting and engineering practices; or

(v) Any other method as the Secretary may designate by publication in the FEDERAL REGISTER or in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter) on or after December 23, 2011. For this purpose, a last-in, first-out method of accounting is not a designated method. Under the last-in, first-out method of accounting, the taxpayer identifies the general asset account with the most recent placed-in-service year that has the same recovery period as the disposed of or converted asset and that has assets at the beginning of the taxable year of the disposition or conversion, and the taxpayer treats the disposed of or converted asset as being from that general asset account. To determine which general asset account has assets at the beginning of the taxable year of the disposition or conversion, the taxpayer reduces the number of assets originally included in the account by the number of assets disposed of or converted in any prior taxable year in a transaction to which this paragraph (j) applies.

(3) *Basis of disposed of or converted asset.* After identifying which asset in a general asset account is disposed of or converted, the taxpayer may use any reasonable method that is consistently applied to all its general asset accounts for purposes of determining the unadjusted depreciable basis of a disposed of or converted asset.

(k) *Effect of adjustments on prior dispositions.* The adjustments to a general asset account under paragraph (e)(3)(iii), (e)(3)(iv), (e)(3)(v), (e)(3)(vii), (g), or (h) of this section have no effect on the recognition and character of prior dispositions subject to paragraph (e)(2) of this section.

(l) *Election*—(1) *Irrevocable election.* If a taxpayer makes an election under this paragraph (l), the taxpayer consents to, and agrees to apply, all of the provisions of this section to the assets included in a general asset account. Except as provided in paragraph (c)(1)(ii)(A), (e)(3), (g), or (h) of this section, an election made under this section is irrevocable and will be binding on the taxpayer for computing taxable income for the taxable year for which the election is made and for all subsequent taxable years. An election under this paragraph (l) is made separately by each person owning an asset to which this section applies (for example, by each member of a consolidated group, at the partnership level (and not by the partner separately), or at the S corporation level (and not by the shareholder separately)).

(2) [Reserved] For further guidance, see § 1.168(i)–1(l)(2).

(3) [Reserved] For further guidance, see § 1.168(i)–1(l)(3).

(m) *Effective/applicability date*—(1) *In general.* This section applies to taxable years beginning on or after January 1, 2014. Section 1.168(i)–1 as contained in 26 CFR part 1 edition revised as of April 1, 2011, applies to taxable years beginning before January 1, 2014.

(2) *Optional early application.* A taxpayer may choose to apply this section to taxable years beginning on or after January 1, 2012.

(3) *Change in method of accounting.* A change to comply with this section for depreciable assets placed in service in a

taxable year ending on or after December 30, 2003, is a change in method of accounting to which the provisions of section 446(e) and the regulations under section 446(e) apply. A taxpayer also may treat a change to comply with this section for depreciable assets placed in service in a taxable year ending before December 30, 2003, as a change in method of accounting to which the provisions of section 446(e) and the regulations under section 446(e) apply. This paragraph (m)(3) does not apply to a change to comply with paragraph (e)(3)(ii), (e)(3)(iii) or paragraph (l) of this section.

(4) The applicability of this section expires on December 23, 2014.

[T.D. 9564, 76 FR 81086, Dec. 27, 2011; 77 FR 18687, Mar. 28, 2012, as amended at 77 FR 74585, Dec. 17, 2012]

§ 1.168(i)–2 Lease term.

(a) *In general.* For purposes of section 168, a lease term is determined under all the facts and circumstances. Paragraph (b) of this section and § 1.168(j)–1T, Q&A 17, describe certain circumstances that will result in a period of time not included in the stated duration of an original lease (additional period) nevertheless being included in the lease term. These rules do not prevent the inclusion of an additional period in the lease term in other circumstances.

(b) *Lessee retains financial obligation*—(1) *In general.* An additional period of time during which a lessee may not continue to be the lessee will nevertheless be included in the lease term if the lessee (or a related person)—

(i) Has agreed that one or both of them will or could be obligated to make a payment of rent or a payment in the nature of rent with respect to such period; or

(ii) Has assumed or retained any risk of loss with respect to the property for such period (including, for example, by holding a note secured by the property).

(2) *Payments in the nature of rent.* For purposes of paragraph (b)(1)(i) of this section, a payment in the nature of rent includes a payment intended to substitute for rent or to fund or supplement the rental payments of another. For example, a payment in the nature of rent includes a payment of any kind (whether denominated as supplemental rent, as liquidated damages, or otherwise) that is required to be made in the event that—

(i) The leased property is not leased for the additional period;

(ii) The leased property is leased for the additional period under terms that do not satisfy specified terms and conditions;

(iii) There is a failure to make a payment of rent with respect to such additional period; or

(iv) Circumstances similar to those described in paragraph (b)(2) (i), (ii), or (iii) of this section occur.

(3) *De minimis rule.* For the purposes of this paragraph (b), obligations to make de minimis payments will be disregarded.

(c) *Multiple leases or subleases.* If property is subject to more than one lease (including any sublease) entered into as part of a single transaction (or a series of related transactions), the lease term includes all periods described in one or more of such leases. For example, if one taxable corporation leases property to another taxable corporation for a 20-year term and, as part of the same transaction, the lessee subleases the property to a tax-exempt entity for a 10-year term, then the lease term of the property for purposes of section 168 is 20 years. During the period of tax-exempt use, the property must be depreciated under the alternative depreciation system using the straight line method over the greater of its class life or 25 years (125 percent of the 20-year lease term).

(d) *Related person.* For purposes of paragraph (b) of this section, a person is related to the lessee if such person is described in section 168(h)(4).

(e) *Changes in status.* Section 168(i)(5) (changes in status) applies if an additional period is included in a lease term under this section and the leased property ceases to be tax-exempt use property for such additional period.

(f) *Example.* The following example illustrates the principles of this section. The example does not address common law doctrines or other authorities that may apply to cause an additional period to be included in the lease term or to recharacterize a lease as a conditional sale or otherwise for federal income tax purposes. Unless otherwise indicated, parties to the transactions are not related to one another.

Example. Financial obligation with respect to an additional period—(i) *Facts.* X, a taxable corporation, and Y, a foreign airline whose income is not subject to United States taxation, enter into a lease agreement under which X agrees to lease an aircraft to Y for a period of 10 years. The lease agreement provides that, at the end of the lease period, Y is obligated to find a subsequent lessee (replacement lessee) to enter into a subsequent lease (replacement lease) of the aircraft from X for an additional 10-year period. The provisions of the lease agreement require that any replacement lessee be unrelated to Y and that it not be a tax-exempt entity as defined in section 168(h)(2). The provisions of the lease agreement also set forth the basic terms and conditions of the replacement lease, including its duration and the required rental payments. In the event Y fails to secure a replacement lease, the lease agreement requires Y to make a payment to X in an amount determined under the lease agreement.

(ii) *Application of this section.* The lease agreement between X and Y obligates Y to make a payment in the event the aircraft is not leased for the period commencing after the initial 10-year lease period and ending on the date the replacement lease is scheduled to end. Accordingly, pursuant to paragraph (b) of this section, the term of the lease between X and Y includes such additional period, and the lease term is 20 years for purposes of section 168.

(iii) *Facts modified.* Assume the same facts as in paragraph (i) of this *Example,* except that Y is required to guarantee the payment of rentals under the 10-year replacement lease and to make a payment to X equal to the present value of any excess of the replacement lease rental payments specified in the lease agreement between X and Y, over the rental payments actually agreed to be paid by the replacement lessee. Pursuant to paragraph (b) of this section, the term of the lease between X and Y includes the additional period, and the lease term is 20 years for purposes of section 168.

(iv) *Changes in status.* If, upon the conclusion of the stated duration of the lease between X and Y, the aircraft either is returned to X or leased to a replacement lessee that is not a tax-exempt entity as defined in section 168(h)(2), the subsequent method of depreciation will be determined pursuant to section 168(i)(5).

(g) *Effective date*—(1) *In general.* Except as provided in paragraph (g)(2) of this section, this section applies to leases entered into on or after April 20, 1995.

(2) *Special rules.* Paragraphs (b)(1)(ii) and (c) of this section apply to leases entered into after April 26, 1996.

[T.D. 8667, 61 FR 18677, Apr. 29, 1996]

§ 1.168(i)–3 Treatment of excess deferred income tax reserve upon disposition of deregulated public utility property.

(a) *Scope*—(1) *In general.* This section provides rules for the application of section 203(e) of the Tax Reform Act of 1986, Public Law 99–514 (100 Stat. 2146) to a taxpayer with respect to public utility property (within the meaning of section 168(i)(10)) that ceases, whether by disposition, deregulation, or otherwise, to be public utility property with respect to the taxpayer and that is not described in paragraph (a)(2) of this section (deregulated public utility property).

(2) *Exceptions.* This section does not apply to the following property:

(i) Property that ceases to be public utility property with respect to the taxpayer on account of an ordinary retirement within the meaning of § 1.167(a)–11(d)(3)(ii).

(ii) Property transferred by the taxpayer if after the transfer the property is public utility property of the transferee and the taxpayer's excess tax reserve with respect to the property (within the meaning of section 203(e) of the Tax Reform Act of 1986) is treated as an excess tax reserve of the transferee with respect to the property.

(b) *Amount of reduction.* If public utility property of a taxpayer becomes deregulated public utility property to which this section applies, the reduction in the taxpayer's excess tax reserve permitted under section 203(e) of the Tax Reform Act of 1986 is equal to the amount by which the reserve could be reduced under that provision if all such property had remained public utility property of the taxpayer and the taxpayer had continued use of its normalization method of accounting with respect to such property.

(c) *Cross reference.* See § 1.46–6(k) for rules relating to the treatment of accumulated deferred investment tax credits when utilities dispose of regulated public utility property.

(d) *Effective/applicability dates*—(1) *In general*. Except as provided in paragraph (d)(2) of this section, this section applies to public utility property that becomes deregulated public utility property after December 21, 2005.

(2) *Property that becomes public utility property of the transferee*. This section does not apply to property that becomes deregulated public utility property with respect to a taxpayer on account of a transfer on or before March 20, 2008 if after the transfer the property is public utility property of the transferee.

(3) *Application of regulation project (REG–104385–01)*. A reduction in the taxpayer's excess deferred income tax reserve will be treated as ratable if it is consistent with the proposed rules in regulation project (REG–104385–01) (68 FR 10190) March 4, 2003, and occurs during the period beginning on March 5, 2003, and ending on the earlier of—

(i) The last date on which the utility's rates are determined under the rate order in effect on December 21, 2005; or

(ii) December 21, 2007.

[T.D. 9387, 73 FR 14937, Mar. 20, 2008]

§ 1.168(i)–4 Changes in use.

(a) *Scope*. This section provides the rules for determining the depreciation allowance for MACRS property (as defined in § 1.168(b)–1T(a)(2)) for which the use changes in the hands of the same taxpayer (change in the use). The allowance for depreciation under this section constitutes the amount of depreciation allowable under section 167(a) for the year of change and any subsequent taxable year. For purposes of this section, the year of change is the taxable year in which a change in the use occurs.

(b) *Conversion to business or income-producing use*—(1) *Depreciation deduction allowable*. This paragraph (b) applies to property that is converted from personal use to use in a taxpayer's trade or business, or for the production of income, during a taxable year. This conversion includes property that was previously used by the taxpayer for personal purposes, including real property (other than land) that is acquired before 1987 and converted from personal use to business or income-producing use after 1986, and depreciable property that was previously used by a tax-exempt entity before the entity changed to a taxable entity. Except as otherwise provided by the Internal Revenue Code or regulations under the Internal Revenue Code, upon a conversion to business or income-producing use, the depreciation allowance for the year of change and any subsequent taxable year is determined as though the property is placed in service by the taxpayer on the date on which the conversion occurs. Thus, except as otherwise provided by the Internal Revenue Code or regulations under the Internal Revenue Code, the taxpayer must use any applicable depreciation method, recovery period, and convention prescribed under section 168 for the property in the year of change, consistent with any election made under section 168 by the taxpayer for that year (see, for example, section 168(b)(5)). See §§ 1.168(k)–1T(f)(6)(iii) and 1.1400L(b)–1T(f)(6) for the additional first year depreciation deduction rules applicable to a conversion to business or income-producing use. The depreciable basis of the property for the year of change is the lesser of its fair market value or its adjusted depreciable basis (as defined in § 1.168(b)–1T(a)(4)), as applicable, at the time of the conversion to business or income-producing use.

(2) *Example*. The application of this paragraph (b) is illustrated by the following example:

Example. *A*, a calendar-year taxpayer, purchases a house in 1985 that she occupies as her principal residence. In February 2004, *A* ceases to occupy the house and converts it to residential rental property. At the time of the conversion to residential rental property, the house's fair market value (excluding land) is $130,000 and adjusted depreciable basis attributable to the house (excluding land) is $150,000. Pursuant to this paragraph (b), *A* is considered to have placed in service residential rental property in February 2004 with a depreciable basis of $130,000. *A* depreciates the residential rental property under the general depreciation system by using the straight-line method, a 27.5-year recovery period, and the mid-month convention. Pursuant to §§ 1.168(k)–1T(f)(6)(iii)(B) or 1.1400L(b)–1T(f)(6), this property is not eligible for the additional first year depreciation deduction provided by section 168(k) or section 1400L(b). Thus, the depreciation allowance for the house for 2004 is $4,137, after taking into account the mid-month convention (($130,000 adjusted depreciable basis multiplied by the applicable depreciation rate of 3.636% (1/27.5)) multiplied by the mid-month convention fraction of 10.5/12). The amount of depreciation computed under section 168, however, may be limited under other provisions of the Internal Revenue Code, such as, section 280A.

(c) *Conversion to personal use.* The conversion of MACRS property from business or income-producing use to personal use during a taxable year is treated as a disposition of the property in that taxable year. The depreciation allowance for MACRS property for the year of change in which the property is treated as being disposed of is determined by first multiplying the adjusted depreciable basis of the property as of the first day of the year of change by the applicable depreciation rate for that taxable year (for further guidance, for example, see section 6 of Rev. Proc. 87–57 (1987–2 C. B. 687, 692) (see §601.601(d)(2)(ii)(*b*) of this chapter)). This amount is then multiplied by a fraction, the numerator of which is the number of months (including fractions of months) the property is deemed to be placed in service during the year of change (taking into account the applicable convention) and the denominator of which is 12. No depreciation deduction is allowable for MACRS property placed in service and disposed of in the same taxable year. See §§1.168(k)–1T(f)(6)(ii) and 1.1400L(b)–1T(f)(6) for the additional first year depreciation deduction rules applicable to property placed in service and converted to personal use in the same taxable year. Upon the conversion to personal use, no gain, loss, or depreciation recapture under section 1245 or section 1250 is recognized. However, the provisions of section 1245 or section 1250 apply to any disposition of the converted property by the taxpayer at a later date. For listed property (as defined in section 280F(d)(4)), see section 280F(b)(2) for the recapture of excess depreciation upon the conversion to personal use.

(d) *Change in the use results in a different recovery period and/or depreciation method*—(1) *In general.* This paragraph (d) applies to a change in the use of MACRS property during a taxable year subsequent to the placed-in-service year, if the property continues to be MACRS property owned by the same taxpayer and, as a result of the change in the use, has a different recovery period, a different depreciation method, or both. For example, this paragraph (d) applies to MACRS property that—

(i) Begins or ceases to be used predominantly outside the United States;

(ii) Results in a reclassification of the property under section 168(e) due to a change in the use of the property; or

(iii) Begins or ceases to be tax-exempt use property (as defined in section 168(h)).

(2) *Determination of change in the use*—(i) *In general.* Except as provided in paragraph (d)(2)(ii) of this section, a change in the use of MACRS property occurs when the primary use of the MACRS property in the taxable year is different from its primary use in the immediately preceding taxable year. The primary use of MACRS property may be determined in any reasonable manner that is consistently applied to the taxpayer's MACRS property.

(ii) *Alternative depreciation system property*—(A) *Property used within or outside the United States.* A change in the use of MACRS property occurs when a taxpayer begins or ceases to use MACRS property predominantly outside the United States during the taxable year. The determination of whether MACRS property is used predominantly outside the United States is made in accordance with the test in §1.48–1(g)(1)(i) for determining predominant use.

(B) *Tax-exempt bond financed property.* A change in the use of MACRS property occurs when the property changes to tax-exempt bond financed property, as described in section 168(g)(1)(C) and (g)(5), during the taxable year. For purposes of this paragraph (d), MACRS property changes to tax-exempt bond financed property when a tax-exempt bond is first issued after the MACRS property is placed in service. MACRS property continues to be tax-exempt bond financed property in the hands of the taxpayer even if the tax-exempt bond (including any refunding issue) is no longer outstanding or is redeemed.

(C) *Other mandatory alternative depreciation system property.* A change in the use of MACRS property occurs when the property changes to, or changes from, property described in section 168(g)(1)(B) (tax-exempt use property) or (D) (imported property covered by an Executive order) during the taxable year.

(iii) *Change in the use deemed to occur on first day of the year of change.* If a change in the use of MACRS property occurs under this paragraph (d)(2), the depreciation allowance for that MACRS property for the year of change is determined as though the use of the MACRS property changed on the first day of the year of change.

(3) *Change in the use results in a shorter recovery period and/or a more accelerated depreciation method*—(i) *Treated as placed in service in the year of change*—(A) *In general.* If a change in the use results in the MACRS property changing to a shorter recovery period and/or a depreciation method that is more accelerated than the method used for the MACRS property before the change in the use, the depreciation allowances beginning in the year of change are determined as though the MACRS property is placed in service by the taxpayer in the year of change.

(B) *Computation of depreciation allowance.* The depreciation allowances for the MACRS property for any 12-month taxable year beginning with the year of change are determined by multiplying the adjusted depreciable basis of the MACRS property as of the first day of each taxable year by the applicable depreciation rate for each taxable year. In determining the applicable depreciation rate for the year of change and subsequent taxable years, the taxpayer must use any applicable depreciation method and recovery period prescribed under section 168 for the MACRS property in the year of change, consistent with any election made under section 168 by the taxpayer for that year (see, for example, section 168(b)(5)). If there is a change in the use of MACRS property, the applicable convention that applies to the MACRS property is the same as the convention that applied before the change in the use of the MACRS property. However, the depreciation allowance for the year of change for the MACRS property is determined without applying the applicable convention, unless the MACRS property is disposed of during the year of change. See paragraph (d)(5) of this section for the rules relating to the computation of the depreciation allowance under the optional depreciation tables. If the year of change or any subsequent taxable year is less than 12 months, the depreciation allowance determined under this paragraph (d)(3)(i) must be adjusted for a short taxable year (for further guidance, for example, see Rev. Proc. 89–15 (1989–1 C.B. 816) (see §601.601(d)(2)(ii)(*b*) of this chapter)).

(C) *Special rules.* MACRS property affected by this paragraph (d)(3)(i) is not eligible in the year of change for the election provided under section 168(f)(1), 179, or 1400L(f), or for the additional first year depreciation deduction provided in section 168(k) or 1400L(b). See §§1.168(k)–1T(f)(6)(iv) and 1.1400L(b)–1T(f)(6) for other additional first year depreciation deduction rules applicable to a change in the use of MACRS property subsequent to its placed-in-service year. For purposes of determining whether the mid-quarter convention applies to other MACRS property placed in service during the year of change, the unadjusted depreciable basis (as defined in §1.168(b)–1T(a)(3)) or the adjusted depreciable basis of MACRS property affected by this paragraph (d)(3)(i) is not taken into account.

(ii) *Option to disregard the change in the use.* In lieu of applying paragraph (d)(3)(i) of this section, the taxpayer may elect to determine the depreciation allowance as though the change in the use had not occurred. The taxpayer elects this option by claiming on the taxpayer's timely filed (including extensions) Federal income tax return for the year of change the depreciation allowance for the property as though the change in the use had not occurred. See paragraph (g)(2) of this section for the manner for revoking this election.

(4) *Change in the use results in a longer recovery period and/or a slower depreciation method*—(i) *Treated as originally placed in service with longer recovery period and/or slower depreciation method.* If a change in the use results in a longer recovery period and/or a depreciation method for the MACRS property that is less accelerated than the method

used for the MACRS property before the change in the use, the depreciation allowances beginning with the year of change are determined as though the MACRS property had been originally placed in service by the taxpayer with the longer recovery period and/or the slower depreciation method. MACRS property affected by this paragraph (d)(4) is not eligible in the year of change for the election provided under section 168(f)(1), 179, or 1400L(f), or for the additional first year depreciation deduction provided in section 168(k) or 1400L(b). See §§1.168(k)–1T(f)(6)(iv) and 1.1400L(b)–1T(f)(6) for other additional first year depreciation deduction rules applicable to a change in the use of MACRS property subsequent to its placed-in-service year.

(ii) *Computation of the depreciation allowance.* The depreciation allowances for the MACRS property for any 12-month taxable year beginning with the year of change are determined by multiplying the adjusted depreciable basis of the MACRS property as of the first day of each taxable year by the applicable depreciation rate for each taxable year. If there is a change in the use of MACRS property, the applicable convention that applies to the MACRS property is the same as the convention that applied before the change in the use of the MACRS property. If the year of change or any subsequent taxable year is less than 12 months, the depreciation allowance determined under this paragraph (d)(4)(ii) must be adjusted for a short taxable year (for further guidance, for example, see Rev. Proc. 89–15 (1989–1 C.B. 816) (see §601.601(d)(2)(ii)(*b*) of this chapter)). See paragraph (d)(5) of this section for the rules relating to the computation of the depreciation allowance under the optional depreciation tables. In determining the applicable depreciation rate for the year of change and any subsequent taxable year—

(A) The applicable depreciation method is the depreciation method that would apply in the year of change and any subsequent taxable year for the MACRS property had the taxpayer used the longer recovery period and/or the slower depreciation method in the placed-in-service year of the property. If the 200-or 150-percent declining balance method would have applied in the placed-in-service year but the method would have switched to the straight line method in the year of change or any prior taxable year, the applicable depreciation method beginning with the year of change is the straight line method; and

(B) The applicable recovery period is either—

(*1*) The longer recovery period resulting from the change in the use if the applicable depreciation method is the 200-or 150-percent declining balance method (as determined under paragraph (d)(4)(ii)(A) of this section) unless the recovery period did not change as a result of the change in the use, in which case the applicable recovery period is the same recovery period that applied before the change in the use; or

(*2*) The number of years remaining as of the beginning of each taxable year (taking into account the applicable convention) had the taxpayer used the longer recovery period in the placed-in-service year of the property if the applicable depreciation method is the straight line method (as determined under paragraph (d)(4)(ii)(A) of this section) unless the recovery period did not change as a result of the change in the use, in which case the applicable recovery period is the number of years remaining as of the beginning of each taxable year (taking into account the applicable convention) based on the recovery period that applied before the change in the use.

(5) *Using optional depreciation tables*—(i) *Taxpayer not bound by prior use of table.* If a taxpayer used an optional depreciation table for the MACRS property before a change in the use, the taxpayer is not bound to use the appropriate new table for that MACRS property beginning in the year of change (for further guidance, for example, see section 8 of Rev. Proc. 87–57 (1987–2 C.B. 687, 693) (see §601.601(d)(2)(ii)(*b*) of this chapter)). If a taxpayer did not use an optional depreciation table for MACRS property before a change in the use and the change in the use results in a shorter recovery period and/or a more accelerated depreciation method (as described in paragraph (d)(3)(i) of this section), the taxpayer may use the appropriate new table for that MACRS

property beginning in the year of change. If a taxpayer chooses not to use the optional depreciation table, the depreciation allowances for the MACRS property beginning in the year of change are determined under paragraph (d)(3)(i) or (4) of this section, as applicable.

(ii) *Taxpayer chooses to use optional depreciation table after a change in the use.* If a taxpayer chooses to use an optional depreciation table for the MACRS property after a change in the use, the depreciation allowances for the MACRS property for any 12-month taxable year beginning with the year of change are determined as follows:

(A) *Change in the use results in a shorter recovery period and/or a more accelerated depreciation method.* If a change in the use results in a shorter recovery period and/or a more accelerated depreciation method (as described in paragraph (d)(3)(i) of this section), the depreciation allowances for the MACRS property for any 12-month taxable year beginning with the year of change are determined by multiplying the adjusted depreciable basis of the MACRS property as of the first day of the year of change by the annual depreciation rate for each recovery year (expressed as a decimal equivalent) specified in the appropriate optional depreciation table. The appropriate optional depreciation table for the MACRS property is based on the depreciation system, depreciation method, recovery period, and convention applicable to the MACRS property in the year of change as determined under paragraph (d)(3)(i) of this section. The depreciation allowance for the year of change for the MACRS property is determined by taking into account the applicable convention (which is already factored into the optional depreciation tables). If the year of change or any subsequent taxable year is less than 12 months, the depreciation allowance determined under this paragraph (d)(5)(ii)(A) must be adjusted for a short taxable year (for further guidance, for example, see Rev. Proc. 89–15 (1989–1 C.B. 816) (see § 601.601(d)(2)(ii)(*b*) of this chapter)).

(B) *Change in the use results in a longer recovery period and/or a slower depreciation method*—(*1*) *Determination of the appropriate optional depreciation table.* If a change in the use results in a longer recovery period and/or a slower depreciation method (as described in paragraph (d)(4)(i) of this section), the depreciation allowances for the MACRS property for any 12-month taxable year beginning with the year of change are determined by choosing the optional depreciation table that corresponds to the depreciation system, depreciation method, recovery period, and convention that would have applied to the MACRS property in the placed-in-service year had that property been originally placed in service by the taxpayer with the longer recovery period and/or the slower depreciation method. If there is a change in the use of MACRS property, the applicable convention that applies to the MACRS property is the same as the convention that applied before the change in the use of the MACRS property. If the year of change or any subsequent taxable year is less than 12 months, the depreciation allowance determined under this paragraph (d)(5)(ii)(B) must be adjusted for a short taxable year (for further guidance, for example, see Rev. Proc. 89–15 (1989–1 C.B. 816) (see § 601.601(d)(2)(ii)(*b*) of this chapter)).

(*2*) *Computation of the depreciation allowance.* The depreciation allowances for the MACRS property for any 12-month taxable year beginning with the year of change are computed by first determining the appropriate recovery year in the table identified under paragraph (d)(5)(ii)(B)(*1*) of this section. The appropriate recovery year for the year of change is the year that corresponds to the year of change. For example, if the recovery year for the year of change would have been Year 4 in the table that applied before the change in the use of the MACRS property, then the recovery year for the year of change is Year 4 in the table identified under paragraph (d)(5)(ii)(B)(*1*) of this section. Next, the annual depreciation rate (expressed as a decimal equivalent) for each recovery year is multiplied by a transaction coefficient. The transaction coefficient is the formula $(1 / (1-x))$ where x equals the sum of the annual depreciation rates from the table identified under paragraph (d)(5)(ii)(B)(*1*) of this section (expressed as a decimal equivalent) for the taxable years beginning with the placed-in-service year of the MACRS property through the taxable year immediately prior to the year of change. The product of the annual depreciation rate and the transaction coefficient is multiplied by the adjusted depreciable basis of the MACRS property as of the beginning of the year of change.

(6) *Examples.* The application of this paragraph (d) is illustrated by the following examples:

Example 1. Change in the use results in a shorter recovery period and/or a more accelerated depreciation method and optional depreciation table is not used. (i) *X*, a calendar-year corporation, places in service in 1999 equipment at a cost of $100,000 and uses this equipment from 1999 through 2003 primarily in its *A* business. *X* depreciates the equipment for 1999 through 2003 under the general depreciation system as 7-year property by using the 200-percent declining balance method (which switched to the straight-line method in 2003), a 7-year recovery period, and a half-year convention. Beginning in 2004, *X* primarily uses the equipment in its *B* business. As a result, the classification of the equipment under section 168(e) changes from 7-year property to 5-year property and the recovery period of the equipment under the general depreciation system changes from 7 years to 5 years. The depreciation method does not change. On January 1, 2004, the adjusted depreciable basis of the equipment is $22,311. *X* depreciates its 5-year recovery property placed in service in 2004 under the general depreciation system by using the 200-percent declining balance method and a 5-year recovery period. *X* does not use the optional depreciation tables.

(ii) Under paragraph (d)(3)(i) of this section, *X*'s allowable depreciation deduction for the equipment for 2004 and subsequent taxable years is determined as though *X* placed the equipment in service in 2004 for use primarily in its *B* business. The depreciable basis of the equipment as of January 1, 2004, is $22,311 (the adjusted depreciable basis at January 1, 2004). Because *X* does not use the optional depreciation tables, the depreciation allowance for 2004 (the deemed placed-in-service year) for this equipment only is computed without taking into account the half-year convention. Pursuant to paragraph (d)(3)(i)(C) of this section, this equipment is not eligible for the additional first year depreciation deduction provided by section 168(k) or section 1400L(b). Thus, *X*'s allowable depreciation deduction for the equipment for 2004 is $8,924 ($22,311 adjusted depreciable basis at January 1, 2004, multiplied by the applicable depreciation rate of 40% (200/5)). *X*'s allowable depreciation deduction for the equipment for 2005 is $5,355 ($13,387 adjusted depreciable basis at January 1, 2005, multiplied by the applicable depreciation rate of 40% (200/5)).

(iii) Alternatively, under paragraph (d)(3)(ii) of this section, *X* may elect to disregard the change in the use and, as a result, may continue to treat the equipment as though it is used primarily in its *A* business. If the election is made, *X*'s allowable depreciation deduction for the equipment for 2004 is $8,924 ($22,311 adjusted depreciable basis at January 1, 2004, multiplied by the applicable depreciation rate of 40% (1/2.5 years remaining at January 1, 2004)). *X*'s allowable depreciation deduction for the equipment for 2005 is $8,925 ($13,387 adjusted depreciable basis at January 1, 2005, multiplied by the applicable depreciation rate of 66.67% (1/1.5 years remaining at January 1, 2005)).

Example 2. Change in the use results in a shorter recovery period and/or a more accelerated depreciation method and optional depreciation table is used. (i) Same facts as in *Example 1*, except that *X* used the optional depreciation tables for computing depreciation for 1999 through 2003. Pursuant to paragraph (d)(5) of this section, *X* chooses to continue to use the optional depreciation table for the equipment. *X* does not make the election provided in paragraph (d)(3)(ii) of this section to disregard the change in use.

(ii) In accordance with paragraph (d)(5)(ii)(A) of this section, *X* must first identify the appropriate optional depreciation table for the equipment. This table is table 1 in Rev. Proc. 87–57 because the equipment will be depreciated in the year of change (2004) under the general depreciation system using the 200-percent declining balance method, a 5-year recovery period, and the half-year convention (which is the convention that applied to the equipment in 1999). Pursuant to paragraph (d)(3)(i)(C) of this section, this equipment is not eligible for the additional first year depreciation deduction provided by section 168(k) or section 1400L(b). For 2004, *X* multiplies its adjusted depreciable basis in the equipment as of January 1, 2004, of $22,311, by the annual depreciation rate in table 1 for recovery year 1 for a 5-year recovery period (.20), to determine the depreciation allowance of $4,462. For 2005, *X* multiplies its adjusted depreciable basis in the equipment as of January 1, 2004, of $22,311, by the annual depreciation rate in table 1 for recovery year 2 for a 5-year recovery period (.32), to determine the depreciation allowance of $7,140.

Example 3. Change in the use results in a longer recovery period and/or a slower depreciation method. (i) *Y*, a calendar-year corporation, places in service in January 2002, equipment at a cost of $100,000 and uses this equipment in 2002 and 2003 only within the United States. *Y* elects not to deduct the additional first year depreciation under section 168(k). *Y* depreciates the equipment for 2002 and 2003 under the general depreciation system by using the 200-percent declining balance method, a 5-year recovery period, and a half-year convention. Beginning in 2004, *Y* uses the equipment predominantly outside the United States. As a result of this change in the use, the equipment is subject to the alternative depreciation system beginning in 2004. Under the alternative depreciation system, the equipment is depreciated by using the straight line method and a 9-year recovery period. The adjusted depreciable basis of the equipment at January 1, 2004, is $48,000.

(ii) Pursuant to paragraph (d)(4) of this section, *Y*'s allowable depreciation deduction for 2004 and subsequent taxable years is determined as though the equipment had been placed in service in January 2002, as property used predominantly outside the United States. Further, pursuant to paragraph (d)(4)(i) of this section, the equipment is not eligible in 2004 for the additional first year depreciation deduction provided by section 168(k) or section 1400L(b). In determining the applicable depreciation rate for 2004, the applicable depreciation method is the straight line method and the applicable recovery period is 7.5 years, which is the number of years remaining at January 1, 2004, for property placed in service in 2002 with a 9-year recovery period (taking into account the half-year convention). Thus, the depreciation allowance for 2004 is $6,398 ($48,000 adjusted depreciable basis at January 1, 2004, multiplied by the applicable depreciation rate of 13.33% (1/7.5 years)). The depreciation allowance for 2005 is $6,398 ($41,602 adjusted depreciable basis at January 1, 2005, multiplied by the applicable depreciation rate of 15.38% (1/6.5 years remaining at January 1, 2005)).

Example 4. Change in the use results in a longer recovery period and/or a slower depreciation method and optional depreciation table is used—(i) Same facts as in *Example 3*, except that *Y* used the optional depreciation tables for computing depreciation in 2002 and 2003. Pursuant to paragraph (d)(5) of this section, *Y* chooses to continue to use the optional depreciation table for the equipment. Further, pursuant to paragraph (d)(4)(i) of this section, the equipment is not eligible in 2004 for the additional first year depreciation deduction provided by section 168(k) or section 1400L(b).

(ii) In accordance with paragraph (d)(5)(ii)(B) of this section, *Y* must first determine the appropriate optional depreciation table for the equipment pursuant to paragraph (d)(5)(ii)(B)(*1*) of this section. This table is table 8 in Rev. Proc. 87–57, which corresponds to the alternative depreciation system, the straight line method, a 9-year recovery period, and the half-year convention (because *Y* depreciated 5-year property in 2002 using a half-year convention). Next, *Y* must determine the appropriate recovery year in table 8. Because the year of change is 2004, the depreciation allowance for the equipment for 2004 is determined using recovery year 3 of table 8. For 2004, *Y* multiplies its adjusted depreciable basis in the equipment as of January 1, 2004, of $48,000, by the product of the annual depreciation rate in table 8 for recovery year 3 for a 9-year recovery period (.1111) and the transaction coefficient of 1.200 [1/(1 − (.0556 (table 8 for recovery year 1 for a 9-year recovery period) + .1111 (table 8 for recovery year 2 for a 9-year recovery period)))], to determine the depreciation allowance of $6,399. For 2005, *Y* multiplies its adjusted depreciable basis in the equipment as of January 1, 2004, of $48,000, by the product of the annual depreciation rate in table 8 for recovery year 4 for a 9-year recovery period (.1111) and the transaction coefficient (1.200), to determine the depreciation allowance of $6,399.

(e) *Change in the use of MACRS property during the placed-in-service year*—(1) *In general.* Except as provided in paragraph (e)(2) of this section, if a change in the use of MACRS property occurs during the placed-in-service year and the property continues to be MACRS property owned by the same taxpayer, the depreciation allowance for that property for the placed-in-service year is determined by its primary use during that year. The primary use of MACRS property may be determined in any reasonable manner that is consistently applied to the taxpayer's MACRS property. For purposes of this paragraph (e), the determination of whether the mid-quarter convention applies to any MACRS property placed in service during the year of change is made in accordance with §1.168(d)–1.

(2) *Alternative depreciation system property*—(i) *Property used within and outside the United States.* The depreciation allowance for the placed-in-service year for MACRS property that is used within and outside the United States is determined by its predominant use during that year. The determination of whether MACRS property is used predominantly outside the United States during the placed-in-service year shall be made in accordance with the test in §1.48–1(g)(1)(i) for determining predominant use.

(ii) *Tax-exempt bond financed property.* The depreciation allowance for the placed-in-service year for MACRS property that changes to tax-exempt bond financed property, as described in section 168(g)(1)(C) and (g)(5), during that taxable year is determined under the alternative depreciation system. For purposes of this paragraph (e), MACRS property changes to tax-exempt bond financed property when a tax-exempt bond is first issued after the MACRS property is placed in service. MACRS property continues to be tax-exempt bond financed property in the hands of the taxpayer even if the tax-exempt bond (including any refunding issue) is not outstanding at, or is redeemed by, the end of the placed-in-service year.

(iii) *Other mandatory alternative depreciation system property*. The depreciation allowance for the placed-in-service year for MACRS property that changes to, or changes from, property described in section 168(g)(1)(B) (tax-exempt use property) or (D) (imported property covered by an Executive order) during that taxable year is determined under—

(A) The alternative depreciation system if the MACRS property is described in section 168(g)(1)(B) or (D) at the end of the placed-in-service year; or

(B) The general depreciation system if the MACRS property is not described in section 168(g)(1)(B) or (D) at the end of the placed-in-service year, unless other provisions of the Internal Revenue Code or regulations under the Internal Revenue Code require the depreciation allowance for that MACRS property to be determined under the alternative depreciation system (for example, section 168(g)(7)).

(3) *Examples*. The application of this paragraph (e) is illustrated by the following examples:

Example 1. (i) *Z*, a utility and calendar-year corporation, acquires and places in service on January 1, 2004, equipment at a cost of $100,000. *Z* uses this equipment in its combustion turbine production plant for 4 months and then uses the equipment in its steam production plant for the remainder of 2004. *Z*'s combustion turbine production plant assets are classified as 15-year property and are depreciated by *Z* under the general depreciation system using a 15-year recovery period and the 150-percent declining balance method of depreciation. *Z*'s steam production plant assets are classified as 20-year property and are depreciated by *Z* under the general depreciation system using a 20-year recovery period and the 150-percent declining balance method of depreciation. *Z* uses the optional depreciation tables. The equipment is 50-percent bonus depreciation property for purposes of section 168(k).

(ii) Pursuant to this paragraph (e), *Z* must determine depreciation based on the primary use of the equipment during the placed-in-service year. *Z* has consistently determined the primary use of all of its MACRS properties by comparing the number of full months in the taxable year during which a MACRS property is used in one manner with the number of full months in that taxable year during which that MACRS property is used in another manner. Applying this approach, *Z* determines the depreciation allowance for the equipment for 2004 is based on the equipment being classified as 20-year property because the equipment was used by *Z* in its steam production plant for 8 months in 2004. If the half-year convention applies in 2004, the appropriate optional depreciation table is table 1 in Rev. Proc. 87–57, which is the table for MACRS property subject to the general depreciation system, the 150-percent declining balance method, a 20-year recovery period, and the half-year convention. Thus, the depreciation allowance for the equipment for 2004 is $51,875, which is the total of $50,000 for the 50-percent additional first year depreciation deduction allowable (the unadjusted depreciable basis of $100,000 multiplied by .50), plus $1,875 for the 2004 depreciation allowance on the remaining adjusted depreciable basis of $50,000 [(the unadjusted depreciable basis of $100,000 less the additional first year depreciation deduction of $50,000) multiplied by the annual depreciation rate of .0375 in table 1 for recovery year 1 for a 20-year recovery period].

Example 2. *T*, a calendar year corporation, places in service on January 1, 2004, several computers at a total cost of $100,000. *T* uses these computers within the United States for 3 months in 2004 and then moves and uses the computers outside the United States for the remainder of 2004. Pursuant to §1.48–1(g)(1)(i), the computers are considered as used predominantly outside the United States in 2004. As a result, for 2004, the computers are required to be depreciated under the alternative depreciation system of section 168(g) with a recovery period of 5 years pursuant to section 168(g)(3)(C). *T* uses the optional depreciation tables. If the half-year convention applies in 2004, the appropriate optional depreciation table is table 8 in Rev. Proc. 87–57, which is the table for MACRS property subject to the alternative depreciation system, the straight line method, a 5-year recovery period, and the half-year convention. Thus, the depreciation allowance for the computers for 2004 is $10,000, which is equal to the unadjusted depreciable basis of $100,000 multiplied by the annual depreciation rate of .10 in table 8 for recovery year 1 for a 5-year recovery period. Because the computers are required to be depreciated under the alternative depreciation system in their placed-in-service year, pursuant to section 168(k)(2)(C)(i) and §1.168(k)–1T(b)(2)(ii), the computers are not eligible for the additional first year depreciation deduction provided by section 168(k).

(f) *No change in accounting method.* A change in computing the depreciation allowance in the year of change for property subject to this section is not a change in method of accounting under section 446(e). *See* §1.446–1(e)(2)(ii)(*d*)(*3*)(*ii*).

(g) *Effective dates*—(1) *In general.* This section applies to any change in the use of MACRS property in a taxable year ending on or after June 17, 2004. For any change in the use of MACRS property after December 31, 1986, in a taxable year ending before June 17, 2004, the Internal Revenue Service will allow any reasonable method of depreciating the property under section 168 in the year of change and the subsequent taxable years that is consistently applied to any property for which the use changes in the hands of the same taxpayer or the taxpayer may choose, on a property-by-property basis, to apply the provisions of this section.

(2) *Change in method of accounting*—(i) *In general.* If a taxpayer adopted a method of accounting for depreciation due to a change in the use of MACRS property in a taxable year ending on or after December 30, 2003, and the method adopted is not in accordance with the method of accounting for depreciation provided in this section, a change to the method of accounting for depreciation provided in this section is a change in the method of accounting to which the provisions of sections 446(e) and 481 and the regulations under sections 446(e) and 481 apply. Also, a revocation of the election provided in paragraph (d)(3)(ii) of this section to disregard a change in the use is a change in method of accounting to which the provisions of sections 446(e) and 481 and the regulations under sections 446(e) and 481 apply. However, if a taxpayer adopted a method of accounting for depreciation due to a change in the use of MACRS property after December 31, 1986, in a taxable year ending before December 30, 2003, and the method adopted is not in accordance with the method of accounting for depreciation provided in this section, the taxpayer may treat the change to the method of accounting for depreciation provided in this section as a change in method of accounting to which the provisions of sections 446(e) and 481 and the regulations under sections 446(e) and 481 apply.

(ii) *Automatic consent to change method of accounting.* A taxpayer changing its method of accounting in accordance with this paragraph (g)(2) must follow the applicable administrative procedures issued under §1.446–1(e)(3)(ii) for obtaining the Commissioner's automatic consent to a change in method of accounting (for further guidance, for example, *see* Rev. Proc. 2002–9 (2002–1 C.B. 327), (*see* §601.601(d)(2)(ii)(*b*) of this chapter)). Any change in method of accounting made under this paragraph (g)(2) must be made using an adjustment under section 481(a). For purposes of Form 3115, *Application for Change in Accounting Method,* the designated number for the automatic accounting method change authorized by this paragraph (g)(2) is ''88.'' If Form 3115 is revised or renumbered, any reference in this section to that form is treated as a reference to the revised or renumbered form.

[T.D. 9132, 69 FR 33843, June 17, 2004, as amended by T.D. 9307, 71 FR 78068, Dec. 28, 2006]

§ 1.168(i)–5 Table of contents.

This section lists the major paragraphs contained in §1.168(i)–6.

§1.168(i)–6 Like-kind exchanges and involuntary conversions.

[T.D. 9314, 72 FR 9250, Mar. 1, 2007]

§ 1.168(i)–6 Like-kind exchanges and involuntary conversions.

(a) *Scope*. This section provides the rules for determining the depreciation allowance for MACRS property acquired in a like-kind exchange or an involuntary conversion, including a like-kind exchange or an involuntary conversion of MACRS property that is exchanged or replaced with other MACRS property in a transaction between members of the same affiliated group. The allowance for depreciation under this section constitutes the amount of depreciation allowable under section 167(a) for the year of replacement and any subsequent taxable year for the replacement MACRS property and for the year of disposition of the relinquished MACRS property. The provisions of this section apply only to MACRS property to which §1.168(h)–1 (like-kind exchanges of tax-exempt use property) does not apply. Additionally, paragraphs (c) through (f) of this section apply only to MACRS property for which an election under paragraph (i) of this section has not been made.

(b) *Definitions.* For purposes of this section, the following definitions apply:

(1) *Replacement MACRS property* is MACRS property (as defined in §1.168(b)–1(a)(2)) in the hands of the acquiring taxpayer that is acquired for other MACRS property in a like-kind exchange or an involuntary conversion.

(2) *Relinquished MACRS property* is MACRS property that is transferred by the taxpayer in a like-kind exchange, or in an involuntary conversion.

(3) *Time of disposition* is when the disposition of the relinquished MACRS property takes place under the convention, as determined under §1.168(d)–1, that applies to the relinquished MACRS property.

(4) *Time of replacement* is the later of—

(i) When the replacement MACRS property is placed in service under the convention, as determined under this section, that applies to the replacement MACRS property; or

(ii) The time of disposition of the exchanged or involuntarily converted property.

(5) *Year of disposition* is the taxable year that includes the time of disposition.

(6) *Year of replacement* is the taxable year that includes the time of replacement.

(7) *Exchanged basis* is determined after the depreciation deductions for the year of disposition are determined under paragraph (c)(5)(i) of this section and is the lesser of—

(i) The basis in the replacement MACRS property, as determined under section 1031(d) and the regulations under section 1031(d) or section 1033(b) and the regulations under section 1033(b); or

(ii) The adjusted depreciable basis (as defined in §1.168(b)–1(a)(4)) of the relinquished MACRS property.

(8) *Excess basis* is any excess of the basis in the replacement MACRS property, as determined under section 1031(d) and the regulations under section 1031(d) or section 1033(b) and the regulations under section 1033(b), over the exchanged basis as determined under paragraph (b)(7) of this section.

(9) *Depreciable exchanged basis* is the exchanged basis as determined under paragraph (b)(7) of this section reduced by—

(i) The percentage of such basis attributable to the taxpayer's use of property for the taxable year other than in the taxpayer's trade or business (or for the production of income); and

(ii) Any adjustments to basis provided by other provisions of the Internal Revenue Code (Code) and the regulations under the Code (including section 1016(a)(2) and (3), for example, depreciation deductions in the year of replacement allowable under section 168(k) or 1400L(b)).

(10) *Depreciable excess basis* is the excess basis as determined under paragraph (b)(8) of this section reduced by—

(i) The percentage of such basis attributable to the taxpayer's use of property for the taxable year other than in the taxpayer's trade or business (or for the production of income);

(ii) Any portion of the basis the taxpayer properly elects to treat as an expense under section 179; and

(iii) Any adjustments to basis provided by other provisions of the Code and the regulations under the Code (including section 1016(a)(2) and (3), for example, depreciation deductions in the year of replacement allowable under section 168(k) or 1400L(b)).

(11) *Like-kind exchange* is an exchange of property in a transaction to which section 1031(a)(1), (b), or (c) applies.

(12) *Involuntary conversion* is a transaction described in section 1033(a)(1) or (2) that resulted in the nonrecognition of any part of the gain realized as the result of the conversion.

(c) *Determination of depreciation allowance*—(1) *Computation of the depreciation allowance for depreciable exchanged basis beginning in the year of replacement*—(i) *In general.* This paragraph (c) provides rules for determining the applicable recovery period, the applicable depreciation method, and the applicable convention used to determine the depreciation allowances for the depreciable exchanged basis beginning in the year of replacement. See paragraph (c)(5) of this section for rules relating to the computation of the depreciation allowance for the year of disposition and for the year of replacement. See paragraph (d)(1) of this section for rules relating to the computation of the depreciation allowance for depreciable excess basis. See paragraph (d)(4) of this section if the replacement MACRS property is acquired before disposition of the relinquished MACRS property in a transaction to which section 1033 applies. See paragraph (e) of this section for rules relating to the computation of the depreciation allowance using the optional depreciation tables.

(ii) *Applicable recovery period, depreciation method, and convention.* The recovery period, depreciation method, and convention determined under this paragraph (c) are the only permissible methods of accounting for MACRS property within the scope of this section unless the taxpayer makes the election under paragraph (i) of this section not to apply this section.

(2) *Effect of depreciation treatment of the replacement MACRS property by previous owners of the acquired property.* If replacement MACRS property is acquired by a taxpayer in a like-kind exchange or an involuntary conversion, the depreciation treatment of the replacement MACRS property by previous owners has no effect on the determination of depreciation allowances for the replacement MACRS property in the hands of the acquiring taxpayer. For example, a taxpayer exchanging, in a like-kind exchange, MACRS property for property that was depreciated under section 168 of the Internal Revenue Code of 1954 (ACRS) by the previous owner must use this section because the replacement property will become MACRS property in the hands of the acquiring taxpayer. In addition, elections made by previous owners in determining depreciation allowances for the replacement MACRS property have no effect on the acquiring taxpayer. For example, a taxpayer exchanging, in a like-kind exchange, MACRS property that the taxpayer depreciates under the general depreciation system of section 168(a) for other MACRS property that the previous owner elected to depreciate under the alternative depreciation system pursuant to section 168(g)(7) does not have to continue using the alternative depreciation system for the replacement MACRS property.

(3) *Recovery period and/or depreciation method of the properties are the same, or both are not the same*—(i) *In general.* For purposes of paragraphs (c)(3) and (c)(4) of this section in determining whether the recovery period and the depreciation method prescribed under section 168 for the replacement MACRS property are the same as the recovery period and the depreciation method prescribed under section 168 for the relinquished MACRS property, the recovery period and the depreciation method for the replacement MACRS property are considered to be the recovery period and the depreciation method that would have applied under section 168, taking into account any elections made by the acquiring taxpayer under section 168(b)(5) or 168(g)(7), had the replacement MACRS property been placed in service by the acquiring taxpayer at the same time as the relinquished MACRS property.

(ii) *Both the recovery period and the depreciation method are the same.* If both the recovery period and the depreciation method prescribed under section 168 for the replacement MACRS property are the same as the recovery period and the depreciation method prescribed under section 168 for the relinquished MACRS property, the depreciation allowances for the replacement MACRS property beginning in the year of replacement are determined by using the same recovery period and depreciation method that were used for the relinquished MACRS property. Thus, the replacement MACRS property is depreciated over the remaining recovery period (taking into account the applicable convention), and by using the depreciation method, of the relinquished MACRS property. Except as provided in paragraph (c)(5) of this section, the depreciation allowances for the depreciable exchanged basis for any 12-month taxable year beginning with the year of replacement are determined by multiplying the depreciable exchanged basis by the applicable depreciation rate for each taxable year (for further guidance, for example, see section 6 of Rev. Proc. 87–57 (1987–2 CB

687, 692) and §601.601(d)(2)(ii)(*b*) of this chapter).

(iii) *Either the recovery period or the depreciation method is the same, or both are not the same.* If either the recovery period or the depreciation method prescribed under section 168 for the replacement MACRS property is the same as the recovery period or the depreciation method prescribed under section 168 for the relinquished MACRS property, the depreciation allowances for the depreciable exchanged basis beginning in the year of replacement are determined using the recovery period or the depreciation method that is the same as the relinquished MACRS property. See paragraph (c)(4) of this section to determine the depreciation allowances when the recovery period or the depreciation method of the replacement MACRS property is not the same as that of the relinquished MACRS property.

(4) *Recovery period or depreciation method of the properties is not the same.* If the recovery period prescribed under section 168 for the replacement MACRS property (as determined under paragraph (c)(3)(i) of this section) is not the same as the recovery period prescribed under section 168 for the relinquished MACRS property, the depreciation allowances for the depreciable exchanged basis beginning in the year of replacement are determined under this paragraph (c)(4). Similarly, if the depreciation method prescribed under section 168 for the replacement MACRS property (as determined under paragraph (c)(3)(i) of this section) is not the same as the depreciation method prescribed under section 168 for the relinquished MACRS property, the depreciation method used to determine the depreciation allowances for the depreciable exchanged basis beginning in the year of replacement is determined under this paragraph (c)(4).

(i) *Longer recovery period.* If the recovery period prescribed under section 168 for the replacement MACRS property (as determined under paragraph (c)(3)(i) of this section) is longer than that prescribed for the relinquished MACRS property, the depreciation allowances for the depreciable exchanged basis beginning in the year of replacement are determined as though the replacement MACRS property had originally been placed in service by the acquiring taxpayer in the same taxable year the relinquished MACRS property was placed in service by the acquiring taxpayer, but using the longer recovery period of the replacement MACRS property (as determined under paragraph (c)(3)(i) of this section) and the convention determined under paragraph (c)(4)(v) of this section. Thus, the depreciable exchanged basis is depreciated over the remaining recovery period (taking into account the applicable convention) of the replacement MACRS property.

(ii) *Shorter recovery period.* If the recovery period prescribed under section 168 for the replacement MACRS property (as determined under paragraph (c)(3)(i) of this section) is shorter than that of the relinquished MACRS property, the depreciation allowances for the depreciable exchanged basis beginning in the year of replacement are determined using the same recovery period as that of the relinquished MACRS property. Thus, the depreciable exchanged basis is depreciated over the remaining recovery period (taking into account the applicable convention) of the relinquished MACRS property.

(iii) *Less accelerated depreciation method*—(A) If the depreciation method prescribed under section 168 for the replacement MACRS property (as determined under paragraph (c)(3)(i) of this section) is less accelerated than that of the relinquished MACRS property at the time of disposition, the depreciation allowances for the depreciable exchanged basis beginning in the year of replacement are determined as though the replacement MACRS property had originally been placed in service by the acquiring taxpayer at the same time the relinquished MACRS property was placed in service by the acquiring taxpayer, but using the less accelerated depreciation method. Thus, the depreciable exchanged basis is depreciated using the less accelerated depreciation method.

(B) Except as provided in paragraph (c)(5) of this section, the depreciation allowances for the depreciable exchanged basis for any 12-month taxable year beginning in the year of replacement are determined by multiplying the adjusted depreciable basis by the applicable depreciation rate for each taxable year. If, for example, the depreciation method of the replacement MACRS property in the year of replacement is the 150-percent declining balance method and the depreciation method of the relinquished MACRS property in the year of replacement is the 200-percent declining balance method, and neither method had been switched to the straight line method in the year of replacement or any prior taxable year, the applicable depreciation rate for the year of replacement and subsequent taxable years is determined by using the depreciation rate of the replacement MACRS property as if the replacement MACRS property was placed in service by the acquiring taxpayer at the same time the relinquished MACRS property was placed in service by the acquiring taxpayer, until the 150-percent declining balance method has been switched to the straight line method. If, for example, the depreciation method of the replacement MACRS property is the straight line method, the applicable depreciation rate for the year of replacement is determined by using the remaining recovery period at the beginning of the year of disposition (as determined under this paragraph (c)(4) and taking into account the applicable convention).

(iv) *More accelerated depreciation method*—(A) If the depreciation method prescribed under section 168 for the replacement MACRS property (as determined under paragraph (c)(3)(i) of this section) is more accelerated than that of the relinquished MACRS property at the time of disposition, the depreciation allowances for the replacement MACRS property beginning in the year of replacement are determined using the same depreciation method as the relinquished MACRS property.

(B) Except as provided in paragraph (c)(5) of this section, the depreciation allowances for the depreciable exchanged basis for any 12-month taxable year beginning in the year of replacement are determined by multiplying the adjusted depreciable basis by the applicable depreciation rate for each taxable year. If, for example, the depreciation method of the relinquished MACRS property in the year of replacement is the 150-percent declining balance method and the depreciation method of the replacement MACRS property in the year of replacement is the 200-percent declining balance method, and neither method had been switched to the straight line method in the year of replacement or any prior taxable year, the applicable depreciation rate for the year of replacement and subsequent taxable years is the same depreciation rate that applied to the relinquished MACRS property in the year of replacement, until the 150-percent declining balance method has been switched to the straight line method. If, for example, the depreciation method is the straight line method, the applicable depreciation rate for the year of replacement is determined by using the remaining recovery period at the beginning of the year of disposition (as determined under this paragraph (c)(4) and taking into account the applicable convention).

(v) *Convention.* The applicable convention for the exchanged basis is determined under this paragraph (c)(4)(v).

(A) *Either the relinquished MACRS property or the replacement MACRS property is mid-month property.* If either the relinquished MACRS property or the replacement MACRS property is property for which the applicable convention (as determined under section 168(d)) is the mid-month convention, the exchanged basis must be depreciated using the mid-month convention.

(B) *Neither the relinquished MACRS property nor the replacement MACRS property is mid-month property.* If neither the relinquished MACRS property nor the replacement MACRS property is property for which the applicable convention (as determined under section 168(d)) is the mid-month convention, the applicable convention for the exchanged basis is the same convention that applied to the relinquished MACRS property. If the relinquished MACRS property is placed in service in the year of disposition, and the time of replacement is also in the year of disposition, the convention that applies to the relinquished MACRS property is determined under paragraph (f)(1)(i) of this section. If, however, relinquished

MACRS property was placed in service in the year of disposition and the time of replacement is in a taxable year subsequent to the year of disposition, the convention that applies to the exchanged basis is the convention that applies in that subsequent taxable year (see paragraph (f)(1)(ii) of this section).

(5) *Year of disposition and year of replacement.* No depreciation deduction is allowable for MACRS property disposed of by a taxpayer in a like-kind exchange or involuntary conversion in the same taxable year that such property was placed in service by the taxpayer. If replacement MACRS property is disposed of by a taxpayer during the same taxable year that the relinquished MACRS property is placed in service by the taxpayer, no depreciation deduction is allowable for either MACRS property. Otherwise, the depreciation allowances for the year of disposition and for the year of replacement are determined as follows:

(i) *Relinquished MACRS property*—(A) *General rule.* Except as provided in paragraphs (c)(5)(i)(B), (c)(5)(iii), (e), and (i) of this section, the depreciation allowance in the year of disposition for the relinquished MACRS property is computed by multiplying the allowable depreciation deduction for the property for that year by a fraction, the numerator of which is the number of months (including fractions of months) the property is deemed to be placed in service during the year of disposition (taking into account the applicable convention of the relinquished MACRS property), and the denominator of which is 12. In the case of termination under §1.168(i)–1(e)(3)(v) of general asset account treatment of an asset, or of all the assets remaining, in a general asset account, the allowable depreciation deduction in the year of disposition for the asset or assets for which general asset account treatment is terminated is determined using the depreciation method, recovery period, and convention of the general asset account. This allowable depreciation deduction is adjusted to account for the period the asset or assets is deemed to be in service in accordance with this paragraph (c)(5)(i).

(B) *Special rule.* If, at the beginning of the year of disposition, the remaining recovery period of the relinquished MACRS property, taking into account the applicable convention of such property, is less than the period between the beginning of the year of disposition and the time of disposition, the depreciation deduction for the relinquished MACRS property for the year of disposition is equal to the adjusted depreciable basis of the relinquished MACRS property at the beginning of the year of disposition. If this paragraph applies, the exchanged basis is zero and no depreciation is allowable for the exchanged basis in the replacement MACRS property.

(ii) *Replacement MACRS property*—(A) *Remaining recovery period of the replacement MACRS property.* The replacement MACRS property is treated as placed in service at the time of replacement under the convention that applies to the replacement MACRS property as determined under this paragraph (c)(5)(ii). The remaining recovery period of the replacement MACRS property at the time of replacement is the excess of the recovery period for the replacement MACRS property, as determined under paragraph (c) of this section, over the period of time that the replacement MACRS property would have been in service if it had been placed in service when the relinquished MACRS property was placed in service and removed from service at the time of disposition of the relinquished MACRS property. This period is determined by using the convention that applied to the relinquished MACRS property to determine the date that the relinquished MACRS property is deemed to have been placed in service and the date that it is deemed to have been disposed of. The length of time the replacement MACRS property would have been in service is determined by using these dates and the convention that applies to the replacement MACRS property.

(B) *Year of replacement is 12 months.* Except as provided in paragraphs (c)(5)(iii), (e), and (i) of this section, the depreciation allowance in the year of replacement for the depreciable exchanged basis is determined by—

(*1*) Calculating the applicable depreciation rate for the replacement MACRS property as of the beginning of the year of replacement taking into account the depreciation method prescribed for the replacement MACRS property under paragraph (c)(3) of this section and the remaining recovery period of the replacement MACRS property as of the beginning of the year of disposition as determined under this paragraph (c)(5)(ii);

(*2*) Calculating the depreciable exchanged basis of the replacement MACRS property, and adding to that amount the amount determined under paragraph (c)(5)(i) of this section for the year of disposition; and

(*3*) Multiplying the product of the amounts determined under paragraphs (c)(5)(ii)(B)(*1*) and (B)(*2*) of this section by a fraction, the numerator of which is the number of months (including fractions of months) the property is deemed to be in service during the year of replacement (in the year of replacement the replacement MACRS property is deemed to be placed in service by the acquiring taxpayer at the time of replacement under the convention determined under paragraph (c)(4)(v) of this section), and the denominator of which is 12.

(iii) *Year of disposition or year of replacement is less than 12 months.* If the year of disposition or the year of replacement is less than 12 months, the depreciation allowance determined under paragraph (c)(5)(ii)(A) of this section must be adjusted for a short taxable year (for further guidance, for example, see Rev. Proc. 89–15 (1989–1 CB 816) and § 601.601(d)(2)(ii)(*b*) of this chapter).

(iv) *Deferred transactions*—(A) *In general.* If the replacement MACRS property is not acquired until after the disposition of the relinquished MACRS property, taking into account the applicable convention of the relinquished MACRS property and replacement MACRS property, depreciation is not allowable during the period between the disposition of the relinquished MACRS property and the acquisition of the replacement MACRS property. The recovery period for the replacement MACRS property is suspended during this period. For purposes of paragraph (c)(5)(ii) of this section, only the depreciable exchanged basis of the replacement MACRS property is taken into account for calculating the amount in paragraph (c)(5)(ii)(B)(*2*) of this section if the year of replacement is a taxable year subsequent to the year of disposition.

(B) *Allowable depreciation for a qualified intermediary.* [Reserved]

(v) *Remaining recovery period.* The remaining recovery period of the replacement MACRS property is determined as of the beginning of the year of disposition of the relinquished MACRS property. For purposes of determining the remaining recovery period of the replacement MACRS property, the replacement MACRS property is deemed to have been originally placed in service under the convention determined under paragraph (c)(4)(v) of this section, but at the time the relinquished MACRS property was deemed to be placed in service under the convention that applied to it when it was placed in service.

(6) *Examples.* The application of this paragraph (c) is illustrated by the following examples:

Example 1. A1, a calendar-year taxpayer, exchanges Building M, an office building, for Building N, a warehouse in a like-kind exchange. Building M is relinquished in July 2004 and Building N is acquired and placed in service in October 2004. A1 did not make any elections under section 168 for either Building M or Building N. The unadjusted depreciable basis of Building M was $4,680,000 when placed in service in July 1997. Since the recovery period and depreciation method prescribed under section 168 for Building N (39 years, straight line method) are the same as the recovery period and depreciation method prescribed under section 168 for Building M (39 years, straight line method), Building N is depreciated over the remaining recovery period of, and using the same depreciation method and convention as that of, Building M. Applying the applicable convention, Building M is deemed disposed of on July 15, 2004, and Building N is placed in service on October 15, 2004. Thus, Building N will be depreciated using the straight line method over a remaining recovery period of 32 years beginning in October 2004 (the remaining recovery period of 32 years and 6.5 months at the beginning of 2004, less the 6.5 months of depreciation taken prior to the disposition of the exchanged MACRS property (Building M) in 2004). For 2004, the year in which the transaction takes place, the depreciation allowance for Building M is ($120,000)(6.5/12) which equals $65,000. The depreciation allowance for Building N for 2004 is ($120,000)(2.5/

12) which equals $25,000. For 2005 and subsequent years, Building N is depreciated over the remaining recovery period of, and using the same depreciation method and convention as that of, Building M. Thus, the depreciation allowance for Building N is the same as Building M, namely $10,000 per month.

Example 2. B, a calendar-year taxpayer, placed in service Bridge P in January 1998. Bridge P is depreciated using the half-year convention. In January 2004, B exchanges Bridge P for Building Q, an apartment building, in a like-kind exchange. Pursuant to paragraph (k)(2)(i) of this section, B decided to apply §1.168(i)-6 to the exchange of Bridge P for Building Q, the replacement MACRS property. B did not make any elections under section 168 for either Bridge P or Building Q. Since the recovery period prescribed under section 168 for Building Q (27.5 years) is longer than that of Bridge P (15 years), Building Q is depreciated as if it had originally been placed in service in July 1998 and disposed of in July 2004 using a 27.5 year recovery period. Additionally, since the depreciation method prescribed under section 168 for Building Q (straight line method) is less accelerated than that of Bridge P (150-percent declining balance method), then the depreciation allowance for Building Q is computed using the straight line method. Thus, when Building Q is acquired and placed in service in 2004, its basis is depreciated over the remaining 21.5 year recovery period using the straight line method of depreciation and the mid-month convention beginning in July 2004.

Example 3. C, a calendar-year taxpayer, placed in service Building R, a restaurant, in January 1996. In January 2004, C exchanges Building R for Tower S, a radio transmitting tower, in a like-kind exchange. Pursuant to paragraph (k)(2)(i) of this section, C decided to apply §1.168(i)-6 to the exchange of Building R for Tower S, the replacement MACRS property. C did not make any elections under section 168 for either Building R or Tower S. Since the recovery period prescribed under section 168 for Tower S (15 years) is shorter than that of Building R (39 years), Tower S is depreciated over the remaining recovery period of Building R. Additionally, since the depreciation method prescribed under section 168 for Tower S (150% declining balance method) is more accelerated than that of Building R (straight line method), then the depreciation allowance for Tower S is also computed using the same depreciation method as Building R. Thus, Tower S is depreciated over the remaining 31 year recovery period of Building R using the straight line method of depreciation and the mid-month convention. Alternatively, C may elect under paragraph (i) of this section to treat Tower S as though it is placed in service in January 2004. In such case, C uses the applicable recovery period, depreciation method, and convention prescribed under section 168 for Tower S.

Example 4. (i) In February 2002, D, a calendar-year taxpayer and manufacturer of rubber products, acquired for $60,000 and placed in service Asset T (a special tool) and depreciated Asset T using the straight line method election under section 168(b)(5) and the mid-quarter convention over its 3-year recovery period. D elected not to deduct the additional first year depreciation for 3-year property placed in service in 2002. In June 2004, D exchanges Asset T for Asset U (not a special tool) in a like-kind exchange. D elected not to deduct the additional first year depreciation for 7-year property placed in service in 2004. Since the recovery period prescribed under section 168 for Asset U (7 years) is longer than that of Asset T (3 years), Asset U is depreciated as if it had originally been placed in service in February 2002 using a 7-year recovery period. Additionally, since the depreciation method prescribed under section 168 for Asset U (200-percent declining balance method) is more accelerated than that of Asset T (straight line method) at the time of disposition, the depreciation allowance for Asset U is computed using the straight line method. Asset U is depreciated over its remaining recovery period of 4.75 years using the straight line method of depreciation and the mid-quarter convention.

(ii) The 2004 depreciation allowance for Asset T is $7,500 ($20,000 allowable depreciation deduction for 2004) $\times$ 4.5 months $\div$ 12).

(iii) The depreciation rate in 2004 for Asset U is 0.1951 (1 $\div$ 5.125 years (the length of the applicable recovery period remaining as of the beginning of 2004)). Therefore, the depreciation allowance for Asset U in 2004 is $2,744 (0.1951 $\times$ $22,500 (the sum of the $15,000 depreciable exchanged basis of Asset U ($22,500 adjusted depreciable basis at the beginning of 2004 for Asset T, less the $7,500 depreciation allowable for Asset T for 2004) and the $7,500 depreciation allowable for Asset T for 2004) $\times$ 7.5 months $\div$ 12).

Example 5. The facts are the same as in *Example 4* except that D exchanges Asset T for Asset U in June 2005, in a like-kind exchange. Under these facts, the remaining recovery period of Asset T at the beginning of 2005 is 1.5 months and, as a result, is less than the 5-month period between the beginning of 2005 (year of disposition) and June 2005 (time of disposition). Accordingly, pursuant to paragraph (c)(5)(i)(B) of this section, the 2005 depreciation allowance for Asset T is $2,500 ($2,500 adjusted depreciable basis at the beginning of 2005 ($60,000 original basis minus $17,500 depreciation deduction for 2002 minus $20,000 depreciation deduction for 2003 minus $20,000 depreciation deduction for 2004)). Because the exchanged basis of asset U is $0.00, no depreciation is allowable for asset U.

Example 6. On January 1, 2004, E, a calendar-year taxpayer, acquired and placed in service Canopy V, a gas station canopy. The purchase price of Canopy V was $60,000. On August 1, 2004, Canopy V was destroyed in a hurricane and was therefore no longer usable in E's business. On October 1, 2004, as part of the involuntary conversion, E acquired and placed in service new Canopy W with the insurance proceeds E received due to the loss of Canopy V. E elected not to deduct the additional first year depreciation for 5-year property placed in service in 2004. E depreciates both canopies under the general depreciation system of section 168(a) by using the 200-percent declining balance method of depreciation, a 5-year recovery period, and the half-year convention. No depreciation deduction is allowable for Canopy V. The depreciation deduction allowable for Canopy W for 2004 is $12,000 ($60,000 × the annual depreciation rate of .40 × ½ year). For 2005, the depreciation deduction for Canopy W is $19,200 ($48,000 adjusted basis × the annual depreciation rate of .40).

Example 7. The facts are the same as in *Example 6*, except that E did not make the election out of the additional first year depreciation for 5-year property placed in service in 2004. E depreciates both canopies under the general depreciation system of section 168(a) by using the 200-percent declining balance method of depreciation, a 5-year recovery period, and the half-year convention. No depreciation deduction is allowable for Canopy V. For 2004, E is allowed a 50-percent additional first year depreciation deduction of $30,000 for Canopy W (the unadjusted depreciable basis of $60,000 multiplied by .50), and a regular MACRS depreciation deduction of $6,000 for Canopy W (the depreciable exchanged basis of $30,000 multiplied by the annual depreciation rate of .40 × ½ year). For 2005, E is allowed a regular MACRS depreciation deduction of $9,600 for Canopy W (the depreciable exchanged basis of $24,000 ($30,000 minus regular 2003 depreciation of $6,000) multiplied by the annual depreciation rate of .40).

Example 8. In January 2001, F, a calendar-year taxpayer, places in service a paved parking lot, Lot W, and begins depreciating Lot W over its 15-year recovery period. F's unadjusted depreciable basis in Lot W is $1,000x. On April 1, 2004, F disposes of Lot W in a like-kind exchange for Building X, which is nonresidential real property. Lot W is depreciated using the 150 percent declining balance method and the half-year convention. Building X is depreciated using the straight-line method with a 39-year recovery period and using the mid-month convention. Both Lot W and Building X were in service at the time of the exchange. Because Lot W was depreciated using the half-year convention, it is deemed to have been placed in service on July 1, 2001, the first day of the second half of 2001, and to have been disposed of on July 1, 2004, the first day of the second half of 2004. To determine the remaining recovery period of Building X at the time of replacement, Building X is deemed to have been placed in service on July 1, 2001, and removed from service on July 1, 2004. Thus, Building X is deemed to have been in service, at the time of replacement, for 3 years (36 months = 5.5 months in 2001 + 12 months in 2002 + 12 months in 2003 + 6.5 months in 2004) and its remaining recovery period is 36 years (39 − 3). Because Building X is deemed to be placed in service at the time of replacement, July 1, 2004, the first day of the second half of 2004, Building X is depreciated for 5.5 months in 2004. However, at the beginning of the year of replacement the remaining recovery period for Building X is 36 years and 6.5 months (39 years − 2 years and 5.5 months (5.5 months in 2001 + 12 months in 2002 + 12 months in 2003)). The depreciation rate for building X for 2004 is 0.02737 (= 1/(39–2–5.5/12)). For 2005, the depreciation rate for Building X is 0.02814 (= 1/(39–3–5.5/12)).

Example 9. The facts are the same as in *Example 8*. F did not make the election under paragraph (i) of this section for Building Y in the initial exchange. In January 2006, F exchanges Building Y for Building Z, an office building, in a like-kind exchange. F did not make any elections under section 168 for either Building Y or Building Z. Since the recovery period prescribed for Building Y as a result of the initial exchange (39 years) is longer than that of Building Z (27.5 years), Building Z is depreciated over the remaining 33 years of the recovery period of Building Y. The depreciation methods are the same for both Building Y and Building Z so F's exchanged basis in Building Z is depreciated over 33 years, using the straight-line method and the mid-month convention, beginning in January 2006. Alternatively, F could have made the election under paragraph (i) of this section. If F makes such election, Building Z is treated as placed in service by F when acquired in January 2006 and F would recover its exchanged basis in Building Z over 27.5 years, using the straight line method and the mid-month convention, beginning in January 2006.

(d) *Special rules for determining depreciation allowances*—(1) *Excess basis*—(i) *In general.* Any excess basis in the replacement MACRS property is treated as property that is placed in service by the acquiring taxpayer in the year of replacement. Thus, the depreciation allowances for the depreciable excess basis are determined by using the applicable recovery period, depreciation method, and convention prescribed under section 168 for the property at the time of replacement. However, if replacement MACRS property is disposed of during the same taxable year the relinquished MACRS property is placed in service by the acquiring taxpayer, no depreciation deduction is allowable for either MACRS property. See paragraph (g) of this section regarding the application of section 179. See paragraph (h) of this section regarding the application of section 168(k) or 1400L(b).

(ii) *Example*. The application of this paragraph (d)(1) is illustrated by the following example:

Example. In 1989, G placed in service a hospital. On January 16, 2004, G exchanges this hospital plus $2,000,000 cash for an office building in a like-kind exchange. On January 16, 2004, the hospital has an adjusted depreciable basis of $1,500,000. After the exchange, the basis of the office building is $3,500,000. Pursuant to paragraph (k)(2)(i) of this section, G decided to apply §1.168(i)–6 to the exchange of the hospital for the office building, the replacement MACRS property. The depreciable exchanged basis of the office building is depreciated in accordance with paragraph (c) of this section. The depreciable excess basis of $2,000,000 is treated as being placed in service by G in 2004 and, as a result, is depreciated using the applicable depreciation method, recovery period, and convention prescribed for the office building under section 168 at the time of replacement.

(2) *Depreciable and nondepreciable property*—(i) If land or other nondepreciable property is acquired in a like-kind exchange for, or as a result of an involuntary conversion of, depreciable property, the land or other nondepreciable property is not depreciated. If both MACRS and nondepreciable property are acquired in a like-kind exchange for, or as part of an involuntary conversion of, MACRS property, the basis allocated to the nondepreciable property (as determined under section 1031(d) and the regulations under section 1031(d) or section 1033(b) and the regulations under section 1033(b)) is not depreciated and the basis allocated to the replacement MACRS property (as determined under section 1031(d) and the regulations under section 1031(d) or section 1033(b) and the regulations under section 1033(b)) is depreciated in accordance with this section.

(ii) If MACRS property is acquired, or if both MACRS and nondepreciable property are acquired, in a like-kind exchange for, or as part of an involuntary conversion of, land or other nondepreciable property, the basis in the replacement MACRS property that is attributable to the relinquished nondepreciable property is treated as though the replacement MACRS property is placed in service by the acquiring taxpayer in the year of replacement. Thus, the depreciation allowances for the replacement MACRS property are determined by using the applicable recovery period, depreciation method, and convention prescribed under section 168 for the replacement MACRS property at the time of replacement. See paragraph (g) of this section regarding the application of section 179. See paragraph (h) of this section regarding the application of section 168(k) or 1400L(b).

(3) *Depreciation limitations for automobiles*—(i) *In general*. Depreciation allowances under section 179 and section 167 (including allowances under sections 168 and 1400L(b)) for a passenger automobile, as defined in section 280F(d)(5), are subject to the limitations of section 280F(a). The depreciation allowances for a passenger automobile that is replacement MACRS property (replacement MACRS passenger automobile) generally are limited in any taxable year to the replacement automobile section 280F limit for the taxable year. The taxpayer's basis in the replacement MACRS passenger automobile is treated as being comprised of two separate components. The first component is the exchanged basis and the second component is the excess basis, if any. The depreciation allowances for a passenger automobile that is relinquished MACRS property (relinquished MACRS passenger automobile) for the taxable year generally are limited to the relinquished automobile section 280F limit for that taxable year. In the year of disposition the sum of the depreciation deductions for the relinquished MACRS passenger automobile and the replacement MACRS passenger automobile may not exceed the replacement automobile section 280F limit unless the taxpayer makes the election under §1.168(i)–6(i). For purposes of this paragraph (d)(3), the following definitions apply:

(A) *Replacement automobile section 280F limit* is the limit on depreciation deductions under section 280F(a) for the taxable year based on the time of replacement of the replacement MACRS passenger automobile (including the effect of any elections under section 168(k) or section 1400L(b), as applicable).

(B) *Relinquished automobile section 280F limit* is the limit on depreciation deductions under section 280F(a) for the taxable year based on when the relinquished MACRS passenger automobile was placed in service by the taxpayer.

(ii) *Order in which limitations on depreciation under section 280F(a) are applied.* Generally, depreciation deductions allowable under section 280F(a) reduce the basis in the relinquished MACRS passenger automobile and the exchanged basis of the replacement MACRS passenger automobile, before the excess basis of the replacement MACRS passenger automobile is reduced. The depreciation deductions for the relinquished MACRS passenger automobile in the year of disposition and the replacement MACRS passenger automobile in the year of replacement and each subsequent taxable year are allowable in the following order:

(A) The depreciation deduction allowable for the relinquished MACRS passenger automobile as determined under paragraph (c)(5)(i) of this section for the year of disposition to the extent of the smaller of the replacement automobile section 280F limit and the relinquished automobile section 280F limit, if the year of disposition is the year of replacement. If the year of replacement is a taxable year subsequent to the year of disposition, the depreciation deduction allowable for the relinquished MACRS passenger automobile for the year of disposition is limited to the relinquished automobile section 280F limit.

(B) The additional first year depreciation allowable on the remaining exchanged basis (remaining carryover basis as determined under §1.168(k)–1(f)(5) or §1.1400L(b)–1(f)(5), as applicable) of the replacement MACRS passenger automobile, as determined under §1.168(k)–1(f)(5) or §1.1400L(b)–1(f)(5), as applicable, to the extent of the excess of the replacement automobile section 280F limit over the amount allowable under paragraph (d)(3)(ii)(A) of this section.

(C) The depreciation deduction allowable for the taxable year on the depreciable exchanged basis of the replacement MACRS passenger automobile determined under paragraph (c) of this section to the extent of any excess over the sum of the amounts allowable under paragraphs (d)(3)(ii)(A) and (B) of this section of the smaller of the replacement automobile section 280F limit and the relinquished automobile section 280F limit.

(D) Any section 179 deduction allowable in the year of replacement on the excess basis of the replacement MACRS passenger automobile to the extent of the excess of the replacement automobile section 280F limit over the sum of the amounts allowable under paragraphs (d)(3)(ii)(A), (B), and (C) of this section.

(E) The additional first year depreciation allowable on the remaining excess basis of the replacement MACRS passenger automobile, as determined under §1.168(k)–1(f)(5) or §1.1400L(b)–1(f)(5), as applicable, to the extent of the excess of the replacement automobile section 280F limit over the sum of the amounts allowable under paragraphs (d)(3)(ii)(A), (B), (C), and (D) of this section.

(F) The depreciation deduction allowable under paragraph (d) of this section for the depreciable excess basis of the replacement MACRS passenger automobile to the extent of the excess of the replacement automobile section 280F limit over the sum of the amounts allowable under paragraphs (d)(3)(ii)(A), (B), (C), (D), and (E) of this section.

(iii) *Examples.* The application of this paragraph (d)(3) is illustrated by the following examples:

Example 1. H, a calendar-year taxpayer, acquired and placed in service Automobile X in January 2000 for $30,000 to be used solely for H's business. In December 2003, H exchanges, in a like-kind exchange, Automobile X plus $15,000 cash for new Automobile Y that will also be used solely in H's business. Automobile Y is 50-percent bonus depreciation property for purposes of section 168(k)(4). Both automobiles are depreciated using the double declining balance method, the half-year convention, and a 5-year recovery period. Pursuant to §1.168(k)–1(g)(3)(ii) and paragraph (k)(2)(i) of this section, H decided to apply §1.168(i)–6 to the exchange of Automobile X for Automobile Y, the replacement MACRS property. The relinquished automobile section 280F limit for 2003 for Automobile X is $1,775. The replacement automobile section 280F limit for Automobile Y is $10,710. The exchanged basis for Automobile Y is $17,315 ($30,000 less total depreciation allowable of $12,685 (($3,060 for 2000, $4,900 for 2001, $2,950 for 2002, and $1,775 for 2003)). Without taking section 280F into account, the additional first year depreciation deduction for the remaining exchanged basis is $8,658 ($17,315 × 0.5). Because this amount is less than $8,935 ($10,710 (the replacement automobile section 280F limit for 2003 for Automobile Y) − $1,775 (the depreciation allowable for Automobile X for 2003)), the additional first year depreciation deduction for the exchanged basis is $8,658. No depreciation deduction is allowable in 2003 for the depreciable exchanged basis because the depreciation deductions taken for Automobile X and the remaining exchanged basis exceed the exchanged automobile section 280F limit. An additional first year depreciation deduction of $277 is allowable for the excess basis of $15,000 in Automobile Y. Thus, at the end of 2003 the adjusted depreciable basis in Automobile Y is $23,379 comprised of adjusted depreciable exchanged basis of $8,657 ($17,315 (exchanged basis) − $8,658 (additional first year depreciation for exchanged basis)) and of an adjusted depreciable excess basis of $14,723 ($15,000 (excess basis) − $277 (additional first year depreciation for 2003)).

Example 2. The facts are the same as in *Example 1,* except that H used Automobile X only 75 percent for business use. As such, the total allowable depreciation for Automobile X is reduced to reflect that the automobile is only used 75 percent for business. The total allowable depreciation of Automobile X is $9,513.75 ($2,295 for 2000 ($3,060 limit × .75), $3,675 for 2001 ($4,900 limit × .75), $2,212.50 for 2002 ($2,950 limit × .75), and $1,331.25 for 2003 ($1,775 limit × .75). However, under §1.280F–2T(g)(2)(ii)(A), the exchanged basis is reduced by the excess (if any) of the depreciation that would have been allowable if the exchanged automobile had been used solely for business over the depreciation that was allowable in those years. Thus, the exchanged basis, for purposes of computing depreciation, for Automobile Y is $17,315.

Example 3. The facts are the same as in *Example 1,* except that H placed in service Automobile X in January 2002, and H elected not to claim the additional first year depreciation deduction for 5-year property placed in service in 2002 and 2003. The relinquished automobile section 280F limit for Automobile X for 2003 is $4,900. Because the replacement automobile section 280F limit for 2003 for Automobile Y ($3,060) is less than the relinquished automobile section 280F limit for Automobile X for 2003 and is less than $5,388 (($30,000 (cost) − $3,060 (depreciation allowable for 2002)) × 0.4 × 6/12), the depreciation that would be allowable for Automobile X (determined without regard to section 280F) in the year of disposition, the depreciation for Automobile X in the year of disposition is limited to $3,060. For 2003 no depreciation is allowable for the excess basis and the exchanged basis in Automobile Y.

Example 4. AB, a calendar-year taxpayer, purchased and placed in service Automobile X1 in February 2000 for $10,000. X1 is a passenger automobile subject to section 280F(a) and is used solely for AB's business. AB depreciated X1 using a 5-year recovery period, the double declining balance method, and the half-year convention. As of January 1, 2003, the adjusted depreciable basis of X1 was $2,880 ($10,000 original cost minus $2,000 depreciation deduction for 2000, minus $3,200 depreciation deduction for 2001, and $1,920 depreciation deduction for 2002). In November 2003, AB exchanges, in a like-kind exchange, Automobile X1 plus $14,000 cash for new Automobile Y1 that will be used solely in AB's business. Automobile Y1 is 50-percent bonus depreciation property for purposes of section 168(k)(4) and qualifies for the expensing election under section 179. Pursuant to paragraph §1.168(k)–1(g)(3)(ii) and paragraph (k)(2)(i) of this section, AB decided to apply §1.168(i)–6 to the exchange of Automobile X1 for Automobile Y1, the replacement MACRS property. AB also makes the election under section 179 for the excess basis of Automobile Y1. AB depreciates Y1 using a five-year recovery period, the double declining balance method and the half-year convention. For 2003, the relinquished automobile section 280F limit for Automobile X1 is $1,775 and the replacement automobile section 280F limit for 2003 for Automobile Y1 is $10,710.

(i) The 2003 depreciation deduction for Automobile X1 is $576. The depreciation deduction calculated for X1 is $576 (the adjusted depreciable basis of Automobile X1 at the beginning of 2003 of $2,880 × 40% × ½ year), which is less than the relinquished automobile section 280F limit and the replacement automobile section 280F limit.

(ii) The additional first year depreciation deduction for the exchanged basis is $1,152. The additional first year depreciation deduction of $1,152 (remaining exchanged basis of $2,304 ($2,880 adjusted basis of Automobile X1 at the beginning of 2003 minus $576) − 0.5)) is less than the replacement automobile section 280F limit minus $576.

(iii) AB's MACRS depreciation deduction allowable in 2003 for the remaining exchanged basis of $1,152 is $47 (the relinquished automobile section 280F limit of $1,775 less the depreciation deduction of $576 taken for Automobile X1 less the additional first year depreciation deduction of $1,152 taken for the exchanged basis) which is less than the depreciation deduction calculated for the depreciable exchanged basis.

(iv) For 2003, AB takes a $1,400 section 179 deduction for the excess basis of Automobile Y1. AB must reduce the excess basis of $14,000 by the section 179 deduction of $1,400 to determine the remaining excess basis of $12,600.

(v) For 2003, AB is allowed a 50-percent additional first year depreciation deduction of $6,300 (the remaining excess basis of $12,600 multiplied by .50).

(vi) For 2003, AB's depreciation deduction for the depreciable excess basis is limited to $1,235. The depreciation deduction computed without regard to the replacement automobile section 280F limit is $1,260 ($6,300 depreciable excess basis × 0.4 × 6/12). However the depreciation deduction for the depreciable excess basis is limited to $1,235 ($10,710 (replacement automobile section 280F limit) − $576 (depreciation deduction for Automobile X1) − $1,152 (additional first year depreciation deduction for the exchanged basis) − $47 (depreciation deduction for exchanged basis) − 1,400 (section 179 deduction) − $6,300 (additional first year depreciation deduction for remaining excess basis)).

(4) *Involuntary conversion for which the replacement MACRS property is acquired and placed in service before disposition of relinquished MACRS property.* If, in an involuntary conversion, a taxpayer acquires and places in service the replacement MACRS property before the date of disposition of the relinquished MACRS property, the taxpayer depreciates the unadjusted depreciable basis of the replacement MACRS property under section 168 beginning in the taxable year when the replacement MACRS property is placed in service by the taxpayer and by using the applicable depreciation method, recovery period, and convention prescribed under section 168 for the replacement MACRS property at the placed-in-service date. However, at the time of disposition of the relinquished MACRS property, the taxpayer determines the exchanged basis and the excess basis of the replacement MACRS property and begins to depreciate the depreciable exchanged basis of the replacement MACRS property in accordance with paragraph (c) of this section. The depreciable excess basis of the replacement MACRS property continues to be depreciated by the taxpayer in accordance with the first sentence of this paragraph (d)(4). Further, in the year of disposition of the relinquished MACRS property, the taxpayer must include in taxable income the excess of the depreciation deductions allowable on the unadjusted depreciable basis of the replacement MACRS property over the depreciation deductions that would have been allowable to the taxpayer on the depreciable excess basis of the replacement MACRS property from the date the replacement MACRS property was placed in service by the taxpayer (taking into account the applicable convention) to the time of disposition of the relinquished MACRS property. However, see §1.168(k)–1(f)(5)(v) for replacement MACRS property that is qualified property or 50-percent bonus depreciation property and §1.1400L(b)–1(f)(5) for replacement MACRS property that is qualified New York Liberty Zone property.

(e) *Use of optional depreciation tables*—(1) *Taxpayer not bound by prior use of table.* If a taxpayer used an optional depreciation table for the relinquished MACRS property, the taxpayer is not required to use an optional table for the depreciable exchanged basis of the replacement MACRS property. Conversely, if a taxpayer did not use an optional depreciation table for the relinquished MACRS property, the taxpayer may use the appropriate table for the depreciable exchanged basis of the replacement MACRS property. If a taxpayer decides not to use the table for the depreciable exchanged basis of the replacement MACRS property, the depreciation allowance for this property for the year of replacement and subsequent taxable years is determined under paragraph (c) of this section. If a taxpayer decides to use the optional depreciation tables, no depreciation deduction is allowable for MACRS property placed in service by the acquiring taxpayer and subsequently exchanged or involuntarily converted by such taxpayer in the same taxable year, and, if, during the same taxable year, MACRS property is placed in service by the acquiring taxpayer, exchanged or involuntarily converted by such taxpayer, and the replacement MACRS property is disposed of by such taxpayer, no depreciation deduction is allowable for either MACRS property.

(2) *Determination of the depreciation deduction*—(i) *Relinquished MACRS property*. In the year of disposition, the depreciation allowance for the relinquished MACRS property is computed by multiplying the unadjusted depreciable basis (less the amount of the additional first year depreciation deduction allowed or allowable, whichever is greater, under section 168(k) or section 1400L(b), as applicable) of the relinquished MACRS property by the annual depreciation rate (expressed as a decimal equivalent) specified in the appropriate table for the recovery year corresponding to the year of disposition. This product is then multiplied by a fraction, the numerator of which is the number of months (including fractions of months) the property is deemed to be placed in service during the year of the exchange or involuntary conversion (taking into account the applicable convention) and the denominator of which is 12. However, if the year of disposition is less than 12 months, the depreciation allowance determined under this paragraph (e)(2)(i) must be adjusted for a short taxable year (for further guidance, for example, see Rev. Proc. 89–15 (1989–1 CB 816) and §601.601(d)(2)(ii)(*b*) of this chapter).

(ii) *Replacement MACRS property*—(A) *Determination of the appropriate optional depreciation table*. If a taxpayer chooses to use the appropriate optional depreciation table for the depreciable exchanged basis, the depreciation allowances for the depreciable exchanged basis beginning in the year of replacement are determined by choosing the optional depreciation table that corresponds to the recovery period, depreciation method, and convention of the replacement MACRS property determined under paragraph (c) of this section.

(B) *Calculating the depreciation deduction for the replacement MACRS property*. (*1*) The depreciation deduction for the taxable year is computed by first determining the appropriate recovery year in the table identified under paragraph (e)(2)(ii)(A) of this section. The appropriate recovery year for the year of replacement is the same as the recovery year for the year of disposition, regardless of the taxable year in which the replacement property is acquired. For example, if the recovery year for the year of disposition would have been year 4 in the table that applied before the disposition of the relinquished MACRS property, then the recovery year for the year of replacement is Year 4 in the table identified under paragraph (e)(2)(ii)(A) of this section.

(*2*) Next, the annual depreciation rate (expressed as a decimal equivalent) for each recovery year is multiplied by a transaction coefficient. The transaction coefficient is the formula $(1 / (1 - x))$ where x equals the sum of the annual depreciation rates from the table identified under paragraph (e)(2)(ii)(A) of this section (expressed as a decimal equivalent) corresponding to the replacement MACRS property (as determined under paragraph (e)(2)(ii)(A) of this section) for the taxable years beginning with the placed-in-service year of the relinquished MACRS property through the taxable year immediately prior to the year of disposition. The product of the annual depreciation rate and the transaction coefficient is multiplied by the depreciable exchanged basis (taking into account paragraph (e)(2)(i) of this section). In the year of replacement, this product is then multiplied by a fraction, the numerator of which is the number of months (including fractions of months) the property is deemed to be placed in service by the acquiring taxpayer during the year of replacement (taking into account the applicable convention) and the denominator of which is 12. However, if the year of replacement is the year the relinquished MACRS property is placed in service by the acquiring taxpayer, the preceding sentence does not apply. In addition, if the year of replacement is less than 12 months, the depreciation allowance determined under paragraph (e)(2)(ii) of this section must be adjusted for a short taxable year (for further guidance, for example, see Rev. Proc. 89–15 (1989–1 CB 816) and §601.601(d)(2)(ii)(*b*) of this chapter).

(iii) *Unrecovered basis*. If the replacement MACRS property would have unrecovered depreciable basis after the final recovery year (for example, due to a deferred exchange), the unrecovered basis is an allowable depreciation deduction in the taxable year that corresponds to the final recovery year unless the unrecovered basis is subject to a depreciation limitation such as section 280F.

(3) *Excess basis.* As provided in paragraph (d)(1) of this section, any excess basis in the replacement MACRS property is treated as property that is placed in service by the acquiring taxpayer at the time of replacement. Thus, if the taxpayer chooses to use the appropriate optional depreciation table for the depreciable excess basis in the replacement MACRS property, the depreciation allowances for the depreciable excess basis are determined by multiplying the depreciable excess basis by the annual depreciation rate (expressed as a decimal equivalent) specified in the appropriate table for each taxable year. The appropriate table for the depreciable excess basis is based on the depreciation method, recovery period, and convention applicable to the depreciable excess basis under section 168 at the time of replacement. However, If the year of replacement is less than 12 months, the depreciation allowance determined under this paragraph (e)(3) must be adjusted for a short taxable year (for further guidance, for example, see Rev. Proc. 89–15 (1989–1 CB 816) and §601.601(d)(2)(ii)(*b*) of this chapter).

(4) *Examples.* The application of this paragraph (e) is illustrated by the following examples:

Example 1. J, a calendar-year taxpayer, acquired 5-year property for $10,000 and placed it in service in January 2001. J uses the optional tables to depreciate the property. J uses the half-year convention and did not make any elections for the property. In December 2003, J exchanges the 5-year property for used 7-year property in a like-kind exchange. Pursuant to paragraph (k)(2)(i) of this section, J decided to apply §1.168(i)–6 to the exchange of the 5-year property for the 7-year property, the replacement MACRS property. The depreciable exchanged basis of the 7-year property equals the adjusted depreciable basis of the 5-year property at the time of disposition of the relinquished MACRS property, namely $3,840 ($10,000 less $2,000 depreciation in 2001, $3,200 depreciation in 2002, and $960 depreciation in 2003). J must first determine the appropriate optional depreciation table pursuant to paragraph (c) of this section. Since the replacement MACRS property has a longer recovery period and the same depreciation method as the relinquished MACRS property, J uses the optional depreciation table corresponding to a 7-year recovery period, the 200% declining balance method, and the half-year convention (because the 5-year property was depreciated using a half-year convention). Had the replacement MACRS property been placed in service in the same taxable year as the placed-in-service year of the relinquished MACRS property, the depreciation allowance for the replacement MACRS property for the year of replacement would be determined using recovery year 3 of the optional table. The depreciation allowance equals the depreciable exchanged basis ($3,840) multiplied by the annual depreciation rate for the current taxable year (.1749 for recovery year 3) as modified by the transaction coefficient [1 / (1 − (.1429 + .2449))] which equals 1.6335. Thus, J multiplies $3,840, its depreciable exchanged basis in the replacement MACRS property, by the product of .1749 and 1.6335, and then by one-half, to determine the depreciation allowance for 2003, $549. For 2004, J multiples its depreciable exchanged basis in the replacement MACRS property determined at the time of replacement of $3,840 by the product of the modified annual depreciation rate for the current taxable year (.1249 for recovery year 4) and the transaction coefficient (1.6335) to determine its depreciation allowance of $783.

Example 2. K, a calendar-year taxpayer, acquired used Asset V for $100,000 and placed it in service in January 1999. K depreciated Asset V under the general depreciation system of section 168(a) by using a 5-year recovery period, the 200-percent declining balance method of depreciation, and the half-year convention. In December 2003, as part of the involuntary conversion, Asset V is involuntarily converted due to an earthquake. In October 2005, K purchases used Asset W with the insurance proceeds from the destruction of Asset V and places Asset W in service to replace Asset V. Pursuant to paragraph (k)(2)(i) of this section, K decided to apply §1.168(i)–6 to the involuntary conversion of Asset V with the replacement of Asset W, the replacement MACRS property. If Asset W had been placed in service when Asset V was placed in service, it would have been depreciated using a 7-year recovery period, the 200-percent declining balance method, and the half-year convention. K uses the optional depreciation tables to depreciate Asset V and Asset W. For 2003 (recovery year 5 on the optional table), the depreciation deduction for Asset V is $5,760 ((0.1152)($100,000)(1/2)). Thus, the adjusted depreciable basis of Asset V at the time of replacement is $11,520 ($100,000 less $20,000 depreciation in 1999, $32,000 depreciation in 2000, $19,200 depreciation in 2001, $11,520 depreciation in 2002, and $5,760 depreciation in 2003). Under the table that applied to Asset V, the year of disposition was recovery year 5 and the depreciation deduction was determined under the straight line method. The table that applies for Asset W is the table that applies the straight line depreciation method, the half-year convention, and a 7-year recovery period. The appropriate recovery year under this table is recovery year 5. The depreciation deduction for Asset W for 2005 is $1,646 (($11,520)(0.1429)(1/(1−0.5))(1/2)). Thus, the depreciation deduction for Asset W in 2006 (recovery year 6) is $3,290 ($11,520)(0.1428)(1/(1−0.5)). The depreciation deduction for 2007 (recovery year 7) is $3,292 (($11,520)(.1429)(1/(1−.5))). The depreciation deduction for 2008 (recovery year 8) is $3292 ($11,520 less allowable depreciation for Asset W for 2005 through 2007 ($1,646 + $3,290 + $3,292)).

Example 3. L, a calendar-year taxpayer, placed in service used Computer X in January 2002 for $5,000. L depreciated Computer X under the general depreciation system of section 168(a) by using the 200-percent declining balance method of depreciation, a 5-year recovery period, and the half-year convention. Computer X is destroyed in a fire in March 2004. For 2004, the depreciation deduction allowable for Computer X equals $480 ([($5,000)(.1920)] × (1/2)). Thus, the adjusted depreciable basis of Computer X was $1,920 when it was destroyed ($5,000 unadjusted depreciable basis less $1,000 depreciation for 2002, $1,600 depreciation for 2003, and $480 depreciation for 2004). In April 2004, as part of the involuntary conversion, L acquired and placed in service used Computer Y with insurance proceeds received due to the loss of Computer X. Computer Y will be depreciated using the same depreciation method, recovery period, and convention as Computer X. L elected to use the optional depreciation tables to compute the depreciation allowance for Computer X and Computer Y. The depreciation deduction allowable for 2004 for Computer Y equals $384 ([$1,920 × (.1920)(1/(1−.52))] × (1/2)).

(f) *Mid-quarter convention.* For purposes of applying the 40-percent test under section 168(d) and the regulations under section 168(d), the following rules apply:

(1) *Exchanged basis.* If, in a taxable year, MACRS property is placed in service by the acquiring taxpayer (but not as a result of a like-kind exchange or involuntary conversion) and—

(i) In the same taxable year, is disposed of by the acquiring taxpayer in a like-kind exchange or an involuntary conversion and replaced by the acquiring taxpayer with replacement MACRS property, the exchanged basis (determined without any adjustments for depreciation deductions during the taxable year) of the replacement MACRS property is taken into account in the year of replacement in the quarter the relinquished MACRS property was placed in service by the acquiring taxpayer; or

(ii) In the same taxable year, is disposed of by the acquiring taxpayer in a like-kind exchange or an involuntary conversion, and in a subsequent taxable year is replaced by the acquiring taxpayer with replacement MACRS property, the exchanged basis (determined without any adjustments for depreciation deductions during the taxable year) of the replacement MACRS property is taken into account in the year of replacement in the quarter the replacement MACRS property was placed in service by the acquiring taxpayer; or

(iii) In a subsequent taxable year, disposed of by the acquiring taxpayer in a like-kind exchange or involuntary conversion, the exchanged basis of the replacement MACRS property is not taken into account in the year of replacement.

(2) *Excess basis.* Any excess basis is taken into account in the quarter the replacement MACRS property is placed in service by the acquiring taxpayer.

(3) *Depreciable property acquired for nondepreciable property.* Both the exchanged basis and excess basis of the replacement MACRS property described in paragraph (d)(2)(ii) of this section (depreciable property acquired for nondepreciable property), are taken into account for determining whether the mid-quarter convention applies in the year of replacement.

(g) *Section 179 election.* In applying the section 179 election, only the excess basis, if any, in the replacement MACRS property is taken into account. If the replacement MACRS property is described in paragraph (d)(2)(ii) of this section (depreciable property acquired for nondepreciable property), only the excess basis in the replacement MACRS property is taken into account.

(h) *Additional first year depreciation deduction.* See §1.168(k)–1(f)(5) (for qualified property or 50-percent bonus depreciation property) and §1.1400L(b)–

1(f)(5) (for qualified New York Liberty Zone property).

(i) *Elections*—(1) *Election not to apply this section.* A taxpayer may elect not to apply this section for any MACRS property involved in a like-kind exchange or involuntary conversion. An election under this paragraph (i)(1) applies only to the taxpayer making the election and the election applies to both the relinquished MACRS property and the replacement MACRS property. If an election is made under this paragraph (i)(1), the depreciation allowances for the replacement MACRS property beginning in the year of replacement and for the relinquished MACRS property in the year of disposition are not determined under this section (except as otherwise provided in this paragraph). Instead, for depreciation purposes only, the sum of the exchanged basis and excess basis, if any, in the replacement MACRS property is treated as property placed in service by the taxpayer at the time of replacement and the adjusted depreciable basis of the relinquished MACRS property is treated as being disposed of by the taxpayer at the time of disposition. While the relinquished MACRS property is treated as being disposed of at the time of disposition for depreciation purposes, the election not to apply this section does not affect the application of sections 1031 and 1033 (for example, if a taxpayer does not make the election under this paragraph (i)(1) and does not recognize gain or loss under section 1031, this result would not change if the taxpayer chose to make the election under this paragraph (i)(1)). In addition, the election not to apply this section does not affect the application of sections 1245 and 1250 to the relinquished MACRS property. Paragraphs (c)(5)(i) (determination of depreciation for relinquished MACRS property in the year of disposition), (c)(5)(iii) (rules for deferred transactions), (g) (section 179 election), and (h) (additional first year depreciation deduction) of this section apply to property to which this paragraph (i)(1) applies. See paragraph (j) of this section for the time and manner of making the election under this paragraph (i)(1).

(2) *Election to treat certain replacement property as MACRS property.* If the tangible depreciable property acquired by a taxpayer in a like-kind exchange or involuntary conversion (the replacement property) replaces tangible depreciable property for which the taxpayer made a valid election under section 168(f)(1) to exclude it from the application of MACRS (the relinquished property), the taxpayer may elect to treat, for depreciation purposes only, the sum of the exchanged basis and excess basis, if any, of the replacement property as MACRS property that is placed in service by the taxpayer at the time of replacement. An election under this paragraph (i)(2) applies only to the taxpayer making the election and the election applies to both the relinquished property and the replacement property. If an election is made under this paragraph (i)(2), the adjusted depreciable basis of the relinquished property is treated as being disposed of by the taxpayer at the time of disposition. Rules similar to those provided in §§1.168(i)–6(b)(3) and (4) apply for purposes of determining the time of disposition and time of replacement under this paragraph (i)(2). While the relinquished property is treated as being disposed of at the time of disposition for depreciation purposes, the election under this paragraph (i)(2) does not affect the application of sections 1031 and 1033, and the application of sections 1245 and 1250 to the relinquished property. If an election is made under this paragraph (i)(2), rules similar to those provided in paragraphs (c)(5)(iii) (rules for deferred transactions), (g) (section 179 election), and (h) (additional first year depreciation deduction) of this section apply to property. Except as provided in paragraph (k)(3)(ii) of this section, a taxpayer makes the election under this paragraph (i)(2) by claiming the depreciation allowance as determined under MACRS for the replacement property on the taxpayer's timely filed (including extensions) original Federal tax return for the placed-in-service year of the replacement property as determined under this paragraph (i)(2).

(j) *Time and manner of making election under paragraph (i)(1) of this section*—(1) *In general.* The election provided in paragraph (i)(1) of this section is made separately by each person acquiring replacement MACRS property. The election is made for each member of a consolidated group by the common parent of the group, by the partnership (and not by the partners separately) in the case of a partnership, or by the S corporation (and not by the shareholders separately) in the case of an S corporation. A separate election under paragraph (i)(1) of this section is required for each like-kind exchange or involuntary conversion. The election provided in paragraph (i)(1) of this section must be made within the time and manner provided in paragraph (j)(2) and (3) of this section and may not be made by the taxpayer in any other manner (for example, the election cannot be made through a request under section 446(e) to change the taxpayer's method of accounting), except as provided in paragraph (k)(2) of this section.

(2) *Time for making election.* The election provided in paragraph (i)(1) of this section must be made by the due date (including extensions) of the taxpayer's Federal tax return for the year of replacement.

(3) *Manner of making election.* The election provided in paragraph (i)(1) of this section is made in the manner provided for on Form 4562, Depreciation and Amortization, and its instructions. If Form 4562 is revised or renumbered, any reference in this section to that form is treated as a reference to the revised or renumbered form.

(4) *Revocation.* The election provided in paragraph (i)(1) of this section, once made, may be revoked only with the consent of the Commissioner of Internal Revenue. Such consent will be granted only in extraordinary circumstances. Requests for consent are requests for a letter ruling and must be filed with the Commissioner of Internal Revenue, Washington, DC 20224. Requests for consent may not be made in any other manner (for example, through a request under section 446(e) to change the taxpayer's method of accounting).

(k) *Effective date*—(1) *In general.* Except as provided in paragraph (k)(3) of this section, this section applies to a like-kind exchange or an involuntary conversion of MACRS property for which the time of disposition and the time of replacement both occur after February 27, 2004.

(2) *Application to pre-effective date like-kind exchanges and involuntary conversions.* For a like-kind exchange or an involuntary conversion of MACRS property for which the time of disposition, the time of replacement, or both occur on or before February 27, 2004, a taxpayer may—

(i) Apply the provisions of this section. If a taxpayer's applicable Federal tax return has been filed on or before February 27, 2004, and the taxpayer has treated the replacement MACRS property as acquired, and the relinquished MACRS property as disposed of, in a like-kind exchange or an involuntary conversion, the taxpayer changes its method of accounting for depreciation of the replacement MACRS property and relinquished MACRS property in accordance with this paragraph (k)(2)(i) by following the applicable administrative procedures issued under §1.446–1(e)(3)(ii) for obtaining the Commissioner's automatic consent to a change in method of accounting (for further guidance, see Rev. Proc. 2002–9 (2002–1 CB 327) and §601.601(d)(2)(ii)(*b*) of this chapter); or

(ii) Rely on prior guidance issued by the Internal Revenue Service for determining the depreciation deductions of replacement MACRS property and relinquished MACRS property (for further guidance, for example, see Notice 2000–4 (2001–1 CB 313) and §601.601(d)(2)(ii)(*b*) of this chapter). In relying on such guidance, a taxpayer may use any reasonable, consistent method of determining depreciation in the year of disposition and the year of replacement. If a taxpayer's applicable Federal tax return has been filed on or before February 27, 2004, and the taxpayer has treated the replacement MACRS property as acquired, and the relinquished MACRS property as disposed of, in a like-kind exchange or an involuntary conversion, the taxpayer changes its method of accounting for depreciation of the replacement MACRS property and relinquished MACRS property in accordance with this paragraph (k)(2)(ii) by following the applicable administrative procedures issued under §1.446–1(e)(3)(ii) for obtaining the Commissioner's automatic consent to a change in method of accounting (for further guidance, see Rev. Proc. 2002–9 (2002–1 CB 327) and §601.601(d)(2)(ii)(*b*) of this chapter).

(3) *Like-kind exchanges and involuntary conversions where the taxpayer made the election under section 168(f)(1) for the relinquished property*—(i) *In general.* If the tangible depreciable property acquired by a taxpayer in a like-kind exchange or involuntary conversion (the replacement property) replaces tangible depreciable property for which the taxpayer made a valid election under section 168(f)(1) to exclude it from the application of MACRS (the relinquished property), paragraph (i)(2) of this section applies to such relinquished property and replacement property for which the time of disposition and the time of replacement (both as determined under paragraph (i)(2) of this section) both occur after February 26, 2007.

(ii) *Application of paragraph (i)(2) of this section to pre-February 26, 2007 like-kind exchanges and involuntary conversions.* If the tangible depreciable property acquired by a taxpayer in a like-kind exchange or involuntary conversion (the replacement property) replaces tangible depreciable property for which the taxpayer made a valid election under section 168(f)(1) to exclude it from the application of MACRS (the relinquished property), the taxpayer may apply paragraph (i)(2) of this section to the relinquished property and the replacement property for which the time of disposition, the time of replacement (both as determined under paragraph (i)(2) of this section), or both occur on or before February 26, 2007. If the taxpayer wants to apply paragraph (i)(2) of this section and the taxpayer's applicable Federal tax return has been filed on or before February 26, 2007, the taxpayer must change its method of accounting for depreciation of the replacement property and relinquished property in accordance with this paragraph (k)(3)(ii) by following the applicable administrative procedures issued under §1.446–1(e)(3)(ii) for obtaining the Commissioner's automatic consent to a change in method of accounting (for further guidance, see Rev. Proc. 2002–9 (2002–1 CB 327) and §601.601(d)(2)(ii)(b) of this chapter).

[T.D. 9314, 72 FR 9251, Mar. 1, 2007]

§ 1.168(i)–7T Accounting for MACRS property (temporary).

(a) *In general.* A taxpayer may account for MACRS property (as defined in §1.168(b)–1(a)(2)) by treating each individual asset as an account (a ''single asset account'' or an ''item account'') or by combining two or more assets in a single account (a ''multiple asset account'' or a ''pool''). A taxpayer may establish as many accounts for MACRS property as the taxpayer wants. This section does not apply to assets included in general asset accounts. For rules applicable to general asset accounts, see §1.168(i)–1T.

(b) *Required use of single asset accounts.* A taxpayer must account for an asset in a single asset account if the taxpayer uses the asset both in a trade or business (or for the production of income) and in a personal activity, or if the taxpayer places in service and disposes of the asset during the same taxable year. Also, if general asset account treatment for an asset terminates under §1.168(i)–1T(c)(1)(ii)(A), (e)(3)(iii), (e)(3)(vii), (g), or (h)(2), the taxpayer must account for the asset in a single asset account beginning in the taxable year in which the general asset account treatment for the asset terminates. If a taxpayer accounts for an asset in a multiple asset account or pool treatment and the taxpayer disposes of the asset, the taxpayer must account for the asset in a single asset account beginning in the taxable year in which the disposition occurs. *See* §1.168(i)–8T(g)(2)(i). If a taxpayer disposes of a component of a larger asset and the unadjusted depreciable basis of the disposed of component is included in the unadjusted depreciable basis of the larger asset, the taxpayer must account for the component in a single asset account beginning in the taxable year in which the disposition occurs. *See* §1.168(i)–8T(g)(3)(i).

(c) *Establishment of multiple asset accounts or pools*—(1) *Assets eligible for multiple asset accounts or pools.* Except as provided in paragraph (b) of this section, assets that are subject to either the general depreciation system of section 168(a) or the alternative depreciation system of section 168(g) may be accounted for in one or more multiple asset accounts or pools.

(2) *Grouping assets in multiple asset accounts or pools*—(i) *General rules.* Assets that are eligible to be grouped into a single multiple asset account or pool may be divided into more than one multiple asset account or pool. Each multiple asset account or pool must include only assets that—

(A) Have the same applicable depreciation method;

(B) Have the same applicable recovery period;

(C) Have the same applicable convention; and

(D) Are placed in service by the taxpayer in the same taxable year.

(ii) *Special rules.* In addition to the general rules in paragraph (c)(2)(i) of this section, the following rules apply when establishing multiple asset accounts or pools—

(A) Assets subject to the mid-quarter convention may only be grouped into a multiple asset account or pool with assets that are placed in service in the same quarter of the taxable year;

(B) Assets subject to the mid-month convention may only be grouped into a multiple asset account or pool with assets that are placed in service in the same month of the taxable year;

(C) Passenger automobiles for which the depreciation allowance is limited under section 280F(a) must be grouped into a separate multiple asset account or pool;

(D) Assets not eligible for any additional first year depreciation deduction (including assets for which the taxpayer elected not to deduct the additional first year depreciation) provided by, for example, section 168(k) through (n), 1400L(b), or 1400N(d), must be grouped into a separate multiple asset account or pool;

(E) Assets eligible for the additional first year depreciation deduction may only be grouped into a multiple asset account or pool with assets for which the taxpayer claimed the same percentage of the additional first year depreciation (for example, 30 percent, 50 percent, or 100 percent);

(F) Except for passenger automobiles described in paragraph (c)(2)(ii)(C) of this section, listed property (as defined in section 280F(d)(4)) must be grouped into a separate multiple asset account or pool;

(G) Assets for which the depreciation allowance for the placed-in-service year is not determined by using an optional depreciation table (for further guidance, see section 8 of Rev. Proc. 87–57, 1987–2 CB 687, 693 (see §601.601(d)(2) of this chapter) must be grouped into a separate multiple asset account or pool; and

(H) Mass assets (as defined in §1.168(i)–8T(b)(2)) that are or will be subject to §1.168–8T(f)(2)(ii) (disposed of or converted mass asset is identified by a mortality dispersion table) must be grouped into a separate multiple asset account or pool.

(d) *Cross references.* See §1.167(a)–7T(c) for the records to be maintained by a taxpayer for each account. In addition, see §1.168(i)–1T for the records to be maintained by a taxpayer for each general asset account.

(e) *Effective/applicability date*—(1) *In general.* This section applies to taxable years beginning on or after January 1, 2014.

(2) *Optional early application.* A taxpayer may choose to apply this section to taxable years beginning on or after January 1, 2012.

(3) *Change in method of accounting.* A change to comply with this section for depreciable assets placed in service in a taxable year ending on or after December 30, 2003, is a change in method of accounting to which the provisions of section 446(e) and the regulations under section 446(e) apply. A taxpayer also may treat a change to comply with this section for depreciable assets placed in service in a taxable year ending before December 30, 2003, as a change in method of accounting to which the provisions of section 446(e) and the regulations under section 446(e) apply.

(4) *Expiration date.* The applicability of this section expires on December 23, 2014.

[T.D. 9564, 76 FR 81095, Dec. 27, 2011, as amended at 77 FR 74585, Dec. 17, 2012]

§ 1.168(i)–8T Dispositions of MACRS property (temporary).

(a) *Scope.* This section provides rules applicable to dispositions of MACRS property (as defined in § 1.168(b)–1(a)(2)) or to depreciable property (as defined in § 1.168(b)–1(a)(1)) that would be MACRS property but for an election made by the taxpayer either to expense all or some of the property's cost under section 179, 179A, 179B, 179C, 179D, or 1400I(a)(1), or any similar provision, or to amortize all or some of the property's cost under section 1400I(a)(2) or any similar provision. Except as provided in § 1.168(i)–1T(e)(iii), this section does not apply to dispositions of assets included in a general asset account. For rules applicable to dispositions of assets included in a general asset account, see § 1.168(i)–1T(e).

(b) *Definitions.* For purposes of this section—

(1) *Disposition* occurs when ownership of the asset is transferred or when the asset is permanently withdrawn from use either in the taxpayer's trade or business or in the production of income. A disposition includes the sale, exchange, retirement, physical abandonment, or destruction of an asset. A disposition also includes the retirement of a structural component (as defined in § 1.48–1(e)(2)) of a building (as defined in § 1.48–1(e)(1)). A disposition also occurs when an asset is transferred to a supplies, scrap, or similar account.

(2) *Mass assets* is a mass or group of individual items of depreciable assets—

(i) That are not necessarily homogenous;

(ii) Each of which is minor in value relative to the total value of the mass or group;

(iii) Numerous in quantity;

(iv) Usually accounted for only on a total dollar or quantity basis;

(v) With respect to which separate identification is impracticable; and

(vi) Placed in service in the same taxable year.

(3) *Unadjusted depreciable basis of the multiple asset account or pool* is the sum of the unadjusted depreciable bases (as defined in § 1.168(b)–1(a)(3)) of all assets included in the multiple asset account or pool.

(c) *Special rules*—(1) *Manner of disposition.* The manner of disposition (for example, normal retirement, abnormal retirement, ordinary retirement, or extraordinary retirement) is not taken into account in determining whether a disposition occurs or gain or loss is recognized.

(2) *Disposition by transfer to a supplies account.* If a taxpayer made an election under § 1.162–3T(d) to treat the cost of any material and supply as a capital expenditure subject to the allowance for depreciation, the taxpayer can dispose of the material and supply by transferring it to a supplies account only if the taxpayer has obtained the consent of the Commissioner to revoke the § 1.162–3T(d) election. *See* § 1.162–3T(d)(3) for the procedures for revoking a § 1.162–3T(d) election.

(3) *Leasehold improvements.* This section also applies to—

(i) A lessor of leased property that made an improvement to that property for the lessee of the property, has a depreciable basis in the improvement, and disposes of the improvement before or upon the termination of the lease with the lessee. *See* section 168(i)(8)(B); and

(ii) A lessee of leased property that made an improvement to that property, has a depreciable basis in the improvement, and disposes of the improvement before or upon the termination of the lease.

(4) *Determination of asset disposed of*—(i) *In general.* For purposes of applying this section, the facts and circumstances of each disposition are considered in determining what is the appropriate asset disposed of. Except as provided in paragraph (c)(4)(ii) of this section, the asset for disposition purposes cannot be larger than the unit of property as determined under § 1.263(a)-3T(e)(2), (e)(3), and (e)(5) or as otherwise determined in published guidance in the FEDERAL REGISTER or in the Internal Revenue Bulletin (see, for example, Rev. Proc. 2011–38, 2011–18 IRB 743, for units of property for wireless network assets (see § 601.601(d)(2)(ii)(*b*) of this chapter)).

(ii) *Exceptions.* For purposes of applying this section:

(A) Each building (not including its structural components) is the asset except as provided in §1.1250–1(a)(2)(ii) or in paragraph (c)(4)(ii)(B) or (E) of this section.

(B) If a building has two or more condominium or cooperative units, each condominium or cooperative unit (not including its structural components) is the asset except as provided in §1.1250–1(a)(2)(ii) or in paragraph (c)(4)(ii)(E) of this section.

(C) Each structural component (including all components thereof) of a building, condominium unit, or cooperative unit is the asset.

(D) If a taxpayer properly includes an item in one of the asset classes 00.11 through 00.4 of Rev. Proc. 87–56 (1987–2 CB 674) (see §601.601(d)(2)(ii)(*b*) of this chapter) or properly classifies an item in one of the categories under section 168(e)(3) (except for a category that includes buildings or structural components; for example, retail motor fuels outlet, qualified leasehold improvement property, qualified restaurant property, and qualified retail improvement property), each item is the asset provided it is not larger than the unit of property as determined under §1.263(a)–3T(e)(3) or (e)(5) or as otherwise determined in published guidance in the FEDERAL REGISTER or in the Internal Revenue Bulletin (see §601.601(d)(2)(ii)(*b*) of this chapter), or provided paragraph (c)(4)(ii)(E) of this section does not apply to the item. For example, each desk is the asset, each computer is the asset, and each qualified smart electric meter is the asset (assuming these assets are not larger than the unit of property as determined under §1.263(a)–3T(e)(3) or (e)(5) or as otherwise determined in published guidance in the FEDERAL REGISTER or in the Internal Revenue Bulletin (see §601.601(d)(2)(ii)(*b*) of this chapter)).

(E) If the taxpayer places in service an improvement or addition to an asset after the taxpayer placed the asset in service, the improvement or addition is a separate asset provided it is not larger than the unit of property as determined under §1.263(a)-3T(e)(3) or (e)(5) or as otherwise determined in published guidance in the FEDERAL REGISTER or in the Internal Revenue Bulletin (see §601.601(d)(2)(ii)(*b*) of this chapter).

(F) If an asset is not described in one of the asset classes 00.11 through 00.4 of Rev. Proc. 87–56 (1987–2 CB 674) (see §601.601(d)(2)(ii)(*b*) of this chapter) or in one of the categories under section 168(e)(3), a taxpayer also may use any reasonable, consistent method to treat each of the asset's components as the asset.

(d) *Gain or loss on dispositions*. Except as provided by section 280B and §1.280B–1, the following rules apply when assets within the scope of this section are disposed of during a taxable year:

(1) If an asset is disposed of by sale, exchange, or involuntary conversion, gain or loss must be recognized under the applicable provisions of the Internal Revenue Code.

(2) If an asset is disposed of by physical abandonment, loss must be recognized in the amount of the adjusted depreciable basis (as defined in §1.168(b)-1(a)(4)) of the asset at the time of the abandonment (taking into account the applicable convention). However, if the abandoned asset is subject to nonrecourse indebtedness, paragraph (d)(1) of this section applies to the asset (instead of this paragraph (d)(2)). For a loss from physical abandonment to qualify for recognition under this paragraph (d)(2), the taxpayer must intend to discard the asset irrevocably so that the taxpayer will neither use the asset again nor retrieve it for sale, exchange, or other disposition.

(3) If an asset is disposed of other than by sale, exchange, involuntary conversion, physical abandonment, or conversion to personal use (as, for example, when the asset is transferred to a supplies or scrap account), gain is not recognized. Loss must be recognized in the amount of the excess of the adjusted depreciable basis of the asset at the time of the disposition (taking into account the applicable convention) over the asset's fair market value at the time of the disposition (taking into account the applicable convention).

(e) *Basis of asset disposed of*—(1) *In general*. The adjusted basis of an asset disposed of for computing gain or loss is its adjusted depreciable basis at the time of the asset's disposition (as determined under the applicable convention for the asset).

(2) *Assets disposed of are in multiple asset accounts or are components.* If the taxpayer accounts for the asset disposed of in a multiple asset account or pool, or the asset disposed of is a component of a larger asset and it is impracticable from the taxpayer's records to determine the unadjusted depreciable basis (as defined in §1.168(b)-1(a)(3)) of the asset disposed of, the taxpayer may use any reasonable method that is consistently applied to the taxpayer's multiple asset accounts or pools or to the taxpayer's larger assets for purposes of determining the unadjusted depreciable basis of assets disposed of. To determine the adjusted depreciable basis of an asset disposed of in a multiple asset account, the depreciation allowed or allowable for the asset disposed of is computed by using the depreciation method, recovery period, and convention applicable to the multiple asset account or pool in which the asset disposed of was included and by including the additional first year depreciation deduction claimed for the asset disposed of. To determine the adjusted depreciable basis of an asset disposed of that is a component of a larger asset, the depreciation allowed or allowable for the asset disposed of is computed by using the depreciation method, recovery period, and convention applicable to the larger asset of which the asset disposed of is a component and by including the portion of the additional first year depreciation deduction claimed for the larger asset that is attributable to the asset disposed of.

(f) *Identification of asset disposed of*—(1) *In general.* Except as provided in paragraph (f)(2) of this section, a taxpayer must use the specific identification method of accounting to identify which asset is disposed of by the taxpayer. Under this method of accounting, the taxpayer can determine the particular taxable year in which the asset disposed of was placed in service by the taxpayer.

(2) *Asset disposed of is in a multiple asset account.* If a taxpayer accounts for the asset disposed of in a multiple asset account or pool and the total dispositions of assets with the same recovery period during the taxable year are readily determined from the taxpayer's records but it is impracticable from the taxpayer's records to determine the particular taxable year in which the asset disposed of was placed in service by the taxpayer, the taxpayer may identify the asset disposed of by using—

(i) A first-in, first-out method of accounting if the unadjusted depreciable basis of the asset disposed of cannot be readily determined from the taxpayer's records. Under this method of accounting, the taxpayer identifies the multiple asset account or pool with the earliest placed-in-service year that has the same recovery period as the asset disposed of and that has assets at the beginning of the taxable year of the disposition, and the taxpayer treats the asset disposed of as being from that multiple asset account or pool;

(ii) A modified first-in, first-out method of accounting if the unadjusted depreciable basis of the asset disposed of can be readily determined from the taxpayer's records. Under this method of accounting, the taxpayer identifies the multiple asset account or pool with the earliest placed-in-service year that has the same recovery period as the asset disposed of and that has assets at the beginning of the taxable year of the disposition with the same unadjusted depreciable basis as the asset disposed of, and the taxpayer treats the asset disposed of as being from that multiple asset account or pool;

(iii) A mortality dispersion table if the asset disposed of is a mass asset. The mortality dispersion table must be based upon an acceptable sampling of the taxpayer's actual disposition experience for mass assets or other acceptable statistical or engineering techniques. To use a mortality dispersion table, the taxpayer must adopt recordkeeping practices consistent with the taxpayer's prior practices and consonant with good accounting and engineering practices; or

(iv) Any other method as the Secretary may designate by publication in the FEDERAL REGISTER or in the Internal Revenue Bulletin (see §601.601(d)(2) of this chapter) on or after December 23, 2011. For this purpose, a last-in, first-out method of accounting is not a designated method. Under the last-in, first-out method of accounting, the taxpayer identifies the multiple asset account or pool with the most recent placed-in-service year that has the same recovery period as the asset disposed of and that has assets at the beginning of the taxable year of the disposition, and the taxpayer treats the asset disposed of as being from that multiple asset account or pool.

(g) *Accounting for asset disposed of*—(1) *Depreciation ends.* Depreciation ends for an asset at the time of the asset's disposition (as determined under the applicable convention for the asset). *See* §1.167(a)–10(b). If the asset disposed of is in a single asset account, the single asset account terminates at the time of the asset's disposition (as determined under the applicable convention for the asset).

(2) *Asset disposed of in a multiple asset account or pool.* If the taxpayer accounts for the asset disposed of in a multiple asset account or pool, then—

(i) As of the first day of the taxable year in which the disposition occurs, the asset disposed of is removed from the multiple asset account or pool and is placed into a single asset account. *See* §1.168(i)–7T(b);

(ii) The unadjusted depreciable basis of the multiple asset account or pool must be reduced by the unadjusted depreciable basis of the asset disposed of as of the first day of the taxable year in which the disposition occurs. See paragraph (e)(2) of this section for determining the unadjusted depreciable basis of the asset disposed of;

(iii) The depreciation reserve of the multiple asset account or pool must be reduced by the depreciation allowed or allowable for the asset disposed of as of the end of the taxable year immediately preceding the year of disposition, computed by using the depreciation method, recovery period, and convention applicable to the multiple asset account or pool in which the asset disposed of was included and by including the additional first year depreciation deduction claimed for the asset disposed of; and

(iv) In determining the adjusted depreciable basis of the asset disposed of at the time of disposition (taking into account the applicable convention), the depreciation allowed or allowable for the asset disposed of is computed by using the depreciation method, recovery period, and convention applicable to the multiple asset account or pool in which the asset disposed of was included and by including the additional first year depreciation deduction claimed for the asset disposed of.

(3) *Disposed of component of a larger asset.* This paragraph (g)(3) applies only to a taxpayer that uses a reasonable, consistent method to treat each of the asset's components as the asset in accordance with paragraph (c)(4)(ii)(F) of this section. If the taxpayer disposes of a component of a larger asset and the unadjusted depreciable basis of the disposed component is included in the unadjusted depreciable basis of the larger asset, then—

(i) As of the first day of the taxable year in which the disposition occurs, the disposed of component is removed from the larger asset and is placed into a single asset account. *See* §1.168(i)–7T(b);

(ii) The unadjusted depreciable basis of the larger asset must be reduced by the unadjusted depreciable basis of the disposed of component as of the first day of the taxable year in which the disposition occurs. See paragraph (e)(2) of this section for determining the unadjusted depreciable basis of the disposed of component;

(iii) The depreciation reserve of the larger asset must be reduced by the depreciation allowed or allowable for the disposed of component as of the end of the taxable year immediately preceding the year of disposition, computed by using the depreciation method, recovery period, and convention applicable to the larger asset in which the disposed of component was included and by including the portion of the additional first year depreciation deduction claimed for the larger asset that is attributable to the disposed of component; and

(iv) In determining the adjusted depreciable basis of the disposed of component at the time of disposition (taking into account the applicable convention), the depreciation allowed or allowable for the asset disposed of is computed by using the depreciation method, recovery period, and convention applicable to the larger asset in which the disposed of component was included and by including the portion of the additional first year depreciation deduction claimed for the larger asset that is attributable to the disposed of component.

(h) *Examples*. The application of this section is illustrated by the following examples:

Example 1. A owns an office building with four elevators. A decides to replace one of the elevators. The retirement of the replaced elevator, which is a structural component of the building, is a disposition. As a result, depreciation for the retired elevator ceases at the time of its retirement (taking into account the applicable convention). A recognizes a loss upon this retirement.

Example 2. B, a calendar-year commercial airline company, owns several aircrafts that are used in the commercial carrying of passengers. B replaces the existing engines on one of the aircrafts with new engines and treats each engine of an aircraft as a major component of the aircraft. Assume each aircraft is a unit of property as determined under §1.263(a)–3T(e)(3). However, for tax disposition purposes, B consistently treats each major component of an aircraft as the asset. Thus, the retirement of the replaced engines is a disposition. As a result, depreciation for the retired engines ceases at the time of their retirement (taking into account the applicable convention). B recognizes a loss upon this retirement.

Example 3. The facts are the same as in *Example 2*, except B treats each aircraft as the asset for tax disposition purposes. Assume each aircraft is a unit of property as determined under §1.263(a)–3T(e)(3). Thus, the replacement of the engines on one of the aircrafts is not a disposition. As a result, depreciation continues for the cost of the aircraft (including the cost of the replaced engines) and B does not recognize a loss upon this replacement.

Example 4. C, a corporation, owns several trucks that are used in its trade or business and described in asset class 00.241 of Rev. Proc. 87–56. C replaces the engine on one of the trucks with a new engine and treats each engine of a truck as a major component of the truck. Assume each truck is a unit of property as determined under §1.263(a)–3T(e)(3). Because the trucks are described in asset class 00.241 of Rev. Proc. 87–56, C must treat each truck as the asset for tax disposition purposes. Thus, the replacement of the engine on the truck is not a disposition. As a result, depreciation continues for the cost of the truck (including the cost of the replaced engine) and C does not recognize a loss upon this replacement.

Example 5. (i) On July 1, 2009, D, a calendar-year taxpayer, purchased and placed in service a multi-story office building that costs $20,000,000. The cost of each structural component of the building was not separately stated. D accounts for the building in its records as a single asset with a cost of $20,000,000. D depreciates the building as nonresidential real property and uses the optional depreciation table that corresponds with the general depreciation system, the straight-line method, a 39-year recovery period, and the mid-month convention. As of January 1, 2012, the depreciation reserve for the building is $1,261,000.

(ii) On June 30, 2012, D replaces one of the building's elevators. Because D cannot identify the cost of the structural components of the office building from its records, D uses a reasonable method that is consistently applied to all of the structural components of the office building to determine the cost of the elevator. Using this reasonable method, D allocates $150,000 of the $20,000,000 purchase price for the building to the retired elevator. Using the optional depreciation table that corresponds with the general depreciation system, the straight-line method, a 39-year recovery period, and the mid-month convention, the depreciation allowed or allowable for the retired elevator as of December 31, 2011, is $9,457.50.

(iii) For D's 2012 Federal income tax return, loss for the retired elevator is determined as follows. The depreciation allowed or allowable for 2012 for the retired elevator is $1,923 ((unadjusted depreciable basis of $150,000 × depreciation rate of 2.564 percent for 2012) × 6/12). Thus, the adjusted depreciable basis of the retired elevator is $138,619.50 (the adjusted depreciable basis of $140,542.50 removed from the building cost less the depreciation allowed or allowable of $1,923 for 2012). As a result, D recognizes a loss of $138,619.50 for the retired elevator in 2012, which is subject to section 1231.

(iv) For D's 2012 Federal income tax return, the depreciation allowance for the building is computed as follows. As of January 1, 2012, the unadjusted depreciable basis of the building is reduced from $20,000,000 to $19,850,000 ($20,000,000 less the unadjusted depreciable basis of $150,000 for the retired elevator), and the depreciation reserve of the building is reduced from $1,261,000 to $1,251,542.50 ($1,261,000 less the depreciation allowed or allowable of $9,457.50 for the retired elevator as of December 31, 2011). Consequently, the depreciation allowance for the building for 2012 is $508,954 ($19,850,000 × depreciation rate of 2.564 percent for 2012).

Example 6. (i) Since 2003, E, a calendar year taxpayer, has accounted for items of MACRS property that are mass assets in pools. Each pool includes only the mass assets that have the same depreciation method, recovery period, and convention, and are placed in service by E in the same taxable year. None of the pools are general asset accounts under section 168(i)(4) and the regulations under section 168(i)(4). E identifies any dispositions of these mass assets by specific identification.

(ii) During 2012, E sells 10 items of mass assets with a 5-year recovery period each for $100. Under the specific identification method, E identifies these mass assets as being from the pool established by E in 2010 for mass assets with a 5-year recovery period. Assume E depreciates this pool using the optional depreciation table that corresponds with the general depreciation system, the 200-percent declining balance method, a 5-year recovery period, and the half-year convention. E elected not to deduct the additional first year depreciation provided by section 168(k) for 5-year property placed in service during 2010. As of January 1, 2012, this pool contains 100 similar items of mass assets with a total cost of $25,000 and a total depreciation reserve of $13,000. Thus, E allocates a cost of $250 ($25,000 × (1/100)) to each disposed of mass asset and depreciation allowed or allowable of $130 ($13,000 × (1/100)) to each disposed of mass asset. The depreciation allowed or allowable in 2012 for each disposed of mass asset is $24 [($250 × 19.2 percent)/2]. As a result, the adjusted depreciable basis of each disposed of mass asset under section 1011 is $96 ($250–$130–$24). Thus, E recognizes a gain of $4 for each disposed of mass asset in 2012, which is subject to section 1245.

(iii) Further, as of January 1, 2012, the unadjusted depreciable basis of the 2010 pool of mass assets with a 5-year recovery period is reduced from $25,000 to $22,500 ($25,000 less the unadjusted depreciable basis of $2,500 for the 10 disposed of items), and the depreciation reserve of this 2010 pool is reduced from $13,000 to $11,700 ($13,000 less the depreciation allowed or allowable of $1,300 for the 10 disposed of items as of December 31, 2011). Consequently, as of January 1, 2012, the 2010 pool of mass assets with a 5-year recovery period has 90 items with a total cost of $22,500 and a depreciation reserve of $11,700. Thus, the depreciation allowance for this pool for 2012 is $4,320 ($22,500 × 19.2 percent).

Example 7. (i) Same facts as in *Example 6*. Because of changes in E's recordkeeping in 2013, it is impracticable for E to continue to identify disposed of mass assets using specific identification and to determine the unadjusted depreciable basis of the disposed of mass assets. As a result, E files a Form 3115, Application for Change in Accounting Method, to change to a first-in, first-out method beginning with the taxable year beginning on January 1, 2013, on a modified cut-off basis. *See* §1.446–1(e)(2)(ii)(*d*)(*2*)(*vii*). Under the first-in, first-out method, the mass assets disposed of in a taxable year are deemed to be from the pool with the earliest placed-in-service year that has assets as of the beginning of the taxable year of the disposition with the same recovery period as the asset disposed of. The Commissioner of Internal Revenue consents to this change in method of accounting.

(ii) During 2013, E sells 20 items of mass assets with a 5-year recovery period each for $50. As of January 1, 2013, the 2006 pool is the pool with the earliest placed-in-service year for mass assets with a 5-year recovery period, and this pool contains 25 items of mass assets with a total cost of $10,000 and a total depreciation reserve of $10,000. Thus, E allocates a cost of $400 ($10,000 × (1/25)) to each disposed of mass asset and depreciation allowed or allowable of $400 to each disposed of mass asset. As a result, the adjusted depreciable basis of each disposed of mass asset is $0. Thus, E recognizes a gain of $50 for each disposed of mass asset in 2013, which is subject to section 1245.

(iii) Further, as of January 1, 2013, the unadjusted depreciable basis of the 2006 pool of mass assets with a 5-year recovery period is reduced from $10,000 to $2,000 ($10,000 less the unadjusted depreciable basis of $8,000 for the 20 disposed of items ($400 × 20)), and the depreciation reserve of this 2006 pool is reduced from $10,000 to $2,000 ($10,000 less the depreciation allowed or allowable of $8,000 for the 20 disposed of items as of December 31, 2012). Consequently, as of January 1, 2013, the 2006 pool of mass assets with a 5-year recovery period has 5 items with a total cost of $2,000 and a depreciation reserve of $2,000.

(i) *Effective/applicability date*—(1) *In general.* This section applies to taxable years beginning on or after January 1, 2014.

(2) *Optional early application.* A taxpayer may choose to apply this section to taxable years beginning on or after January 1, 2012.

(3) *Change in method of accounting.* A change to comply with this section for depreciable assets placed in service in a taxable year ending on or after December 30, 2003, is a change in method of accounting to which the provisions of section 446(e) and the regulations under section 446(e) apply. A taxpayer also may treat a change to comply with this section for depreciable assets placed in service in a taxable year ending before December 30, 2003, as a change in method of accounting to which the provisions of section 446(e) and the regulations under section 446(e) apply.

(4) *Expiration date*. The applicability of this section expires on December 23, 2014.

[T.D. 9564, 76 FR 81096, Dec. 27, 2011; 77 FR 18687, Mar. 28, 2012, as amended at 77 FR 74585, Dec. 17, 2012]

§ 1.168(j)–1T Questions and answers concerning tax-exempt entity leasing rules (temporary).

The following questions and answers concern tax-exempt entity leasing under section 168(j) of the Internal Revenue Code of 1954, as enacted by section 31 of the Tax Reform Act of 1984 (''TRA'') (Pub. L. 98–369):

CONSEQUENCES OF TAX-EXEMPT USE STATUS

Q–1. If recovery property is subject to the tax-exempt entity leasing provisions of section 168(j), how must the taxpayer compute the property's recovery deductions?

A–1. The taxpayer must compute the property's recovery deductions in accordance with section 168(j) (1) and (2); that is, the taxpayer must use the straight line method and the specified recovery period. For property other than 18-year real property, the applicable recovery percentages for the specified recovery period are to be determined with reference to the tables contained in Prop. Treas. Reg. §1.168–2(g)(3)(iv)(A). For 18-year real property for which a 40-year recovery period is required, the applicable recovery percentages are to be determined under the following table:

40-YEAR STRAIGHT LINE METHOD (ASSUMING MID-MONTH CONVENTION)

If the recovery year is—	And the month in the first recovery year the property is placed in service is—											
	1	2	3	4	5	6	7	8	9	10	11	12
	The applicable recovery percentage is—											
1	2.4	2.2	2.0	1.8	1.6	1.4	1.1	0.9	0.7	0.5	0.3	0.1
2	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
3	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
4	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
6	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
7	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
8	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
9	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
10	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
11	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
12	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
13	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
14	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
15	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
16	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
17	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
18	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
19	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
20	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
21	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
22	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
23	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
24	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
25	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
26	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
27	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
28	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
29	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
30	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
31	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
32	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
33	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
34	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
35	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
36	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
37	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
38	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
39	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
40	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
41	0.1	0.3	0.5	0.7	0.9	1.1	1.4	1.6	1.8	2.0	2.2	2.4

Q–2. If recovery property that was placed in service after December 31, 1980 by a taxable entity subsequently becomes tax-exempt use property, how are such property's cost recovery deductions under section 168 affected?

A–2. A change to tax-exempt use property, as defined in section 168(j)(3), will cause the cost recovery deductions under the accelerated cost recovery system (ACRS) to be recomputed. The allowable recovery deduction for the taxable year in which the change occurs (and for subsequent taxable years) must be determined as if the property had originally been tax-exempt use property. Proper adjustment must be made under the principles of Prop. Treas. Reg. §1.168–2(j)(3)(i)(B) to account for the difference between the deductions allowable with respect to the property prior to the year of change and those which would have been allowable had the taxpayer used the recovery period and method for tax-exempt use property under section 168(j) (1) and (2). However, no adjustment is made pursuant to the provisions of this A–2 if section 168(j)(2)(C) applies, that is, if the taxpayer had selected a longer recovery period in the year the property was placed in service than the recovery period prescribed for such property under section 168(j)(1).

Example 1. On July 1, 1983, X, a calendar year taxpayer, places in service 5-year recovery property with an unadjusted basis of $100. For 1983, X's allowable deduction is $15 (*i.e.*, .15 × $100). In 1984, the property becomes tax-exempt use property. Under section 168(j), assume the prescribed recovery period is 12 years. For 1984 (and subsequent taxable years), X's allowable deduction is determined as if the property had been tax-exempt use property since 1983, that is, the year it was placed in service. Thus, taxable year 1984 is the property's second recovery year of its 12-year recovery period. Additionally, X must account for the excess allowable recovery deduction of $11 (*i.e.*, the difference between the recovery allowance for 1983 ($15) and the allowance for that year had the property been tax-exempt use property ($4)) in accordance with the principles of Prop. Treas. Reg. §1.168–2(j)(3)(i)(B). Thus, the recovery allowances in 1984 and 1985 are $7.97, determined as follows:

Unadjusted basis multiplied by the applicable recovery percentage for second recovery year ($100×.09	$9.00
Excess allowable recovery deduction multiplied by the applicable recovery percentage for second recovery year divided by the sum of the remaining unused applicable percentages for tax-exempt use property existing as of the taxable year of change (1984) (($11×.09)/.96)	−1.03
Difference—allowable deduction for 1984	$7.97
Unadjusted basis multiplied by the applicable recovery percentage for third recovery year ($100×.09)	$9.00
Excess allowable recovery deduction multiplied by the applicable recovery percentage for third recovery year divided by the sum of the remaining unused applicable percentages for tax-exempt use property existing as of the taxable year of change (1984) (($11×.09)/.96)	−1.03
Difference—allowable deduction for 1985	$7.97

Additionally, X must make a similar adjustment for the taxable years 1986 through 1995, that is, his fourth through thirteenth recovery years.

Example 2. Assume the same facts as in *Example (1)* except that in 1983, X elected under section 168 (b) (3) with respect to the 5-year property to use the optional recovery percentages over a 25-year recovery period. Based on these facts, the provisions of this A–2 do not apply.

DEFINITION OF TAX-EXEMPT USE PROPERTY

Mixed Leases of Real and Personal Property

Q–3. How is a mixed lease of real property and personal property (e.g., a building with furniture) to be treated for purposes of applying the rules of section 168(j)(3) defining which property constitutes tax-exempt use property?

A–3. The general rule is that 18-year real property and property other than 18-year real property are tested separately to determine whether each constitutes tax-exempt use property. However, if a lease of section 1245 class property is incidental to a lease of 18-year real property, and the 18-year real property is not tax-exempt use property, then the section 1245 class property also does not constitute tax-exempt use property. A lease of section 1245 class property will be considered incidental if the adjusted basis of all section 1245 class property leased in the same transaction is 1 percent or less of the adjusted basis of all 18-year real property leased in such transaction.

Buildings Which Are Partially Tax-Exempt Use Property

Q–4. If part of a building is leased to a tax-exempt entity in a disqualified lease and part of the building is leased other than to a tax-exempt entity in a disqualified lease, to what extent do the tax-exempt entity leasing rules apply to such building?

A–4. The taxpaper must determine the amount of the building's unadjusted basis that is properly allocable to the portion of the building that is tax-exempt use property; the section 168(j) rules apply to the allocated amount. Solely for purposes of determining what percentage of the building's basis is subject to the tax-exempt entity leasing rules, no part of the basis is allocated to common areas.

Example. A constructs a 3-story building in 1984 at a cost of $900,000. Each floor consists of 30,000 square feet. The only common area (10,000 square feet) in the building is on the first floor. A leases the first floor (other than the common areas) to a firm that is not a tax-exempt entity. A leases the top two floors to a tax-exempt entity in a 25-year lease. The top two floors constitute tax-exempt use property. Assume that square footage is the appropriate method for allocating basis in this case. Thus, A must allocate $675,000 of the $900,000 basis to the tax-exempt use portion, determined as follows:

$$\frac{\begin{array}{c}\text{square footage of building which is tax-exempt}\\ \text{use property (excluding common areas)}\end{array}}{\begin{array}{c}\text{total square footage in the building}\\ \text{(excluding common areas)}\end{array}} = \frac{60{,}000 \text{ sq. feet}}{80{,}000 \text{ sq. feet}} = 3/4$$

$$3/4 \times \$900{,}000 = \$675{,}000$$

A must compute his recovery deductions on this portion of the basis ($675,000) in accordance with the rules of section 168(j) (1) and (2).

Requirement of a Lease

Q–5. Can the use of property by a party other than a tax-exempt entity result in the property being treated as tax-exempt use property within the meaning of section 168(j)(3)?

A–5. Yes, if based on all the facts and circumstances it is more appropriate to characterize the transaction as a lease to a tax-exempt entity. A transaction can be characterized as a lease to a tax-exempt entity under section 168(j)(6)(A), which provides that ''the term 'lease' includes any grant of a right to use property''; or under the service contract rules of section 7701(e). See Q&A #18 for rules regarding service contracts.

Example. A trust is executed on January 1, 1984, to create a pooled income fund (P) that meets the requirements of section 642(c)(5). A university (U) that is tax-exempt under section 501(c)(3) is the remainderman of the pooled income fund. P's purpose is to construct and operate an athletic center on land adjacent to U's campus. Construction of the athletic center, which has a 50-year useful life, was completed and the center was placed in service on February 1, 1985. The athletic center is managed for a fee by M, an unrelated taxable organization which operates athletic facilities open to the public. Office space at the facility is occupied rent-free by both the U athletic department and M. Scheduling of activities at the center is handled jointly by members of U's athletic department and M. General operating expenses of the athletic center are paid by P. Although the athletic center is open to the public for a membership fee, the majority of members are U's students who pay membership fees as part of their tuition. These fees are remitted by U to P. This arrangement is in substance a grant to U of a right to use the facility, and therefore a lease to U under section 168(j)(6)(A). U, as remainderman, will have obtained title to the entire building when the last pooled income fund donor dies. This arrangement is a disqualified lease because either (1) U has the equivalent of a fixed price purchase option under section 168(j)(3)(B)(ii)(II) (if U receives title as remainderman before the end of the useful life of the building), or (2) the lease has a term in excess of 20 years under section 168(j)(3)(B)(ii)(III) (if U does not receive title as remainderman until 20 years have elapsed), or both. Therefore, the allowable recovery deductions (without regard to salvage value) must be computed in accordance with section 168(j) (1) and (2). In addition, because this arrangement is treated as a lease under section 168(j), the facility is used by U for purposes of section 48(a)(4), and thus no investment tax credit is permitted with respect to any portion of the facility. This arrangement also may be treated as a lease to U for all purposes of chapter 1 of the Internal Revenue Code under section 7701 (e).

''More Than 35 Percent of the Property'' Test

Q–6. How is the percentage of 18-year real property leased to a tax-exempt entity in a disqualified lease to be determined for purposes of the ''more than 35 percent of the property'' test of section 168(j)(3)(B)(iii)?

A–6. The phrase ''more than 35 percent of the property'' means more than 35 percent of the net rentable floor space of the property. The net rentable floor space in a building does not include the common areas of the building, regardless of the terms of the lease. For purposes of the ''more than 35 percent of the property'' rule, two or more buildings will be treated as separate properties unless they are part of the same project, in which case they will be treated as one property. Two or more buildings will be treated as part of the same project if the buildings are constructed, under a common plan, within a reasonable time of each other on the same site and will be used in an integrated manner.

Q–7. Are disqualified leases to different tax-exempt entities (regardless of whether they are related) aggregated in determining whether 18-year real property is tax-exempt use property?

A–7. Yes.

Example. A tax-exempt entity participates in industrial development bond financing for the acquisition of a new building by a taxable entity. The tax-exempt entity leases 60 percent of the net rentable floor space in the building for 5 years. Sixty percent of the building is tax-exempt use property. If the same tax-exempt entity leased only 19 percent of the net rentable floor space in the building for 5 years, no portion of the building would be tax-exempt use property because not more than 35 percent of the property is leased to a tax-exempt entity pursuant to a disqualified lease. If such tax-exempt entity leased only 19 percent of the net rentable floor space in the building for 5 years and another tax-exempt entity leased 20 percent of the net rentable floor space in the building for a term in excess of 20 years (or a related entity leased 20 percent of the building for 5 years), 39 percent of the building would be tax-exempt use property. See A–4 regarding the determination of the amount of the building's unadjusted basis that is properly allocable to the portion of the building that is tax-exempt use property.

''Predominantly Used'' Test

Q–8. What does the term ''predominantly used'' mean for purposes of the section 168(j)(3)(D) exception to the tax-exempt use property rules?

A–8. ''Predominantly used'' means that for more than 50 percent of the time used, as determined for each taxable year, the real or personal property is used in an unrelated trade or business the income of which is subject to tax under section 511 (determined without regard to the debt-financed income rules of section 514). If only a portion of property is predominantly used in an unrelated trade or business, the remainder may nevertheless be tax-exempt use property.

Q–9. How is the ''predominantly used'' test of section 168(j)(3)(D) to be applied to a building?

A–9. The ''predominantly used'' test is to be applied to a building in the following manner:

(i) Identify the discrete portions (excluding common areas) of the building which are leased to a tax-exempt entity in a disqualified lease under section 168(j)(3)(B)(ii). A discrete portion of a building is an area physically separated from other areas. An area is physically separated from other areas if separated by permanent walls or by partitions serving as room dividers if such partitions remain in place throughout the taxable year. A discrete portion can be the entire building, floors, wings, offices, rooms, or a combination thereof. For example, a building whose entire internal space consists of a single large room used as a gymnasium has only one discrete portion. On the other hand, if the building has 3 stories with 10 offices on each floor, each of the 30 offices is a discrete portion.

(ii) Determine whether each discrete portion is predominantly used in an unrelated trade or business subject to tax under section 511. See A–8 for the rules regarding how to make this determination.

(iii) Once the discrete portions of the building that constitute tax-exempt use property have been identified, an appropriate allocation of basis must be made to such discrete portions. See A–4 for rules regarding how to make such allocation.

(iv) The application of these rules is illustrated by the following example:

Example. A building, constructed in 1985, is leased in its entirety to a tax-exempt entity (E) pursuant to a 25-year lease. The building has 25,000 square feet of net rentable floor space and consists of an auditorium (15,000 square feet), a retail shop (10,000 square feet), plus common area of 5,000 square feet. E uses the auditorium 80 percent of the time in its exempt activity and 20 percent of the time in an unrelated trade or business subject to tax under section 511. The retail shop is used 90 percent of the time in an unrelated trade or business subject to tax under section 511 and 10 percent of the time in an exempt activity. Thus, the auditorium is tax-exempt use property; the retail shop is not. An appropriate allocation of basis to the auditorium must be made. See A–4.

DEFINITION OF TAX-EXEMPT ENTITY

Q–10. What elections must be made in order to avoid the ''5-year lookback'' rule of section 168(j)(4)(E)(i)?

A–10. Only organizations which were exempt from tax under section 501(a) as organizations described in section 501(c)(12) (and which are no longer tax-exempt) may avoid the 5-year lookback rule of section 168(j)(4)(E)(i). In order to avoid the 5-year lookback rule with respect to any property, two elections are required. First, the organization must elect not to be exempt from tax under section 501(a) during the tax-exempt use period (as defined in section 168(j)(4)(E)(ii)(II)) with respect to the property. Second, the organization must elect to be taxed on the exempt arbitrage profits as provided in section 31(g)(16) of the Tax Reform Act of 1984. See Temp. Treas. Reg. § 301.9100–6T(a) for the time and manner of making these elections. These elections, once made, are irrevocable.

Q–11. Does the term ''tax-exempt entity'' include tax-exempt plans of deferred compensation and similar arrangements?

A–11. Yes. For purposes of section 168 (j), the term ''tax-exempt entity'' includes trusts or other entities that are tax-qualified under section 401 (a), individual retirement accounts, simplified employee pensions, and other tax-exempt arrangements described in subchapter D of chapter 1 of the Internal Revenue Code.

SPECIAL RULES FOR HIGH TECHNOLOGY EQUIPMENT

Q–12. What effect do the tax-exempt entity leasing provisions have on ''qualified technological equipment''?

A–12. ''Qualified technological equipment'' which is leased to a tax-exempt entity for a term of 5 years or less shall not constitute tax-exempt use property. If ''qualified technological equipment'' which is leased to a tax-exempt entity for a term of more than 5 years constitutes tax-exempt use property (as defined in section 168(j)(3)) and is not used predominantly outside the United States, the rules of section 168(j) (1) and (2) apply except that the recovery period to be used for such equipment shall be 5 years regardless of the length of the lease term. For purposes of section 168(j)(5), ''qualified technological equipment'' means (1) any computer or peripheral equipment, (2) any high technology telephone station equipment installed on the customer's premises, and (3) any high technology medical equipment. For definitions of these terms, see A–13 through A–16.

Q–13. What is a ''computer'' as that term is used in section 168(j)(5)(C)(i)(I)?

A–13. Computers are electronically activated devices that are programmable by the user and that are capable of accepting information, applying prescribed processes to it, and supplying the results of those processes with or without human intervention. Computers consist of a central processing unit containing extensive storage, logic, arithmetic, and control capabilities. A computer does not include any equipment which is an integral part of property that is not a user-programmable device, any video games or other devices used by the user primarily for amusement or entertainment purposes, or any typewriters, calculators, adding or accounting machines, copiers, duplicating equipment, or similar equipment. A computer does not include any equipment that is not tangible personal property.

Q–14. What is ''peripheral equipment'' as that term is used in section 168(j)(5)(C)(i)(I)?

A–14. Peripheral equipment means tangible personal property such as auxiliary machines, whether on-line or off-line, that are designed to be placed under the control of the central processing unit of the computer. Some examples of peripheral equipment are: card readers, card punches, magnetic tape feeds, high speed printers, optical character readers, tape cassettes, mass storage units, paper tape equipment, keypunches, data entry devices, teleprinters, terminals, tape drives, disc drives, disc files, disc packs, visual image projector tubes, card sorters, plotters, and collators. Peripheral equipment does not include equipment not included in Asset Depreciation Range (ADR) 00.12 listed in section 3 of Rev. Proc. 83–35, 1983–1 C.B. 745, 746. Peripheral equipment also does not include any equipment that is an integral part of property that is not a user-programmable device, any video games or other devices used by the user primarily for amusement or entertainment purposes, or any typewriters, calculators, adding or accounting machines, copiers, duplicating equipment, or similar equipment.

Q–15. What does ''high technology telephone station equipment'' mean as that term is used in section 168(j)(5)(C)(i)(II)?

A–15. High technology telephone station equipment includes only tangible personal property described in asset depreciation range (ADR) class 48.13 listed in section 3 of Rev. Proc. 83–35, 1983–1 C.B. 745, 758 that has a high technology content and which, because of such high technology content, can reasonably be expected to become obsolete before the expiration of its physical useful life. For example, telephone booths and telephones which include only a standard dialing feature are not high technology equipment. However, telephones with features such as an abbreviated dialing short program, an automatic callback, or conference call feature may qualify as high technology equipment. High technology telephone station equipment may include terminal equipment including such extra features but not terminal equipment used in conjunction with features offered through central office capacity. There are no current plans to utilize the regulatory authority provided in section 168(j)(5)(C)(iv).

Q–16. What is ''high technology medical equipment'' as that term is used in section 168 (j)(5)(C)(i)(III)?

A–16. High technology medical equipment is any electronic, electromechanical, or computer-based high technology equipment which is tangible personal property used in the screening, monitoring, observation, diagnosis, or treatment of human patients in a laboratory, medical, or hospital environment. High technology medical equipment includes only equipment that has a high technology content and which, because of such high technology content, can reasonably be expected to become obsolete before the expiration of its physical useful life. High technology medical equipment may include computer axial tomography (C.A.T.) scanners, nuclear magnetic resonance equipment, clinical chemistry analyzers, drug monitors, diagnostic ultrasound scanners, nuclear cameras, radiographic and fluoroscopic systems, Holter monitors, and bedside monitors. Incidental use of any such equipment for othe purposes, such as research, will not prevent it from qualifying as high technology medical equipment. There are no current plans to utilize the regulatory authority provided in section 168(j)(5)(C)(iv).

LEASE TERM

Q–17. What is included in determining the length of a lease term?

A–17. (i) The lease term starts when the property is first made available to the lessee under the lease. The lease term includes not only the stated duration, but also any additional period of time which is within the ''realistic contemplation of the parties at the time the property is first put into service. *Hokanson* v. *Commissioner*, 730 F.2d 1245, 1248 (9th Cir. 1984). A subsequent period of time is included in the term of the original lease if the circumstances indicate that the parties, upon entering into the original lease, had informally agreed that there would be an extension of the original lease.

(ii) With respect to personal property, the lease term includes all periods for which the tax-exempt lessee or a related party (as defined under section 168(j)(7)) has a legally enforceable option to renew the lease, or the lessor has a legally enforceable option to compel its renewal by the tax-exempt entity or a related party. This is true regardless of the renewal terms of the lease agreement or whether the lease is in fact renewed.

(iii) With respect to real property, the lease term includes all periods for which the tax-exempt lessee or a related party (as defined under section 168(j)(7)) has a legally enforceable option to renew the lease, or the lessor has a legally enforceable option to compel its renewal by the tax-exempt entity or a related party, unless the option to renew is at fair market value, determined at the time of renewal. The *Hokanson* facts and circumstances test (see (i) above) may cause the term of a fair market value renewal option to be treated as part of the original lease term.

(iv) Successive leases that are part of the same transaction or a series of related transactions concerning the same or substantially similar property shall be treated as one lease. This rule applies if at substantially the same time or as part of one arrangement the parties enter into multiple leases covering the same or substantially similar property, each having a different term. If so, then the original lease term will be treated as running through the term of the lease that has the last expiration date of the multiple leases. The multiple lease rule will not apply merely because the parties enter into a new lease at fair market rental value at the end of the original lease term.

(v) The application of the above rules is illustrated by the following examples:

Example 1. On December 30, 1984, X, a taxable corporation, and Y, a tax-exempt entity, enter into a requirements contract for a period of 3 years. The requirements contract sets the terms and conditions under which X and Y will do business on those occasions when X actually leases items of personal property to Y. The requirements contract imposes no obligation on either party to actually enter into a lease agreement. Pursuant to this requirements contract, on January 1, 1985, X and Y enter into three separate leases. Under the leases, Y obtained the use of three identical items of personal property, each for a term of six months beginning on January 1, 1985. On March 1, 1985, Y entered into a fourth lease for the use of a fourth item of personal property substantially similar to the other three items for a term of 20 months beginning on that date. The mere fact that all 4 leases were entered into pursuant to the same requirements contract and involved the same or substantially similar property does not require aggregation of the terms of such leases under section 168(j)(6)(B).

Example 2. Assume the same facts as in *example* (1) except that, instead of the 4 leases entered into in example (1), on January 1, 1985, pursuant to the requirements contract, X and Y enter into a lease for an item of personal property for one year. On January 10, 1986, after the end of the one-year lease term, X and Y enter into a second lease with respect to the same or substantially similar equipment. Assuming that the requirements contract itself is not a lease and assuming that the parties did not have any informal or implicit understanding (other than the general expectation of doing some business in the future) to enter into the second lease when the first lease was entered into, these two leases are not aggregated. The mere fact that the parties entered into two leases under the requirements contract does not result in the application of the section 168(j)(6)(B) rules for successive leases.

Example 3. The facts are the same as in *example* (2) except that the parties did have an understanding, informal or otherwise, at the time of the first lease that they would enter into a second lease of the same personal property. The terms of the leases are aggregated.

Example 4. The facts are the same as in *example* (2) except that, instead of the leases entered into in example (2), on January 1, 1985, X and Y enter into two separate leases, each for a term of one year. One lease is for the period beginning on January 1, 1985 and ending on December 31, 1985. The other lease is for the period beginning on January 1, 1986 and ending on December 31, 1986. Both leases involve the same or substantially similar personal property. Under the successive lease rule, the terms of both leases are aggregated for purposes of determining the term of either lease under section 168(j)(6)(B). This result occurs because the two leases were entered into as part of the same transaction, and they relate to the same or substantially similar personal property.

SERVICE CONTRACT ISSUES

Q–18. How is the treatment of service contracts affected by the service contract rules set forth in section 7701(e)?

A–18. If a contract which purports to be a service contract is treated as a lease under section 7701(e), such contract is to be treated as a lease for all purposes of Chapter 1 of the Internal Revenue Code (including, for example, section 168(j) and section 48(a) (4) and (5)).

Q–19. Does a contract to provide heating, maintenance, etc. services in low-income housing come within the low-income housing exception in section 7701(e)(5) to the service contract rules set forth in section 7701(e)?

A–19. No. Although certain low-income housing operated by or for an organization described in paragraphs (3) or (4) of section 501(c) is not subject to the service contract rules in section 7701(e), a contract, for instance, to provide heating services to low-income housing units, such as by installing and operating a furnace, does not constitute ''low-income housing'' within the meaning of section 7701(e)(5). Thus, the rules of section 7701(e) apply to such contracts in determining whether they are properly treated as leases.

PARTNERSHIP ISSUES

Q–20. Do the provisions applicable to property leased to partnerships, set forth in section 168(j)(8), and the provisions applicable to property owned by partnerships, set forth in section 168(j)(9), apply to pass-through entities other than partnerships?

A–20. Yes. Rules similar to those provided in paragraphs (8), (9)(A), (9)(B), and (9)(C) of section 168(j) and those provided in Q & A's 21–26 apply to pass-through entities other than partnerships.

Q–21. What rules apply to property owned by a partnership in which one or more partners is a tax-exempt entity?

A–21. If property is owned by a partnership having both taxable and tax-exempt entities as partners, and any allocation to a tax-exempt entity partner is not a ''qualified allocation'' under section 168(j)(9)(B), then such entity's proportionate share of the property is to be treated as tax-exempt use property for all purposes. However, the property will not be tax-exempt use property if it is predominantly used by the partnership in an activity which, with respect to the tax-exempt entity, is an unrelated trade or business. An activity is an unrelated trade or business with respect to a tax-exempt entity if such entity's distributive share of the partnership's gross income from the activity is includible in computing its unrelated business taxable income under section 512(c) (determined without regard to the debt-financed income rules of section 514). A tax-exempt entity partner's proportionate share of property of a partnership equals such partner's share of that item of the partnership's income or gain (excluding income or gain allocated under section 704(c)) in which the tax-exempt entity has the highest share. If the tax-exempt entity partner's share of any item of income or gain (excluding income or gain allocated under section 704(c)) may vary during the period it is a partner, the previous sentence shall be applied with reference to the highest share of any such item that it may receive at any time during such period. The application of these rules is illustrated by the following example:

Example. A partnership (P) operates a factory, which consists of a building and various items of machinery. P has one tax-exempt entity (E) as a partner, and E's proportionate share is 10 percent (*i.e.,* 10 percent is the largest share of any item of income or gain that E may receive during the time E is a partner). Unless P's allocations to E are qualified under section 168(j)(9)(B), 10 percent of each item of partnership property (including the building) is tax-exempt use property, notwithstanding the 35 percent threshold test of section 168(j)(3)(B)(iii) that is otherwise applicable to 18-year real property. However, the property will not be tax-exempt use property if it is predominantly used by the partnership in an activity which, with respect to E, is an unrelated trade or business (determined without regard to the debt-financed income rules of section 514).

Q–22. What consititutes a ''qualified allocation'' under section 168(j)(9)(B)?

A–22. (i) A ''qualified allocation'' means any allocation to a tax-exempt entity which is consistent with such entity's being allocated the same share (*i.e.,* the identical percentage) of each and every item of partnership income, gain, loss, deduction, credit, and basis during the entire period such entity is a partner. Except as provided in A–23, an allocation is not qualified if it does not have substantial economic effect under section 704(b). However, for purposes of the two preceding sentences, items allocated under section 704(c) (relating to contributed property) are not taken into account. An allocation is not a ''qualified allocation'' under section 168(j)(9)(B) if the partnership agreement provides for, or the partners have otherwise formally or informally agreed to, any change (regardless of whether such change is contingent upon the happening of one or more events) in the tax-exempt entity's distributive share of income, gain, loss, deduction, credit, or basis at any time during the entire period the tax-exempt entity is a partner.

(ii) A change in a tax-exempt entity's distributive share of income, gain, loss, deduction, credit, or basis which occurs as a result of a sale or redemption of a partnership interest (or portion thereof) or a contribution of cash or property to the partnership shall be disregarded in determining whether the partnership allocations are qualified, provided that such transaction is based on fair market value at the time of the transaction and that the allocations are qualified after the change. For this purpose, the consideration determined by the parties dealing at arm's length and with adverse interests normally will be deemed to satisfy the fair market value requirement. In addition, a change in a tax-exempt entity's distributive share which occurs as a result of a partner's default (other than a prearranged default) under the terms of the partnership agreement will be disregarded, provided that the allocations are qualified after the change, and that the change does not have the effect of avoiding the restrictions of section 168(j)(9). Any of the above-described transactions between existing partners (and parties related to them) will be closely scrutinized.

Example 1. A, a taxable entity, and B, a tax-exempt entity, form a partnership in 1985. A contributes $800,000 to the partnership; B contributes $200,000. The partnership agreement allocates 95 percent of each item of income, gain, loss, deduction, credit, and basis to A; B's share of each of these items is 5 percent. Liquidation proceeds are, throughout the term of the partnership, to be distributed in accordance with the partner's capital account balances, and any partner with a deficit in his capital account following the distribution of liquidation proceeds is required to restore the amount of such deficit to the partnership. Assuming that these allocations have substantial economic effect within the meaning of section 704(b)(2), they are qualified because B's distributive share of each item of income, gain, loss, deduction, credit, and basis will remain the same during the entire period that B is a partner. The fact that the liquidation proceeds may be distributed in a ratio other than 95 percent/5 percent does not cause the allocations not to be qualified.

Example 2. A, B, and E are members of a partnership formed on July 1, 1984. On that date the partnership places in service a building and section 1245 class property. A and B are taxable entities; E is a tax-exempt entity. The partnership agreement provides that during the first 5 years of the partnership, A and B are each allocated 40 percent of each item of income, gain, loss, deduction, credit, and basis; E is allocated 20 percent. Thereafter, A, B, and E are each allocated 33⅓ percent of each item of income, gain, loss, deduction, credit, and basis. Assume that these allocations meet the substantial economic effect test of section 704(b)(2) and E's distributive share of the partnership's income is not unrelated trade or business income subject to tax under section 511. The allocations to E are not qualified allocations under section 168(j)(9)(B) because E's distributive share of partnership items does not remain the same during the entire period that E is a partner in the partnership. Thus, 33⅓ percent of the building and 33⅓ percent of the section 1245 class property are tax-exempt use property from the time each is placed in service by the partnership and are thus subject to the cost recovery rules of section 168(j) (1) and (2). In addition, no investment tax credit is allowed for 33⅓ percent of the section 1245 class property because of section 48(a)(4).

Q–23. In determining whether allocations constitute qualified allocations, what rules are applied to test allocations that are not governed by the substantial economic effect rules?

A–23. A–22 provides the general rules to be used in determining whether an allocation is a qualified allocation, including the rule that the allocation must have substantial economic effect. However, certain allocations are not governed by the substantial economic effect rules (e.g., an allocation of basis of an oil and gas property is generally governed by section 613A(c)(7)(D), rather than section 704(b)), and other allocations cannot satisfy the substantial economic effect rules (e.g., allocations of credits, allocations of deduction and loss attributable to nonrecourse debt, and allocations of percentage depletion in excess of basis). Since allocations in either of these categories cannot be tested under the substantial economic effect test, these allocations, in order to be qualified, must comply with the relevant Code or regulation section that governs the particular allocation (e.g., in the case of an allocation of basis of an oil and gas property, section 613A(c)(7)(D)).

Q–24. Will the Internal Revenue Service issue letter rulings on the issue of whether an allocation is a ''qualified allocation'' for purposes of section 168(j)(9)?

A–24. The Internal Revenue Service will accept requests for rulings on the question of whether an allocation is a ''qualified allocation'' for purposes of section 168(j)(9). Such requests should be submitted in accordance with the appropriate revenue procedure. One requirement of a qualified allocation is that such allocation must have substantial economic effect under section 704(b)(2). Currently, the Service will not rule on the question of whether an allocation has substantial economic effect under section 704(b)(2). Therefore, unless and until this policy is changed, a ruling request regarding a qualified allocation must contain a representation that the subject allocation has substantial economic effect (or complies with A–23, if applicable).

Q–25. Do priority cash distributions which constitute guaranteed payments under section 707(c) disqualify an otherwise qualified allocation?

A–25. Priority cash distributions to partners which constitute guaranteed payments will not disqualify an otherwise qualified allocation if the priority cash distributions are reasonable in amount (e.g., equal to the Federal short-term rate described in section 1274(d)) and are made in equal priorities to all partners in proportion to their capital in the partnership. Other guaranteed payments will be closely scrutinized and, in appropriate cases, will disqualify an otherwise qualified allocation.

Example. A and B form Partnership AB to operate a manufacturing business. A is a tax-exempt entity; B is a taxable person. A contributes $500,000 to the partnership; B contributes $100,000. The partnership agreement provides that A and B are each entitled to cash distributions each year, in equal priority, in an amount equal to 8 percent of their capital contribution. Assume that these payments are reasonable in amount and constitute guaranteed payments under section 707(c). Without taking into consideration the guaranteed payments, all allocations constitute qualified allocations under section 168(j)(9)(B) and A–22. These guaranteed payments will not disqualify such allocations.

Q–26. Can property be treated as tax-exempt use property under both the general rule of section 168(j)(3) and the partnership provisions of section 168(j)(9)?

A–26. Yes. For example, a tax-exempt entity may be a partner in a partnership that owns a building 60 percent of which is tax-exempt use property because it is leased to an unrelated tax-exempt entity under a 25-year lease. The status of the remaining 40 percent depends on whether or not allocations under the partnership agreement are qualified under section 168(j)(9). If the allocations are not qualified under section 168(j)(9), the tax-exempt entity's proportionate share (as determined under section 168(j)(9)(C)) of the remaining 40 percent will be tax-exempt use property. For example, if the tax-exempt entity's proportionate share is 30 percent, then 12 percent of the remaining 40 percent (*i.e.*, .30 times .40) is tax-exempt use property and a total of 72 percent of the property (60 percent +12 percent) is tax-exempt use property.

EFFECTIVE DATE QUESTIONS

Q–27. Does an amendment to a lease (or sublease) to a tax-exempt entity of property which, pursuant to the effective date provisions of section 31(g) of TRA, is not subject to section 168(j) cause such property to be subject to the provisions of section 168(j)?

A–27. An amendment to such a lease (or sublease) does not cause such property to be subject to the provisions of section 168(j) unless the amendment increases the term of the lease (or sublease). However, if the amendment increases the amount of property subject to the lease, the additional property must be tested independently under the effective date provisions of section 31(g) of TRA. See A–31 for special rules regarding improvements to property.

Example. On May 1, 1983, X, a taxable entity, and E, a tax-exempt entity, enter into a lease whereby X will lease to E the top 4 floors of a ten-story building for a lease term of 25 years. In 1985, the lease is amended to provide that E will lease an additional floor for the balance of the lease term. At that time the annual rent due under the lease is increased. Pursuant to the provisions of section 31(g)(2)(A) of TRA, section 168(j) does not apply to the lease to E of the top 4 floors of the building. Assuming that no other provision of section 31(g) of TRA provides otherwise, the floor added to the lease in 1985 is subject to the provisions of section 168(j).

Q–28. If property which is not subject to section 168(j) by virtue of the effective date provisions of section 31(g) of TRA is sold, subject to the lease to the tax-exempt entity, what are the consequences?

A–28. Property to which section 168(j) does not apply by virtue of the effective date provisions set forth in section 31(g) (2), (3), and (4) of TRA will not become subject to section 168(j) merely by reason of a transfer of the property subject to the lease by the lessor (or a transfer of the contract to acquire, construct, reconstruct, or rehabilitate the property), so long as the lessee (or party obligated to lease) does not change. For purposes of the preceding sentence, the term ''transfer'' includes the sale-leaseback by a taxable lessor of its interest in the property, subject to the underlying lease to the tax-exempt entity. However, if property is transferred to a partnership or other pass-through entity after the effective date of section 168(j)(9) (see section 31(g) of TRA), such property is subject to the provisions of section 168(j)(9).

Q–29. Can property which was leased to a tax-exempt entity after May 23, 1983 and acquired by a partnership before October 22, 1983 be tax-exempt use property?

A–29. Yes. Because the property was leased to a tax-exempt entity after May 23, 1983, it may be tax-exempt use property under section 168(j)(3) and section 31(g)(1) of TRA. However, if the partnership included a tax-exempt entity as a partner, section 168(j)(9) would be inapplicable under section 31(g)(3)(B) of TRA because the partnership acquired the property before October 22, 1983.

Q–30. What is a binding contract for purposes of the transitional rules in section 31(g) of TRA?

A–30. (i) A contract is binding only if it is enforceable under State law against the taxpayer or a predecessor and does not limit damages to a specified amount, as for example, by a liquidated damages provision. A contract that limits damages to an amount equal to at least 5 percent of the total contract price will not be treated as limiting damages for this purpose. In determining whether a contract limits damages, the fact that there may be little or no damages because the contract price does not significantly differ from fair market value will not be taken into account. For example, if a taxpayer entered into an irrevocable contract to purchase an asset for $100 and the contract contained no provision for liquidated damages, the contract is considered binding notwithstanding the fact that the property had a fair market value of $99 and under local law the seller would only recover the difference in the event the purchaser failed to perform. If the contract provided for a refund of the purchase price in lieu of any damages allowable by law in the event of breach or cancellation, the contract is not considered binding.

(ii) A contract is binding even if subject to a condition, so long as the condition is not within the control of either party or a predecessor in interest. A contract will not be treated as ceasing to be binding merely because the parties make insubstantial changes in its terms or because any term is to be determined by a standard beyond the control of either party. A contract which imposes significant obligations on the taxpayer (or a predecessor) will be treated as binding notwithstanding the fact that insubstantial terms remain to be negotiated by the parties to the contract.

(iii) A binding contract to acquire a component part of a larger piece of property will not be treated as a binding contract to acquire the larger piece of property. For example, if a tax-exempt entity entered into a binding contract on May 1, 1983 to acquire a new aircraft engine, there would be a binding contract to acquire only the engine, not the entire aircraft.

Q–31. If an improvement is made to a property that is ''grandfathered'' (*i.e.*, property that is not subject to section 168(j) because of the effective date provisions of section 31(g) of TRA), to what extent will such improvement be grandfathered?

A–31. Section 31(g)(20)(B) provides that a ''substantial improvement'' to property is treated as a separate property for purposes of the effective date provisions of section 31(g) of TRA. As a result, a ''substantial improvement'' will not be grandfathered unless such ''substantial improvement'' is grandfathered under a provision other than section 31(g)(20)(B). A property that is grandfathered will not become subject to section 168(j) merely because an improvement is made to such property, regardless of whether the improvement is a ''substantial improvement''. If an improvement other than a ''substantial improvement'' is made to property (other than land) that is grandfathered, that improvement also will be grandfathered. The determination of whether new construction constitutes an improvement to property or the creation of a new separate property will be based on all facts and circumstances. Furthermore, any improvement to land will be treated as a separate property.

Example. On January 3, 1983, T, a taxable entity, entered into a lease of a parking lot to E, a tax-exempt entity. On January 1, 1985, T begins construction of a building for use by E on the site of the parking lot. The building is completed and placed in service in November 1985. The building is treated as a separate property, and is thus subject to the provisions of section 168(j), unless the building is grandfathered under a provision other than section 31(g)(20)(B) of TRA.

Q–32. What is ''significant official governmental action'' for purposes of the section 31(g)(4) transitional rule of TRA?

A–32. (i) ''Significant official governmental action'' involves three separate requirements. First, the action must be an official action. Second, the action must be specific action with respect to a particular project. Third, the action must be taken by a governmental entity having authority to commit the tax-exempt entity to the project, to provide funds for it, or to approve the project under State or local law.

(ii) The first requirement of official action means that the governing body must adopt a resolution or ordinance, or take similar official action, on or before November 1, 1983. The action qualifies only if it conforms with Federal, State, and local law (as applicable) and is a proper exercise of the powers of the governing body. Moreover, the action must not have been withdrawn. There must be satisfactory written evidence of the action that was in existence on or before November 1, 1983. Satisfactory written evidence includes a formal resolution or ordinance, minutes of meetings, and binding contracts with third parties pursuant to which third parties are to render services in furtherance of the project.

(iii) The second requirement of specific action is directed at the substance of the action taken. The action must be a specific action with respect to a particular project in which the governing body indicates an intent to have the project (or the design work for it) proceed. This requires that a specific project have been formulated and that the significant official action be a step toward consummation of the project. If the action does not relate to a specific project or merely directs that a proposal or recommendation be formulated, it will not qualify. The following set of actions with respect to a particular project constitute specific action: the hiring of bond counsel or bond underwriters necessary to assist in the issuance and sale of bonds to finance a particular project or the adoption of an inducement resolution relating to bonds to be issued for such a project; applying for an Urban Development Action Grant on behalf of the project described in the application, receiving such a grant concerning the project, or the recommendation of a city planning authority to proceed with a project;

the enactment of a State law authorizing the sale, lease, or construction of the property; the appropriation of funds for the property or authorization of a feasibility study or a development services contract with respect to it; the approval of financing arrangements by a regulatory agency; the enactment of a State law designed to provide funding for a project; the certification of a building as a historic structure by a State agency and the Department of the Interior; or the endorsement of the application for a certification of need with respect to a medical facility by a regulatory agency other than the agency empowered to issue such a certificate.

(iv) The third requirement for significant official governmental action is that the action must be taken by a Federal, State, or local governing body having authority to commit the tax-exempt entity to the project, to provide funds for it, or to approve the project under applicable law.

If the chief executive or another representative of a governing body has such authority, action by such representative would satisfy the requirement of this (iv). A governing body may have the authority to commit the tax-exempt entity to a project notwithstanding the fact that the project cannot be consummated without other governmental action being taken. For example, a city council will be treated as having authority to commit a city to do a sale-leaseback of its city hall notwithstanding the fact that State law needs to be amended to permit such a transaction. Similarly, if a local project cannot be completed without Federal approval, either legislative or administrative, the obtaining of such approval satisfies the requirements of this (iv).

(v) Routine governmental action at a local level will not qualify as significant official governmental action. Routine governmental action includes the granting of building permits or zoning changes and the issuance of environmental impact statements.

(vi) In order to qualify under the transitional rule of TRA section 31(g)(4), a sale and leaseback pursuant to a binding contract entered into before January 1, 1985 must be part of the project as to which there was significant official governmental action. Except as provided in the following sentence, where there has been significant official governmental action on or before November 1, 1983 with respect to the construction, reconstruction or rehabilitation of a property, the sale and leaseback of such property pursuant to a binding contract entered into before January 1, 1985 will be treated as part of the project which was the subject of the significant official governmental action. However, if the construction, reconstruction or rehabilitation was substantially completed prior to January 1, 1983, the sale and leaseback of such property will be treated as a separate project, unless the sale and leaseback was contemplated at the time of the significant official governmental action. Nevertheless, where the sale and leaseback is treated as a separate project, section 31(g)(4) may apply if there was significant official governmental action on or before November 1, 1983, with respect to such sale and leaseback. The application of this provision is illustrated by the following example:

Example. In the summer of 1927, the Board of Aldermen of City C passed a resolution authorizing the design and contruction of a new city hall and appropriated the funds necessary for such project. Construction was completed in 1928. At the time of the significant official governmental action, City C had no plan to enter into a sale-leaseback arrangement with respect to the facility. On December 15, 1984, City C entered into a binding sale-leaseback arrangement concerning the city hall. This transaction will not qualify for exclusion from section 168(j) under the section 31(g)(4) of TRA since construction of the facility in question was substantially completed before January 1, 1983. If, however, there had been significant official governmental action on or before November 1, 1983 with respect to the sale-leaseback project, then the transitional rule of section 31(g)(4) of TRA would apply.

[T.D. 8033, 50 FR 27224, July 2, 1985, as amended by T.D. 8435, 57 FR 43896, Sept. 23, 1992]

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[T.D. 9091, 68 FR 52991, Sept. 8, 2003. Redesignated and amended by T.D. 9283, 71 FR 51738, Aug. 31, 2006]

§ 1.168(k)–1 Additional first year depreciation deduction.

(a) *Scope and definitions*—(1) *Scope.* This section provides the rules for determining the 30-percent additional first year depreciation deduction allowable under section 168(k)(1) for qualified property and the 50-percent additional first year depreciation deduction allowable under section 168(k)(4) for 50-percent bonus depreciation property.

(2) *Definitions.* For purposes of section 168(k) and this section, the following definitions apply:

(i) *Depreciable property* is property that is of a character subject to the allowance for depreciation as determined under section 167 and the regulations thereunder.

(ii) *MACRS property* is tangible, depreciable property that is placed in service after December 31, 1986 (or after July 31, 1986, if the taxpayer made an election under section 203(a)(1)(B) of the Tax Reform Act of 1986; 100 Stat. 2143) and subject to section 168, except for property excluded from the application of section 168 as a result of section 168(f) or as a result of a transitional rule.

(iii) *Unadjusted depreciable basis* is the basis of property for purposes of section 1011 without regard to any adjustments described in section 1016(a)(2) and (3). This basis reflects the reduction in basis for the percentage of the taxpayer's use of property for the taxable year other than in the taxpayer's trade or business (or for the production of income), for any portion of the basis the taxpayer properly elects to treat as an expense under section 179 or section 179C, and for any adjustments to basis provided by other provisions of the Internal Revenue Code and the regulations thereunder (other than section 1016(a)(2) and (3)) (for example, a reduction in basis by the amount of the disabled access credit pursuant to section 44(d)(7)). For property subject to a lease, see section 167(c)(2).

(iv) *Adjusted depreciable basis* is the unadjusted depreciable basis of the property, as defined in §1.168(k)–1(a)(2)(iii), less the adjustments described in section 1016(a)(2) and (3).

(b) *Qualified property or 50-percent bonus depreciation property*—(1) *In general.* Qualified property or 50-percent bonus depreciation property is depreciable property that meets all the following requirements in the first taxable year in which the property is subject to depreciation by the taxpayer whether or not depreciation deductions for the property are allowable:

(i) The requirements in §1.168(k)–1(b)(2) (description of property);

(ii) The requirements in §1.168(k)–1(b)(3) (original use);

(iii) The requirements in §1.168(k)–1(b)(4) (acquisition of property); and

(iv) The requirements in §1.168(k)–1(b)(5) (placed-in-service date).

(2) *Description of qualified property or 50-percent bonus depreciation property*—(i) *In general.* Depreciable property will meet the requirements of this paragraph (b)(2) if the property is—

(A) MACRS property (as defined in §1.168(k)–1(a)(2)(ii)) that has a recovery period of 20 years or less. For purposes of this paragraph (b)(2)(i)(A) and section 168(k)(2)(B)(i)(II) and 168(k)(4)(C), the recovery period is determined in accordance with section 168(c) regardless of any election made by the taxpayer under section 168(g)(7);

(B) Computer software as defined in, and depreciated under, section 167(f)(1) and the regulations thereunder;

(C) Water utility property as defined in section 168(e)(5) and depreciated under section 168; or

(D) Qualified leasehold improvement property as defined in paragraph (c) of this section and depreciated under section 168.

(ii) *Property not eligible for additional first year depreciation deduction*—(A) *Property that is not qualified property*. For purposes of the 30-percent additional first year depreciation deduction, depreciable property will not meet the requirements of this paragraph (b)(2) if the property is—

(*1*) Described in section 168(f);

(*2*) Required to be depreciated under the alternative depreciation system of section 168(g) pursuant to section 168(g)(1)(A) through (D) or other provisions of the Internal Revenue Code (for example, property described in section 263A(e)(2)(A) if the taxpayer (or any related person as defined in section 263A(e)(2)(B)) has made an election under section 263A(d)(3), or property described in section 280F(b)(1)).

(*3*) Included in any class of property for which the taxpayer elects not to deduct the 30-percent additional first year depreciation (for further guidance, see paragraph (e) of this section); or

(*4*) Qualified New York Liberty Zone leasehold improvement property as defined in section 1400L(c)(2).

(B) *Property that is not 50-percent bonus depreciation property*. For purposes of the 50-percent additional first year depreciation deduction, depreciable property will not meet the requirements of this paragraph (b)(2) if the property is—

(*1*) Described in paragraph (b)(2)(ii)(A)(*1*), (*2*), or (*4*) of this section; or

(*2*) Included in any class of property for which the taxpayer elects the 30-percent, instead of the 50-percent, additional first year depreciation deduction or elects not to deduct any additional first year depreciation (for further guidance, see paragraph (e) of this section).

(3) *Original use*—(i) *In general*. For purposes of the 30-percent additional first year depreciation deduction, depreciable property will meet the requirements of this paragraph (b)(3) if the original use of the property commences with the taxpayer after September 10, 2001. For purposes of the 50-percent additional first year depreciation deduction, depreciable property will meet the requirements of this paragraph (b)(3) if the original use of the property commences with the taxpayer after May 5, 2003. Except as provided in paragraphs (b)(3)(iii) and (iv) of this section, original use means the first use to which the property is put, whether or not that use corresponds to the use of the property by the taxpayer. Thus, additional capital expenditures incurred by a taxpayer to recondition or rebuild property acquired or owned by the taxpayer satisfies the original use requirement. However, the cost of reconditioned or rebuilt property does not satisfy the original use requirement. The question of whether property is reconditioned or rebuilt property is a question of fact. For purposes of this paragraph (b)(3)(i), property that contains used parts will not be treated as reconditioned or rebuilt if the cost of the used parts is not more than 20 percent of the total cost of the property, whether acquired or self-constructed.

(ii) *Conversion to business or income-producing use*—(A) *Personal use to business or income-producing use*. If a taxpayer initially acquires new property for personal use and subsequently uses the property in the taxpayer's trade or business or for the taxpayer's production of income, the taxpayer is considered the original user of the property. If a person initially acquires new property for personal use and a taxpayer subsequently acquires the property from the person for use in the taxpayer's trade or business or for the taxpayer's production of income, the taxpayer is not considered the original user of the property.

(B) *Inventory to business or income-producing use*. If a taxpayer initially acquires new property and holds the property primarily for sale to customers in the ordinary course of the taxpayer's business and subsequently withdraws the property from inventory and uses the property primarily in the taxpayer's trade or business or primarily for the taxpayer's production of income, the taxpayer is considered the original user of the property. If a person initially acquires new property and holds the property primarily for sale to customers in the ordinary course of the person's business and a taxpayer subsequently acquires the property from the person for use primarily in the taxpayer's trade or business or primarily for the taxpayer's production of income, the taxpayer is considered the original user of the property. For purposes of this paragraph (b)(3)(ii)(B), the original use of the property by the taxpayer commences on the date on which the taxpayer uses the property primarily in the taxpayer's trade or business or primarily for the taxpayer's production of income.

(iii) *Sale-leaseback, syndication, and certain other transactions*—(A) *Sale-leaseback transaction.* If new property is originally placed in service by a person after September 10, 2001 (for qualified property), or after May 5, 2003 (for 50-percent bonus depreciation property), and is sold to a taxpayer and leased back to the person by the taxpayer within three months after the date the property was originally placed in service by the person, the taxpayer-lessor is considered the original user of the property.

(B) *Syndication transaction and certain other transactions.* If new property is originally placed in service by a lessor (including by operation of paragraph (b)(5)(ii)(A) of this section) after September 10, 2001 (for qualified property), or after May 5, 2003 (for 50-percent bonus depreciation property), and is sold by the lessor or any subsequent purchaser within three months after the date the property was originally placed in service by the lessor (or, in the case of multiple units of property subject to the same lease, within three months after the date the final unit is placed in service, so long as the period between the time the first unit is placed in service and the time the last unit is placed in service does not exceed 12 months), and the user of the property after the last sale during the three-month period remains the same as when the property was originally placed in service by the lessor, the purchaser of the property in the last sale during the three-month period is considered the original user of the property.

(C) *Sale-leaseback transaction followed by a syndication transaction and certain other transactions.* If a sale-leaseback transaction that satisfies the requirements in paragraph (b)(3)(iii)(A) of this section is followed by a transaction that satisfies the requirements in paragraph (b)(3)(iii)(B) of this section, the original user of the property is determined in accordance with paragraph (b)(3)(iii)(B) of this section.

(iv) *Fractional interests in property.* If, in the ordinary course of its business, a taxpayer sells fractional interests in property to third parties unrelated to the taxpayer, each first fractional owner of the property is considered as the original user of its proportionate share of the property. Furthermore, if the taxpayer uses the property before all of the fractional interests of the property are sold but the property continues to be held primarily for sale by the taxpayer, the original use of any fractional interest sold to a third party unrelated to the taxpayer subsequent to the taxpayer's use of the property begins with the first purchaser of that fractional interest. For purposes of this paragraph (b)(3)(iv), persons are not related if they do not have a relationship described in section 267(b) or 707(b) and the regulations thereunder.

(v) *Examples.* The application of this paragraph (b)(3) is illustrated by the following examples:

Example 1. On August 1, 2002, *A* buys from *B* for $20,000 a machine that has been previously used by *B* in *B*'s trade or business. On March 1, 2003, *A* makes a $5,000 capital expenditure to recondition the machine. The $20,000 purchase price does not qualify for the additional first year depreciation deduction because the original use requirement of this paragraph (b)(3) is not met. However, the $5,000 expenditure satisfies the original use requirement of this paragraph (b)(3) and, assuming all other requirements are met, qualifies for the 30-percent additional first year depreciation deduction, regardless of whether the $5,000 is added to the basis of the machine or is capitalized as a separate asset.

Example 2. C, an automobile dealer, uses some of its automobiles as demonstrators in order to show them to prospective customers. The automobiles that are used as demonstrators by *C* are held by *C* primarily for sale to customers in the ordinary course of its business. On September 1, 2002, *D* buys from *C* an automobile that was previously used as a demonstrator by *C*. *D* will use the automobile solely for business purposes. The use of the automobile by *C* as a demonstrator does not constitute a ''use'' for purposes of the original use requirement and, therefore, *D* will be considered the original user of the automobile for purposes of this paragraph (b)(3). Assuming all other requirements are met, *D*'s purchase price of the automobile qualifies for the 30-percent additional first year depreciation deduction for *D*, subject to any limitation under section 280F.

Example 3. On April 1, 2000, *E* acquires a horse to be used in *E*'s thoroughbred racing business. On October 1, 2003, *F* buys the horse from *E* and will use the horse in *F*'s horse breeding business. The use of the horse by *E* in its racing business prevents the original use of the horse from commencing with *F*. Thus, *F*'s purchase price of the horse does not qualify for the additional first year depreciation deduction.

Example 4. In the ordinary course of its business, *G* sells fractional interests in its aircraft to unrelated parties. *G* holds out for sale eight equal fractional interests in an aircraft. On January 1, 2003, *G* sells five of the eight fractional interests in the aircraft to *H*, an unrelated party, and *H* begins to use its proportionate share of the aircraft immediately upon purchase. On June 1, 2003, G sells to I, an unrelated party to G, the remaining unsold ⅜ fractional interests in the aircraft. *H* is considered the original user as to its ⅝ fractional interest in the aircraft and *I* is considered the original user as to its ⅜ fractional interest in the aircraft. Thus, assuming all other requirements are met, *H*'s purchase price for its ⅝ fractional interest in the aircraft qualifies for the 30-percent additional first year depreciation deduction and I's purchase price for its ⅜ fractional interest in the aircraft qualifies for the 50-percent additional first year depreciation deduction.

Example 5. On September 1, 2001, JJ, an equipment dealer, buys new tractors that are held by JJ primarily for sale to customers in the ordinary course of its business. On October 15, 2001, JJ withdraws the tractors from inventory and begins to use the tractors primarily for producing rental income. The holding of the tractors by JJ as inventory does not constitute a ''use'' for purposes of the original use requirement and, therefore, the original use of the tractors commences with JJ on October 15, 2001, for purposes of paragraph (b)(3) of this section. However, the tractors are not eligible for the additional first year depreciation deduction because JJ acquired the tractors before September 11, 2001.

(4) *Acquisition of property*—(i) *In general*—(A) *Qualified property.* For purposes of the 30-percent additional first year depreciation deduction, depreciable property will meet the requirements of this paragraph (b)(4) if the property is—

(*1*) Acquired by the taxpayer after September 10, 2001, and before January 1, 2005, but only if no written binding contract for the acquisition of the property was in effect before September 11, 2001; or

(*2*) Acquired by the taxpayer pursuant to a written binding contract that was entered into after September 10, 2001, and before January 1, 2005.

(B) *50-percent bonus depreciation property.* For purposes of the 50-percent additional first year depreciation deduction, depreciable property will meet the requirements of this paragraph (b)(4) if the property is—

(*1*) Acquired by the taxpayer after May 5, 2003, and before January 1, 2005, but only if no written binding contract for the acquisition of the property was in effect before May 6, 2003; or

(*2*) Acquired by the taxpayer pursuant to a written binding contract that was entered into after May 5, 2003, and before January 1, 2005.

(ii) *Definition of binding contract*—(A) *In general.* A contract is binding only if it is enforceable under State law against the taxpayer or a predecessor, and does not limit damages to a specified amount (for example, by use of a liquidated damages provision). For this purpose, a contractual provision that limits damages to an amount equal to at least 5 percent of the total contract price will not be treated as limiting damages to a specified amount. In determining whether a contract limits damages, the fact that there may be little or no damages because the contract price does not significantly differ from fair market value will not be taken into account. For example, if a taxpayer entered into an irrevocable written contract to purchase an asset for $100 and the contract contained no provision for liquidated damages, the contract is considered binding notwithstanding the fact that the asset had a fair market value of $99 and under local law the seller would only recover the difference in the event the purchaser failed to perform. If the contract provided for a full refund of the purchase price in lieu of any damages allowable by law in the event of breach or cancellation, the contract is not considered binding.

(B) *Conditions.* A contract is binding even if subject to a condition, as long as the condition is not within the control of either party or a predecessor. A contract will continue to be binding if the parties make insubstantial changes in its terms and conditions or because any term is to be determined by a standard beyond the control of either party. A contract that imposes significant obligations on the taxpayer or a predecessor will be treated as binding notwithstanding the fact that certain terms remain to be negotiated by the parties to the contract.

(C) *Options.* An option to either acquire or sell property is not a binding contract.

(D) *Supply agreements.* A binding contract does not include a supply or similar agreement if the amount and design specifications of the property to be purchased have not been specified. The contract will not be a binding contract for the property to be purchased until both the amount and the design specifications are specified. For example, if the provisions of a supply or similar agreement state the design specifications of the property to be purchased, a purchase order under the agreement for a specific number of assets is treated as a binding contract.

(E) *Components.* A binding contract to acquire one or more components of a larger property will not be treated as a binding contract to acquire the larger property. If a binding contract to acquire the component does not satisfy the requirements of this paragraph (b)(4), the component does not qualify for the 30-percent or 50-percent additional first year depreciation deduction, as applicable.

(iii) *Self-constructed property*—(A) *In general.* If a taxpayer manufactures, constructs, or produces property for use by the taxpayer in its trade or business (or for its production of income), the acquisition rules in paragraph (b)(4)(i) of this section are treated as met for qualified property if the taxpayer begins manufacturing, constructing, or producing the property after September 10, 2001, and before January 1, 2005, and for 50-percent bonus depreciation property if the taxpayer begins manufacturing, constructing, or producing the property after May 5, 2003, and before January 1, 2005. Property that is manufactured, constructed, or produced for the taxpayer by another person under a written binding contract (as defined in paragraph (b)(4)(ii) of this section) that is entered into prior to the manufacture, construction, or production of the property for use by the taxpayer in its trade or business (or for its production of income) is considered to be manufactured, constructed, or produced by the taxpayer. If a taxpayer enters into a written binding contract (as defined in paragraph (b)(4)(ii) of this section) after September 10, 2001, and before January 1, 2005, with another person to manufacture, construct, or produce property described in section 168(k)(2)(B) (longer production period property) or section 168(k)(2)(C) (certain aircraft) and the manufacture, construction, or production of this property begins after December 31, 2004, the acquisition rule in paragraph (b)(4)(i)(A)(*2*) or (b)(4)(i)(B)(*2*) of this section is met.

(B) *When does manufacture, construction, or production begin*—(*1*) *In general.* For purposes of paragraph (b)(4)(iii) of this section, manufacture, construction, or production of property begins when physical work of a significant nature begins. Physical work does not include preliminary activities such as planning or designing, securing financing, exploring, or researching. The determination of when physical work of a significant nature begins depends on the facts and circumstances. For example, if a retail motor fuels outlet or other facility is to be constructed onsite, construction begins when physical work of a significant nature commences at the site; that is, when work begins on the excavation for footings, pouring the pads for the outlet, or the driving of foundation pilings into the ground. Preliminary work, such as clearing a site, test drilling to determine soil condition, or excavation to change the contour of the land (as distinguished from excavation for footings) does not constitute the beginning of construction. However, if a retail motor fuels outlet or other facility is to be assembled on-site from modular units manufactured off-site and delivered to the site where the outlet will be used, manufacturing begins when physical work of a significant nature commences at the off-site location.

(*2*) *Safe harbor*. For purposes of paragraph (b)(4)(iii)(B)(*1*) of this section, a taxpayer may choose to determine when physical work of a significant nature begins in accordance with this paragraph (b)(4)(iii)(B)(*2*). Physical work of a significant nature will not be considered to begin before the taxpayer incurs (in the case of an accrual basis taxpayer) or pays (in the case of a cash basis taxpayer) more than 10 percent of the total cost of the property (excluding the cost of any land and preliminary activities such as planning or designing, securing financing, exploring, or researching). When property is manufactured, constructed, or produced for the taxpayer by another person, this safe harbor test must be satisfied by the taxpayer. For example, if a retail motor fuels outlet or other facility is to be constructed for an accrual basis taxpayer by another person for the total cost of $200,000 (excluding the cost of any land and preliminary activities such as planning or designing, securing financing, exploring, or researching), construction is deemed to begin for purposes of this paragraph (b)(4)(iii)(B)(*2*) when the taxpayer has incurred more than 10 percent (more than $20,000) of the total cost of the property. A taxpayer chooses to apply this paragraph (b)(4)(iii)(B)(*2*) by filing an income tax return for the placed-in-service year of the property that determines when physical work of a significant nature begins consistent with this paragraph (b)(4)(iii)(B)(*2*).

(C) *Components of self-constructed property*—(*1*) *Acquired components*. If a binding contract (as defined in paragraph (b)(4)(ii) of this section) to acquire a component does not satisfy the requirements of paragraph (b)(4)(i) of this section, the component does not qualify for the 30-percent or 50-percent additional first year depreciation deduction, as applicable. A binding contract (as defined in paragraph (b)(4)(ii) of this section) to acquire one or more components of a larger self-constructed property will not preclude the larger self-constructed property from satisfying the acquisition rules in paragraph (b)(4)(iii)(A) of this section. Accordingly, the unadjusted depreciable basis of the larger self-constructed property that is eligible for the 30-percent or 50-percent additional first year depreciation deduction, as applicable (assuming all other requirements are met), must not include the unadjusted depreciable basis of any component that does not satisfy the requirements of paragraph (b)(4)(i) of this section. If the manufacture, construction, or production of the larger self-constructed property begins before September 11, 2001, for qualified property, or before May 6, 2003, for 50-percent bonus depreciation property, the larger self-constructed property and any acquired components related to the larger self-constructed property do not qualify for the 30-percent or 50-percent additional first year depreciation deduction, as applicable. If a binding contract to acquire the component is entered into after September 10, 2001, for qualified property, or after May 5, 2003, for 50-percent bonus depreciation property, and before January 1, 2005, but the manufacture, construction, or production of the larger self-constructed property does not begin before January 1, 2005, the component qualifies for the additional first year depreciation deduction (assuming all other requirements are met) but the larger self-constructed property does not.

(*2*) *Self-constructed components*. If the manufacture, construction, or production of a component does not satisfy the requirements of paragraph (b)(4)(iii)(A) of this section, the component does not qualify for the 30-percent or 50-percent additional first year depreciation deduction, as applicable. However, if the manufacture, construction, or production of a component does not satisfy the requirements of paragraph (b)(4)(iii)(A) of this section, but the manufacture, construction, or production of the larger self-constructed property satisfies the requirements of paragraph (b)(4)(iii)(A) of this section, the larger self-constructed property qualifies for the 30-percent or 50-percent additional first year depreciation deduction, as applicable (assuming all other requirements are met) even though the component does not qualify for the 30-percent or 50-percent additional first year depreciation deduction. Accordingly, the unadjusted depreciable basis of the larger self-constructed property that is eligible for the 30-percent or 50-percent additional first year depreciation deduction, as applicable (assuming all other requirements are met), must not include the unadjusted depreciable basis of any component that does not qualify for the 30-percent or 50-percent additional first year depreciation deduction. If the manufacture, construction, or production of the larger self-constructed property began before September 11, 2001, for qualified property, or before May 6, 2003, for 50-percent bonus depreciation property, the larger self-constructed property and any self-constructed components related to the larger self-constructed property do not qualify for the 30-percent or 50-percent additional first year depreciation deduction, as applicable. If the manufacture, construction, or production of a component begins after September 10, 2001, for qualified property, or after May 5, 2003, for 50-percent bonus depreciation property, and before January 1, 2005, but the manufacture, construction, or production of the larger self-constructed property does not begin before January 1, 2005, the component qualifies for the additional first year depreciation deduction (assuming all other requirements are met) but the larger self-constructed property does not.

(iv) *Disqualified transactions*—(A) *In general*. Property does not satisfy the requirements of this paragraph (b)(4) if the user of the property as of the date on which the property was originally placed in service (including by operation of paragraphs (b)(5)(ii), (iii), and (iv) of this section), or a related party to the user or to the taxpayer, acquired, or had a written binding contract (as defined in paragraph (b)(4)(ii) of this section) in effect for the acquisition of the property at any time before September 11, 2001 (for qualified property), or before May 6, 2003 (for 50-percent bonus depreciation property). In addition, property manufactured, constructed, or produced for the use by the user of the property or by a related party to the user or to the taxpayer does not satisfy the requirements of this paragraph (b)(4) if the manufacture, construction, or production of the property for the user or the related party began at any time before September 11, 2001 (for qualified property), or before May 6, 2003 (for 50-percent bonus depreciation property).

(B) *Related party defined*. For purposes of this paragraph (b)(4)(iv), persons are related if they have a relationship specified in section 267(b) or 707(b) and the regulations thereunder.

(v) *Examples*. The application of this paragraph (b)(4) is illustrated by the following examples:

Example 1. On September 1, 2001, *J*, a corporation, entered into a written agreement with *K*, a manufacturer, to purchase 20 new lamps for $100 each within the next two years. Although the agreement specifies the number of lamps to be purchased, the agreement does not specify the design of the lamps to be purchased. Accordingly, the agreement is not a binding contract pursuant to paragraph (b)(4)(ii)(D) of this section.

Example 2. Same facts as *Example 1*. On December 1, 2001, *J* placed a purchase order with *K* to purchase 20 new model XPC5 lamps for $100 each for a total amount of $2,000. Because the agreement specifies the number of lamps to be purchased and the purchase order specifies the design of the lamps to be purchased, the purchase order placed by *J* with *K* on December 1, 2001, is a binding contract pursuant to paragraph (b)(4)(ii)(D) of this section. Accordingly, the cost of the 20 lamps qualifies for the 30-percent additional first year depreciation deduction.

Example 3. Same facts as *Example 1* except that the written agreement between *J* and *K* is to purchase 100 model XPC5 lamps for $100 each within the next two years. Because this agreement specifies the amount and design of the lamps to be purchased, the agreement is a binding contract pursuant to paragraph (b)(4)(ii)(D) of this section. Accordingly, because the agreement was entered into before September 11, 2001, any lamp acquired by *J* under this contract does not qualify for the additional first year depreciation deduction.

Example 4. On September 1, 2001, *L* began constructing an electric generation power plant for its own use. On November 1, 2002, *L* ceases construction of the power plant prior to its completion. Between September 1, 2001, and November 1, 2002, *L* incurred $3,000,000 for the construction of the power plant. On May 6, 2003, *L* resumed construction of the power plant and completed its construction on August 31, 2003. Between May 6, 2003, and August 31, 2003, *L* incurred another $1,600,000 to complete the construction of the power plant and, on September 1, 2003, *L* placed the power plant in service. None of *L*'s total expenditures of $4,600,000 qualify for the additional first year depreciation deduction because, pursuant to paragraph (b)(4)(iii)(A) of this section, *L* began constructing the power plant before September 11, 2001.

Example 5. Same facts as *Example 4* except that *L* began constructing the electric generation power plant for its own use on October 1, 2001. *L*'s total expenditures of $4,600,000 qualify for the additional first year depreciation deduction because, pursuant to paragraph (b)(4)(iii)(A) of this section, *L* began constructing the power plant after September 10, 2001, and placed the power plant in service before January 1, 2005. Accordingly, the additional first year depreciation deduction for the power plant will be $1,380,000, computed as $4,600,000 multiplied by 30 percent.

Example 6. On August 1, 2001, *M* entered into a written binding contract to acquire a new turbine. The new turbine is a component part of a new electric generation power plant that is being constructed on *M*'s behalf. The construction of the new electric generation power plant commenced in November 2001, and the new electric generation power plant was completed in November 2002. Because *M* entered into a written binding contract to acquire a component part (the new turbine) prior to September 11, 2001, pursuant to paragraph (b)(4)(iii)(C) of this section, the component part does not qualify for the additional first year depreciation deduction. However, pursuant to paragraphs (b)(4)(iii)(A) and (C) of this section, the new plant constructed for *M* will qualify for the 30-percent additional first year depreciation deduction because construction of the new plant began after September 10, 2001, and before May 6, 2003. Accordingly, the unadjusted depreciable basis of the new plant that is eligible for the 30-percent additional first year depreciation deduction must not include the unadjusted depreciable basis of the new turbine.

Example 7. Same facts as *Example 6* except that *M* entered into the written binding contract to acquire the new turbine on September 30, 2002, and construction of the new plant commenced on August 1, 2001. Because *M* began construction of the new plant prior to September 11, 2001, pursuant to paragraphs (b)(4)(iii)(A) and (C) of this section, neither the new plant constructed for *M* nor the turbine will qualify for the additional first year depreciation deduction because self-construction of the new plant began prior to September 11, 2001.

Example 8. On September 1, 2001, *N* began constructing property for its own use. On October 1, 2001, *N* sold its rights to the property to *O*, a related party under section 267(b). Pursuant to paragraph (b)(4)(iv) of this section, the property is not eligible for the additional first year depreciation deduction because *N* and *O* are related parties and construction of the property by *N* began prior to September 11, 2001.

Example 9. On September 1, 2001, *P* entered into a written binding contract to acquire property. On October 1, 2001, *P* sold its rights to the property to *Q*, a related party under section 267(b). Pursuant to paragraph (b)(4)(iv) of this section, the property is not eligible for the additional first year depreciation deduction because *P* and *Q* are related parties and a written binding contract for the acquisition of the property was in effect prior to September 11, 2001.

Example 10. Prior to September 11, 2001, *R* began constructing an electric generation power plant for its own use. On May 1, 2003, prior to the completion of the power plant, *R* transferred the rights to own and use this power plant to *S*, an unrelated party, for $6,000,000. Between May 6, 2003, and June 30, 2003, *S*, a calendar-year taxpayer, began construction, and incurred another $1,200,000 to complete the construction, of the power plant and, on August 1, 2003, *S* placed the power plant in service. Because *R* and *S* are not related parties, the transaction between *R* and *S* will not be a disqualified transaction pursuant to paragraph (b)(4)(iv) of this section. Accordingly, *S*'s total expenditures of $7,200,000 for the power plant qualify for the additional first year depreciation deduction. *S*'s additional first year depreciation deduction for the power plant will be $2,400,000, computed as $6,000,000 multiplied by 30 percent, plus $1,200,000 multiplied by 50 percent. The $6,000,000 portion of the total $7,200,000 unadjusted depreciable basis qualifies for the 30-percent additional first year depreciation deduction because that portion of the total unadjusted depreciable basis was acquired by *S* after September 10, 2001, and before May 6, 2003. However, because *S* began construction to complete the power plant after May 5, 2003, the $1,200,000 portion of the total $7,200,000 unadjusted depreciable basis qualifies for the 50-percent additional first year depreciation deduction.

Example 11. On September 1, 2001, *T* acquired and placed in service equipment. On October 15, 2001, *T* sells the equipment to *U*, an unrelated party, and leases the property back from *U* in a sale-leaseback transaction. Pursuant to paragraph (b)(4)(iv) of this section, the equipment does not qualify for the additional first year depreciation deduction because *T*, the user of the equipment, acquired the equipment prior to September 11,

2001. In addition, the sale-leaseback rules in paragraphs (b)(3)(iii)(A) and (b)(5)(ii)(A) of this section do not apply because the equipment was originally placed in service by *T* before September 11, 2001.

Example 12. On July 1, 2001, KK began constructing property for its own use. KK placed this property in service on September 15, 2001. On October 15, 2001, KK sells the property to LL, an unrelated party, and leases the property back from LL in a sale-leaseback transaction. Pursuant to paragraph (b)(4)(iv) of this section, the property does not qualify for the additional first year depreciation deduction because the property was constructed for KK, the user of the property, and that construction began prior to September 11, 2001.

Example 13. On June 1, 2004, MM decided to construct property described in section 168(k)(2)(B) for its own use. However, one of the component parts of the property had to be manufactured by another person for MM. On August 15, 2004, MM entered into a written binding contract with NN to acquire this component part of the property for $100,000. The manufacture of the component part commenced on September 1, 2004, and MM received the completed component part on February 1, 2005. The cost of this component part is 9 percent of the total cost of the property to be constructed by MM. MM began constructing the property described in section 168(k)(2)(B) on January 15, 2005, and placed this property (including all component parts) in service on November 1, 2005. Pursuant to paragraph (b)(4)(iii)(C)(*2*) of this section, the self-constructed component part of $100,000 manufactured by NN for MM is eligible for the additional first year depreciation deduction (assuming all other requirements are met) because the manufacturing of the component part began after September 10, 2001, and before January 1, 2005, and the property described in section 168(k)(2)(B), the larger self-constructed property, was placed in service by MM before January 1, 2006. However, pursuant to paragraph (b)(4)(iii)(A) of this section, the cost of the property described in section 168(k)(2)(B) (excluding the cost of the self-constructed component part of $100,000 manufactured by NN for MM) is not eligible for the additional first year depreciation deduction because construction of the property began after December 31, 2004.

Example 14. On December 1, 2004, OO entered into a written binding contract (as defined in paragraph (b)(4)(ii) of this section) with PP to manufacture an aircraft described in section 168(k)(2)(C) for use in OO's trade or business. PP begins to manufacture the aircraft on February 1, 2005. OO places the aircraft in service on August 1, 2005. Pursuant to paragraph (b)(4)(iii)(A) of this section, the aircraft meets the requirements of paragraph (b)(4)(i)(B)(*2*) of this section because the aircraft was acquired by OO pursuant to a written binding contract entered into after May 5, 2003, and before January 1, 2005.

(5) *Placed-in-service date*—(i) *In general.* Depreciable property will meet the requirements of this paragraph (b)(5) if the property is placed in service by the taxpayer for use in its trade or business or for production of income before January 1, 2005, or, in the case of property described in section 168(k)(2)(B) or (C), is placed in service by the taxpayer for use in its trade or business or for production of income before January 1, 2006 (or placed in service by the taxpayer for use in its trade or business or for production of income before January 1, 2007, in the case of property described in section 168(k)(2)(B) or (C) to which section 105 of the Gulf Opportunity Zone Act of 2005 (Pub. L. 109–135, 119 Stat. 2577) applies (for further guidance, see Announcement 2006–29 (2006–19 I.R.B. 879) and § 601.601(d)(2)(ii)(*b*) of this chapter)).

(ii) *Sale-leaseback, syndication, and certain other transactions*—(A) *Sale-leaseback transaction.* If qualified property is originally placed in service after September 10, 2001, or 50-percent bonus depreciation property is originally placed in service after May 5, 2003, by a person and sold to a taxpayer and leased back to the person by the taxpayer within three months after the date the property was originally placed in service by the person, the property is treated as originally placed in service by the taxpayer-lessor not earlier than the date on which the property is used by the lessee under the leaseback.

(B) *Syndication transaction and certain other transactions.* If qualified property is originally placed in service after September 10, 2001, or 50-percent bonus depreciation property is originally placed in service after May 5, 2003, by a lessor (including by operation of paragraph (b)(5)(ii)(A) of this section) and is sold by the lessor or any subsequent purchaser within three months after the date the property was originally placed in service by the lessor (or, in the case of multiple units of property subject to the same lease, within three months after the date the final unit is placed in service, so long as the period between the time the first unit is placed in service and the time the last unit is placed in service does not exceed 12 months), and the user of the property after the last sale during this three-month period remains the same as when the property was originally placed in service by the lessor, the property is treated as originally placed in service by the purchaser of the property in the last sale during the three-month period but not earlier than the date of the last sale.

(C) *Sale-leaseback transaction followed by a syndication transaction and certain other transactions.* If a sale-leaseback transaction that satisfies the requirements in paragraph (b)(5)(ii)(A) of this section is followed by a transaction that satisfies the requirements in paragraph (b)(5)(ii)(B) of this section, the placed-in-service date of the property is determined in accordance with paragraph (b)(5)(ii)(B) of this section.

(iii) *Technical termination of a partnership.* For purposes of this paragraph (b)(5), in the case of a technical termination of a partnership under section 708(b)(1)(B), qualified property or 50-percent bonus depreciation property placed in service by the terminated partnership during the taxable year of termination is treated as originally placed in service by the new partnership on the date the qualified property or the 50-percent bonus depreciation property is contributed by the terminated partnership to the new partnership.

(iv) *Section 168(i)(7) transactions.* For purposes of this paragraph (b)(5), if qualified property or 50-percent bonus depreciation property is transferred in a transaction described in section 168(i)(7) in the same taxable year that the qualified property or the 50-percent bonus depreciation property is placed in service by the transferor, the transferred property is treated as originally placed in service on the date the transferor placed in service the qualified property or the 50-percent bonus depreciation property, as applicable. In the case of multiple transfers of qualified property or 50-percent bonus depreciation property in multiple transactions described in section 168(i)(7) in the same taxable year, the placed in service date of the transferred property is deemed to be the date on which the first transferor placed in service the qualified property or the 50-percent bonus depreciation property, as applicable.

(v) *Example.* The application of this paragraph (b)(5) is illustrated by the following example:

Example. On September 15, 2004, QQ acquired and placed in service new equipment. This equipment is not described in section 168(k)(2)(B) or (C). On December 1, 2004, QQ sells the equipment to RR and leases the equipment back from RR in a sale-leaseback transaction. On February 15, 2005, RR sells the equipment to TT subject to the lease with QQ. As of February 15, 2005, QQ is still the user of the equipment. The sale-leaseback transaction of December 1, 2004, between QQ and RR satisfies the requirements of paragraph (b)(5)(ii)(A) of this section. The sale transaction of February 15, 2005, between RR and TT satisfies the requirements of paragraph (b)(5)(ii)(B) of this section. Consequently, pursuant to paragraph (b)(5)(ii)(C) of this section, the equipment is treated as originally placed in service by TT on February 15, 2005. Further, pursuant to paragraph (b)(3)(iii)(C) of this section, TT is considered the original user of the equipment. Accordingly, the equipment is not eligible for the additional first year depreciation deduction.

(c) *Qualified leasehold improvement property*—(1) *In general.* For purposes of section 168(k), qualified leasehold improvement property means any improvement, which is section 1250 property, to an interior portion of a building that is nonresidential real property if—

(i) The improvement is made under or pursuant to a lease by the lessee (or any sublessee) of the interior portion, or by the lessor of that interior portion;

(ii) The interior portion of the building is to be occupied exclusively by the lessee (or any sublessee) of that interior portion; and

(iii) The improvement is placed in service more than 3 years after the date the building was first placed in service by any person.

(2) *Certain improvements not included.* Qualified leasehold improvement property does not include any improvement for which the expenditure is attributable to:

(i) The enlargement of the building;

(ii) Any elevator or escalator;

(iii) Any structural component benefiting a common area; or

(iv) The internal structural framework of the building.

(3) *Definitions.* For purposes of this paragraph (c), the following definitions apply:

(i) *Building* has the same meaning as that term is defined in § 1.48–1(e)(1).

(ii) *Common area* means any portion of a building that is equally available to all users of the building on the same basis for uses that are incidental to the primary use of the building. For example, stairways, hallways, lobbies, common seating areas, interior and exterior pedestrian walkways and pedestrian bridges, loading docks and areas, and rest rooms generally are treated as common areas if they are used by different lessees of a building.

(iii) *Elevator* and *escalator* have the same meanings as those terms are defined in § 1.48–1(m)(2).

(iv) *Enlargement* has the same meaning as that term is defined in § 1.48–12(c)(10).

(v) *Internal structural framework* has the same meaning as that term is defined in § 1.48–12(b)(3)(i)(D)(iii).

(vi) *Lease* has the same meaning as that term is defined in section 168(h)(7). In addition, a commitment to enter into a lease is treated as a lease, and the parties to the commitment are treated as lessor and lessee. However, a lease between related persons is not considered a lease. For purposes of the preceding sentence, related persons are—

(A) Members of an affiliated group (as defined in section 1504 and the regulations thereunder); and

(B) Persons having a relationship described in section 267(b) and the regulations thereunder. For purposes of applying section 267(b), the language ''80 percent or more'' is used instead of ''more than 50 percent.''

(vii) *Nonresidential real property* has the same meaning as that term is defined in section 168(e)(2)(B).

(viii) *Structural component* has the same meaning as that term is defined in § 1.48–1(e)(2).

(d) *Computation of depreciation deduction for qualified property or 50-percent bonus depreciation property*—(1) *Additional first year depreciation deduction*—(i) *In general.* Except as provided in paragraph (f) of this section, the additional first year depreciation deduction is allowable in the first taxable year in which the qualified property or 50-percent bonus depreciation property is placed in service by the taxpayer for use in its trade or business or for the production of income. Except as provided in paragraph (f)(5) of this section, the allowable additional first year depreciation deduction for qualified property is determined by multiplying the unadjusted depreciable basis (as defined in § 1.168(k)–1(a)(2)(iii)) of the qualified property by 30 percent. Except as provided in paragraph (f)(5) of this section, the allowable additional first year depreciation deduction for 50-percent bonus depreciation property is determined by multiplying the unadjusted depreciable basis (as defined in § 1.168(k)–1(a)(2)(iii)) of the 50-percent bonus depreciation property by 50 percent. Except as provided in paragraph (f)(1) of this section, the 30-percent or 50-percent additional first year depreciation deduction is not affected by a taxable year of less than 12 months. See paragraph (f)(1) of this section for qualified property or 50-percent bonus depreciation property placed in service and disposed of in the same taxable year. See paragraph (f)(5) of this section for qualified property or 50-percent bonus depreciation property acquired in a like-kind exchange or as a result of an involuntary conversion.

(ii) *Property having a longer production period.* For purposes of paragraph (d)(1)(i) of this section, the unadjusted depreciable basis (as defined in § 1.168(k)–1(a)(2)(iii)) of qualified property or 50-percent bonus depreciation property described in section 168(k)(2)(B) is limited to the property's unadjusted depreciable basis attributable to the property's manufacture, construction, or production after September 10, 2001 (for qualified property), or May 5, 2003 (for 50-percent bonus depreciation property), and before January 1, 2005.

(iii) *Alternative minimum tax.* The 30-percent or 50-percent additional first year depreciation deduction is allowed for alternative minimum tax purposes for the taxable year in which the qualified property or the 50-percent bonus depreciation property is placed in service by the taxpayer. In general, the 30-percent or 50-percent additional first year depreciation deduction for alternative minimum tax purposes is based on the unadjusted depreciable basis of the property for alternative minimum tax purposes. However, see paragraph (f)(5)(iii)(D) of this section for qualified property or 50-percent bonus depreciation property acquired in a like-kind exchange or as a result of an involuntary conversion.

(2) *Otherwise allowable depreciation deduction*. (i) *In general*. Before determining the amount otherwise allowable as a depreciation deduction for the qualified property or the 50-percent bonus depreciation property for the placed-in-service year and any subsequent taxable year, the taxpayer must determine the remaining adjusted depreciable basis of the qualified property or the 50-percent bonus depreciation property. This remaining adjusted depreciable basis is equal to the unadjusted depreciable basis of the qualified property or the 50-percent bonus depreciation property reduced by the amount of the additional first year depreciation allowed or allowable, whichever is greater. The remaining adjusted depreciable basis of the qualified property or the 50-percent bonus depreciation property is then depreciated using the applicable depreciation provisions under the Internal Revenue Code for the qualified property or the 50-percent bonus depreciation property. The remaining adjusted depreciable basis of the qualified property or the 50-percent bonus depreciation property that is MACRS property is also the basis to which the annual depreciation rates in the optional depreciation tables apply (for further guidance, see section 8 of Rev. Proc. 87–57 (1987–2 C.B. 687) and § 601.601(d)(2)(ii)(*b*) of this chapter). The depreciation deduction allowable for the remaining adjusted depreciable basis of the qualified property or the 50-percent bonus depreciation property is affected by a taxable year of less than 12 months.

(ii) *Alternative minimum tax*. For alternative minimum tax purposes, the depreciation deduction allowable for the remaining adjusted depreciable basis of the qualified property or the 50-percent bonus depreciation property is based on the remaining adjusted depreciable basis for alternative minimum tax purposes. The remaining adjusted depreciable basis of the qualified property or the 50-percent bonus depreciable property for alternative minimum tax purposes is depreciated using the same depreciation method, recovery period (or useful life in the case of computer software), and convention that apply to the qualified property or the 50-percent bonus depreciation property for regular tax purposes.

(3) *Examples*. This paragraph (d) is illustrated by the following examples:

Example 1. On March 1, 2003, *V*, a calendar-year taxpayer, purchased and placed in service qualified property that costs $1 million and is 5-year property under section 168(e). *V* depreciates its 5-year property placed in service in 2003 using the optional depreciation table that corresponds with the general depreciation system, the 200-percent declining balance method, a 5-year recovery period, and the half-year convention. For 2003, *V* is allowed a 30-percent additional first year depreciation deduction of $300,000 (the unadjusted depreciable basis of $1 million multiplied by .30). Next, *V* must reduce the unadjusted depreciable basis of $1 million by the additional first year depreciation deduction of $300,000 to determine the remaining adjusted depreciable basis of $700,000. Then, *V*'s depreciation deduction allowable in 2003 for the remaining adjusted depreciable basis of $700,000 is $140,000 (the remaining adjusted depreciable basis of $700,000 multiplied by the annual depreciation rate of .20 for recovery year 1).

Example 2. On June 1, 2003, *W*, a calendar-year taxpayer, purchased and placed in service 50-percent bonus depreciation property that costs $126,000. The property qualifies for the expensing election under section 179 and is 5-year property under section 168(e). *W* did not purchase any other section 179 property in 2003. *W* makes the election under section 179 for the property and depreciates its 5-year property placed in service in 2003 using the optional depreciation table that corresponds with the general depreciation system, the 200-percent declining balance method, a 5-year recovery period, and the half-year convention. For 2003, *W* is first allowed a $100,000 deduction under section 179. Next, *W* must reduce the cost of $126,000 by the section 179 deduction of $100,000 to determine the unadjusted depreciable basis of $26,000. Then, for 2003, *W* is allowed a 50-percent additional first year depreciation deduction of $13,000 (the unadjusted depreciable basis of $26,000 multiplied by .50). Next, *W* must reduce the unadjusted depreciable basis of

$26,000 by the additional first year depreciation deduction of $13,000 to determine the remaining adjusted depreciable basis of $13,000. Then, *W*'s depreciation deduction allowable in 2003 for the remaining adjusted depreciable basis of $13,000 is $2,600 (the remaining adjusted depreciable basis of $13,000 multiplied by the annual depreciation rate of .20 for recovery year 1).

(e) *Election not to deduct additional first year depreciation*—(1) *In general.* If a taxpayer makes an election under this paragraph (e), the election applies to all qualified property or 50-percent bonus depreciation property, as applicable, that is in the same class of property and placed in service in the same taxable year. The rules of this paragraph (e) apply to the following elections provided under section 168(k):

(i) *Qualified property.* A taxpayer may make an election not to deduct the 30-percent additional first year depreciation for any class of property that is qualified property placed in service during the taxable year. If this election is made, no additional first year depreciation deduction is allowable for the property placed in service during the taxable year in the class of property.

(ii) *50-percent bonus depreciation property.* For any class of property that is 50-percent bonus depreciation property placed in service during the taxable year, a taxpayer may make an election—

(A) To deduct the 30-percent, instead of the 50-percent, additional first year depreciation. If this election is made, the allowable additional first year depreciation deduction is determined as though the class of property is qualified property under section 168(k)(2); or

(B) Not to deduct both the 30-percent and the 50-percent additional first year depreciation. If this election is made, no additional first year depreciation deduction is allowable for the class of property.

(2) *Definition of class of property.* For purposes of this paragraph (e), the term class of property means:

(i) Except for the property described in paragraphs (e)(2)(ii) and (iv) of this section, each class of property described in section 168(e) (for example, 5-year property);

(ii) Water utility property as defined in section 168(e)(5) and depreciated under section 168;

(iii) Computer software as defined in, and depreciated under, section 167(f)(1) and the regulations thereunder; or

(iv) Qualified leasehold improvement property as defined in paragraph (c) of this section and depreciated under section 168.

(3) *Time and manner for making election*—(i) *Time for making election.* Except as provided in paragraph (e)(4) of this section, any election specified in paragraph (e)(1) of this section must be made by the due date (including extensions) of the Federal tax return for the taxable year in which the qualified property or the 50-percent bonus depreciation property, as applicable, is placed in service by the taxpayer.

(ii) *Manner of making election.* Except as provided in paragraph (e)(4) of this section, any election specified in paragraph (e)(1) of this section must be made in the manner prescribed on Form 4562, ''Depreciation and Amortization,'' and its instructions. The election is made separately by each person owning qualified property or 50-percent bonus depreciation property (for example, for each member of a consolidated group by the common parent of the group, by the partnership, or by the S corporation). If Form 4562 is revised or renumbered, any reference in this section to that form shall be treated as a reference to the revised or renumbered form.

(4) *Special rules for 2000 or 2001 returns.* For the election specified in paragraph (e)(1)(i) of this section for qualified property placed in service by the taxpayer during the taxable year that included September 11, 2001, the taxpayer should refer to the guidance provided by the Internal Revenue Service for the time and manner of making this election on the 2000 or 2001 Federal tax return for the taxable year that included September 11, 2001 (for further guidance, *see* sections 3.03(3) and 4 of Rev. Proc. 2002–33 (2002–1 C.B. 963), Rev. Proc. 2003–50 (2003–29 I.R.B. 119), and § 601.601(d)(2)(ii)(*b*) of this chapter).

(5) *Failure to make election.* If a taxpayer does not make the applicable election specified in paragraph (e)(1) of this section within the time and in the manner prescribed in paragraph (e)(3) or (4) of this section, the amount of depreciation allowable for that property

under section 167(f)(1) or under section 168, as applicable, must be determined for the placed-in-service year and for all subsequent taxable years by taking into account the additional first year depreciation deduction. Thus, any election specified in paragraph (e)(1) of this section shall not be made by the taxpayer in any other manner (for example, the election cannot be made through a request under section 446(e) to change the taxpayer's method of accounting).

(6) *Alternative minimum tax.* If a taxpayer makes an election specified in paragraph (e)(1) of this section for a class of property, the depreciation adjustments under section 56 and the regulations under section 56 apply to the property to which that election applies for purposes of computing the taxpayer's alternative minimum taxable income.

(7) *Revocation of election*—(i) *In general.* Except as provided in paragraph (e)(7)(ii) of this section, an election specified in paragraph (e)(1) of this section, once made, may be revoked only with the written consent of the Commissioner of Internal Revenue. To seek the Commissioner's consent, the taxpayer must submit a request for a letter ruling.

(ii) *Automatic 6-month extension.* If a taxpayer made an election specified in paragraph (e)(1) of this section for a class of property, an automatic extension of 6 months from the due date of the taxpayer's Federal tax return (excluding extensions) for the placed-in-service year of the class of property is granted to revoke that election, provided the taxpayer timely filed the taxpayer's Federal tax return for the placed-in-service year of the class of property and, within this 6-month extension period, the taxpayer (and all taxpayers whose tax liability would be affected by the election) files an amended Federal tax return for the placed-in-service year of the class of property in a manner that is consistent with the revocation of the election.

(f) *Special rules*—(1) *Property placed in service and disposed of in the same taxable year*—(i) *In general.* Except as provided in paragraphs (f)(1)(ii) and (iii) of this section, the additional first year depreciation deduction is not allowed for qualified property or 50-percent bonus depreciation property placed in service and disposed of during the same taxable year. Also if qualified property or 50-percent bonus depreciation property is placed in service and disposed of during the same taxable year and then reacquired and again placed in service in a subsequent taxable year, the additional first year depreciation deduction is not allowable for the property in the subsequent taxable year.

(ii) *Technical termination of a partnership.* In the case of a technical termination of a partnership under section 708(b)(1)(B), the additional first year depreciation deduction is allowable for any qualified property or 50-percent bonus depreciation property placed in service by the terminated partnership during the taxable year of termination and contributed by the terminated partnership to the new partnership. The allowable additional first year depreciation deduction for the qualified property or the 50-percent bonus depreciation property shall not be claimed by the terminated partnership but instead shall be claimed by the new partnership for the new partnership's taxable year in which the qualified property or the 50-percent bonus depreciation property was contributed by the terminated partnership to the new partnership. However, if qualified property or 50-percent bonus depreciation property is both placed in service and contributed to a new partnership in a transaction described in section 708(b)(1)(B) by the terminated partnership during the taxable year of termination, and if such property is disposed of by the new partnership in the same taxable year the new partnership received such property from the terminated partnership, then no additional first year depreciation deduction is allowable to either partnership.

(iii) *Section 168(i)(7) transactions.* If any qualified property or 50-percent bonus depreciation property is transferred in a transaction described in section 168(i)(7) in the same taxable year that the qualified property or the 50-percent bonus depreciation property is placed in service by the transferor, the additional first year depreciation deduction is allowable for the qualified property or the 50-percent bonus depreciation property. The allowable additional first year depreciation deduction for the qualified property or the 50-percent bonus depreciation property for the transferor's taxable year in which the property is placed in service is allocated between the transferor and the transferee on a monthly basis. This allocation shall be made in accordance with the rules in §1.168(d)–1(b)(7)(ii) for allocating the depreciation deduction between the transferor and the transferee. However, if qualified property or 50-percent bonus depreciation property is both placed in service and transferred in a transaction described in section 168(i)(7) by the transferor during the same taxable year, and if such property is disposed of by the transferee (other than by a transaction described in section 168(i)(7)) during the same taxable year the transferee received such property from the transferor, then no additional first year depreciation deduction is allowable to either party.

(iv) *Examples.* The application of this paragraph (f)(1) is illustrated by the following examples:

Example 1. X and *Y* are equal partners in *Partnership XY,* a general partnership. On February 1, 2002, *Partnership XY* purchased and placed in service new equipment at a cost of $30,000. On March 1, 2002, *X* sells its entire 50 percent interest to *Z* in a transfer that terminates the partnership under section 708(b)(1)(B). As a result, terminated *Partnership XY* is deemed to have contributed the equipment to new *Partnership XY.* Pursuant to paragraph (f)(1)(ii) of this section, new *Partnership XY,* not terminated *Partnership XY,* is eligible to claim the 30-percent additional first year depreciation deduction allowable for the equipment for the taxable year 2002 (assuming all other requirements are met).

Example 2. On January 5, 2002, *BB* purchased and placed in service new office desks for a total amount of $8,000. On August 20, 2002, *BB* transferred the office desks to *Partnership BC* in a transaction described in section 721. *BB* and *Partnership BC* are calendar-year taxpayers. Because the transaction between *BB* and *Partnership BC* is a transaction described in section 168(i)(7), pursuant to paragraph (f)(1)(iii) of this section the 30-percent additional first year depreciation deduction allowable for the desks is allocated between *BB* and *Partnership BC* in accordance with the rules in §1.168(d)–1(b)(7)(ii) for allocating the depreciation deduction between the transferor and the transferee. Accordingly, the 30-percent additional first year depreciation deduction allowable for the desks for 2002 of $2,400 (the unadjusted depreciable basis of $8,000 multiplied by .30) is allocated between *BB* and *Partnership BC* based on the number of months that *BB* and *Partnership BC* held the desks in service. Thus, because the desks were held in service by *BB* for 7 of 12 months, which includes the month in which *BB* placed the desks in service but does not include the month in which the desks were transferred, *BB* is allocated $1,400 ($\frac{7}{12} \times$ $2,400 additional first year depreciation deduction). *Partnership BC* is allocated $1,000, the remaining $\frac{5}{12}$ of the $2,400 additional first year depreciation deduction allowable for the desks.

(2) *Redetermination of basis.* If the unadjusted depreciable basis (as defined in §1.168(k)–1(a)(2)(iii)) of qualified property or 50-percent bonus depreciation property is redetermined (for example, due to contingent purchase price or discharge of indebtedness) before January 1, 2005, or, in the case of property described in section 168(k)(2)(B) or (C), is redetermined before January 1, 2006 (or redetermined before January 1, 2007, in the case of property described in section 168(k)(2)(B) or (C) to which section 105 of the Gulf Opportunity Zone Act of 2005 (Pub. L. 109–135, 119 Stat. 2577) applies (for further guidance, see Announcement 2006–29 (2006–19 I.R.B. 879) and §601.601(d)(2)(ii)(*b*) of this chapter)), the additional first year depreciation deduction allowable for the qualified property or the 50-percent bonus depreciation property is redetermined as follows:

(i) *Increase in basis.* For the taxable year in which an increase in basis of qualified property or 50-percent bonus depreciation property occurs, the taxpayer shall claim an additional first year depreciation deduction for qualified property by multiplying the amount of the increase in basis for this property by 30 percent or, for 50-percent bonus depreciation property, by multiplying the amount of the increase in basis for this property by 50 percent. For purposes of this paragraph (f)(2)(i), the 30-percent additional first year depreciation deduction applies to the increase in basis if the underlying property is qualified property and the 50-percent additional first year depreciation deduction applies to the increase in basis if the underlying property is 50-percent bonus depreciation property. To determine the amount otherwise allowable as a depreciation deduction for the increase in basis of qualified property or 50-percent bonus depreciation property, the amount of the increase in basis of the qualified property or the 50-percent bonus depreciation property must be reduced by the additional first year depreciation deduction allowed or allowable, whichever is greater, for the increase in basis and the remaining increase in basis of—

(A) Qualified property or 50-percent bonus depreciation property (except for computer software described in paragraph (b)(2)(i)(B) of this section) is depreciated over the recovery period of the qualified property or the 50-percent bonus depreciation property, as applicable, remaining as of the beginning of the taxable year in which the increase in basis occurs, and using the same depreciation method and convention applicable to the qualified property or 50-percent bonus depreciation property, as applicable, that applies for the taxable year in which the increase in basis occurs; and

(B) Computer software (as defined in paragraph (b)(2)(i)(B) of this section) that is qualified property or 50-percent bonus depreciation property is depreciated ratably over the remainder of the 36-month period (the useful life under section 167(f)(1)) as of the beginning of the first day of the month in which the increase in basis occurs.

(ii) *Decrease in basis.* For the taxable year in which a decrease in basis of qualified property or 50-percent bonus depreciation property occurs, the taxpayer shall reduce the total amount otherwise allowable as a depreciation deduction for all of the taxpayer's depreciable property by the excess additional first year depreciation deduction previously claimed for the qualified property or the 50-percent bonus depreciation property. If, for such taxable year, the excess additional first year depreciation deduction exceeds the total amount otherwise allowable as a depreciation deduction for all of the taxpayer's depreciable property, the taxpayer shall take into account a negative depreciation deduction in computing taxable income. The excess additional first year depreciation deduction for qualified property is determined by multiplying the amount of the decrease in basis for this property by 30 percent. The excess additional first year depreciation deduction for 50-percent bonus depreciation property is determined by multiplying the amount of the decrease in basis for this property by 50 percent. For purposes of this paragraph (f)(2)(ii), the 30-percent additional first year depreciation deduction applies to the decrease in basis if the underlying property is qualified property and the 50-percent additional first year depreciation deduction applies to the decrease in basis if the underlying property is 50-percent bonus depreciation property. Also, if the taxpayer establishes by adequate records or other sufficient evidence that the taxpayer claimed less than the additional first year depreciation deduction allowable for the qualified property or the 50-percent bonus depreciation property before the decrease in basis or if the taxpayer claimed more than the additional first year depreciation deduction allowable for the qualified property or the 50-percent bonus depreciation property before the decrease in basis, the excess additional first year depreciation deduction is determined by multiplying the amount of the decrease in basis by the additional first year depreciation deduction percentage actually claimed by the taxpayer for the qualified property or the 50-percent bonus depreciation property, as applicable, before the decrease in basis. To determine the amount to reduce the total amount otherwise allowable as a depreciation deduction for all of the taxpayer's depreciable property for the excess depreciation previously claimed (other than the additional first year depreciation deduction) resulting from the decrease in basis of the qualified property or the 50-percent bonus depreciation property, the amount of the decrease in basis of the qualified property or the 50-percent bonus depreciation property must be adjusted by the excess additional first year depreciation deduction that reduced the total amount otherwise allowable as a depreciation deduction (as determined under this paragraph) and the remaining decrease in basis of—

(A) Qualified property or 50-percent bonus depreciation property (except for computer software described in paragraph (b)(2)(i)(B) of this section) reduces the amount otherwise allowable as a depreciation deduction over the recovery period of the qualified property or the 50-percent bonus depreciation property, as applicable, remaining as of the beginning of the taxable year in which the decrease in basis occurs, and using the same depreciation method and convention of the qualified property or 50-percent bonus depreciation property, as applicable, that applies in the taxable year in which the decrease in basis occurs. If, for any taxable year, the reduction to the amount otherwise allowable as a depreciation deduction (as determined under this paragraph (f)(2)(ii)(A)) exceeds the total amount otherwise allowable as a depreciation deduction for all of the taxpayer's depreciable property, the taxpayer shall take into account a negative depreciation deduction in computing taxable income; and

(B) Computer software (as defined in paragraph (b)(2)(i)(B) of this section) that is qualified property or 50-percent bonus depreciation property reduces the amount otherwise allowable as a depreciation deduction over the remainder of the 36-month period (the useful life under section 167(f)(1)) as of the beginning of the first day of the month in which the decrease in basis occurs. If, for any taxable year, the reduction to the amount otherwise allowable as a depreciation deduction (as determined under this paragraph (f)(2)(ii)(B)) exceeds the total amount otherwise allowable as a depreciation deduction for all of the taxpayer's depreciable property, the taxpayer shall take into account a negative depreciation deduction in computing taxable income.

(iii) *Definition*. Except as otherwise expressly provided by the Internal Revenue Code (for example, section 1017(a)), the regulations under the Internal Revenue Code, or other guidance published in the Internal Revenue Bulletin (see §601.601(d)(2)(ii)(*b*) of this chapter), for purposes of this paragraph (f)(2):

(A) An increase in basis occurs in the taxable year an amount is taken into account under section 461; and

(B) A decrease in basis occurs in the taxable year an amount would be taken into account under section 451.

(iv) *Examples*. The application of this paragraph (f)(2) is illustrated by the following examples:

Example 1. (i) On May 15, 2002, *CC*, a cash-basis taxpayer, purchased and placed in service qualified property that is 5-year property at a cost of $200,000. In addition to the $200,000, *CC* agrees to pay the seller 25 percent of the gross profits from the operation of the property in 2002. On May 15, 2003, *CC* paid to the seller an additional $10,000. *CC* depreciates the 5-year property placed in service in 2002 using the optional depreciation table that corresponds with the general depreciation system, the 200-percent declining balance method, a 5-year recovery period, and the half-year convention.

(ii) For 2002, *CC* is allowed a 30-percent additional first year depreciation deduction of $60,000 (the unadjusted depreciable basis of $200,000 multiplied by .30). In addition, *CC*'s depreciation deduction for 2002 for the remaining adjusted depreciable basis of $140,000 (the unadjusted depreciable basis of $200,000 reduced by the additional first year depreciation deduction of $60,000) is $28,000 (the remaining adjusted depreciable basis of $140,000 multiplied by the annual depreciation rate of .20 for recovery year 1).

(iii) For 2003, *CC*'s depreciation deduction for the remaining adjusted depreciable basis of $140,000 is $44,800 (the remaining adjusted depreciable basis of $140,000 multiplied by the annual depreciation rate of .32 for recovery year 2). In addition, pursuant to paragraph (f)(2)(i) of this section, *CC* is allowed an additional first year depreciation deduction for 2003 for the $10,000 increase in basis of the qualified property. Consequently, *CC* is allowed an additional first year depreciation deduction of $3,000 (the increase in basis of $10,000 multiplied by .30). Also, *CC* is allowed a depreciation deduction for 2003 attributable to the remaining increase in basis of $7,000 (the increase in basis of $10,000 reduced by the additional first year depreciation deduction of $3,000). The depreciation deduction allowable for 2003 attributable to the remaining increase in basis of $7,000 is $3,111 (the remaining increase in basis of $7,000 multiplied by .4444, which is equal to 1/remaining recovery period of 4.5 years at January 1, 2003, multiplied by 2). Accordingly, for 2003, *CC*'s total depreciation deduction allowable for the qualified property is $50,911.

Example 2. (i) On May 15, 2002, DD, a calendar-year taxpayer, purchased and placed in service qualified property that is 5-year property at a cost of $400,000. To purchase the property, DD borrowed $250,000 from Bank2. On May 15, 2003, Bank2 forgives $50,000 of the indebtedness. DD makes the election provided in section 108(b)(5) to apply any portion of the reduction under section 1017 to the basis of the depreciable property of the taxpayer. DD depreciates the 5-year property placed in service in 2002 using the optional depreciation table that corresponds with the general depreciation system, the 200-percent declining balance method, a 5-year recovery period, and the half-year convention.

(ii) For 2002, DD is allowed a 30-percent additional first year depreciation deduction of $120,000 (the unadjusted depreciable basis of $400,000 multiplied by .30). In addition, DD's depreciation deduction allowable for 2002 for the remaining adjusted depreciable basis of $280,000 (the unadjusted depreciable basis of $400,000 reduced by the additional first year depreciation deduction of $120,000) is $56,000 (the remaining adjusted depreciable basis of $280,000 multiplied by the annual depreciation rate of .20 for recovery year 1).

(iii) For 2003, DD's deduction for the remaining adjusted depreciable basis of $280,000 is $89,600 (the remaining adjusted depreciable basis of $280,000 multiplied by the annual depreciation rate .32 for recovery year 2). Although Bank2 forgave the indebtedness in 2003, the basis of the property is reduced on January 1, 2004, pursuant to sections 108(b)(5) and 1017(a) under which basis is reduced at the beginning of the taxable year following the taxable year in which the discharge of indebtedness occurs.

(iv) For 2004, DD's deduction for the remaining adjusted depreciable basis of $280,000 is $53,760 (the remaining adjusted depreciable basis of $280,000 multiplied by the annual depreciation rate .192 for recovery year 3). However, pursuant to paragraph (f)(2)(ii) of this section, DD must reduce the amount otherwise allowable as a depreciation deduction for 2004 by the excess depreciation previously claimed for the $50,000 decrease in basis of the qualified property. Consequently, DD must reduce the amount of depreciation otherwise allowable for 2004 by the excess additional first year depreciation of $15,000 (the decrease in basis of $50,000 multiplied by .30). Also, DD must reduce the amount of depreciation otherwise allowable for 2004 by the excess depreciation attributable to the remaining decrease in basis of $35,000 (the decrease in basis of $50,000 reduced by the excess additional first year depreciation of $15,000). The reduction in the amount of depreciation otherwise allowable for 2004 for the remaining decrease in basis of $35,000 is $19,999 (the remaining decrease in basis of $35,000 multiplied by .5714, which is equal to 1/remaining recovery period of 3.5 years at January 1, 2004, multiplied by 2). Accordingly, assuming the qualified property is the only depreciable property owned by DD, for 2004, DD's total depreciation deduction allowable for the qualified property is $18,761 ($53,760 minus $15,000 minus $19,999).

(3) *Section 1245 and 1250 depreciation recapture*. For purposes of section 1245 and the regulations thereunder, the additional first year depreciation deduction is an amount allowed or allowable for depreciation. Further, for purposes of section 1250(b) and the regulations thereunder, the additional first year depreciation deduction is not a straight line method.

(4) *Coordination with section 169*. The additional first year depreciation deduction is allowable in the placed-in-service year of a certified pollution control facility (as defined in §1.169–2(a)) that is qualified property or 50-percent bonus depreciation property, even if the taxpayer makes the election to amortize the certified pollution control facility under section 169 and the regulations thereunder in the certified pollution control facility's placed-in-service year.

(5) *Like-kind exchanges and involuntary conversions*—(i) *Scope*. The rules of this paragraph (f)(5) apply to acquired MACRS property or acquired computer software that is qualified property or 50-percent bonus depreciation property at the time of replacement provided the time of replacement is after September 10, 2001, and before January 1, 2005, or, in the case of acquired MACRS property or acquired computer software that is qualified property, or 50-percent bonus depreciation property, described in section 168(k)(2)(B) or (C), the time of replacement is after September 10, 2001, and before January 1, 2006 (or the time of replacement is after September 10, 2001, and before January 1, 2007, in the case of property described in section 168(k)(2)(B) or (C) to which section 105 of the Gulf Opportunity Zone Act of 2005 (Pub. L. 109–135, 119 Stat. 2577) applies (for further guidance, see Announcement 2006–29 (2006–19 I.R.B. 879) and §601.601(d)(2)(ii)(*b*) of this chapter)).

(ii) *Definitions*. For purposes of this paragraph (f)(5), the following definitions apply:

(A) *Acquired MACRS property* is MACRS property in the hands of the acquiring taxpayer that is acquired in a transaction described in section

1031(a), (b), or (c) for other MACRS property or that is acquired in connection with an involuntary conversion of other MACRS property in a transaction to which section 1033 applies.

(B) *Exchanged or involuntarily converted MACRS property* is MACRS property that is transferred by the taxpayer in a transaction described in section 1031(a), (b), or (c), or that is converted as a result of an involuntary conversion to which section 1033 applies.

(C) *Acquired computer software* is computer software (as defined in paragraph (b)(2)(i)(B) of this section) in the hands of the acquiring taxpayer that is acquired in a like-kind exchange under section 1031 or as a result of an involuntary conversion under section 1033.

(D) *Exchanged or involuntarily converted computer software* is computer software (as defined in paragraph (b)(2)(i)(B) of this section) that is transferred by the taxpayer in a like-kind exchange under section 1031 or that is converted as a result of an involuntary conversion under section 1033.

(E) *Time of disposition* is when the disposition of the exchanged or involuntarily converted MACRS property or the exchanged or involuntarily converted computer software, as applicable, takes place.

(F) Except as provided in paragraph (f)(5)(v) of this section, the *time of replacement* is the later of—

(*1*) When the acquired MACRS property or acquired computer software is placed in service; or

(*2*) The time of disposition of the exchanged or involuntarily converted property.

(G) *Carryover basis* is the lesser of:

(*1*) The basis in the acquired MACRS property or acquired computer software, as applicable and as determined under section 1031(d) or 1033(b) and the regulations thereunder; or

(*2*) The adjusted depreciable basis of the exchanged or involuntarily converted MACRS property or the exchanged or involuntarily converted computer software, as applicable.

(H) *Excess basis* is any excess of the basis in the acquired MACRS property or acquired computer software, as applicable and as determined under section 1031(d) or 1033(b) and the regulations thereunder, over the carryover basis as determined under paragraph (f)(5)(ii)(G) of this section.

(I) *Remaining carryover basis* is the carryover basis as determined under paragraph (f)(5)(ii)(G) of this section reduced by—

(*1*) The percentage of the taxpayer's use of property for the taxable year other than in the taxpayer's trade or business (or for the production of income); and

(*2*) Any adjustments to basis provided by other provisions of the Code and the regulations thereunder (including section 1016(a)(2) and (3)) for periods prior to the disposition of the exchanged or involuntarily converted property.

(J) *Remaining excess basis* is the excess basis as determined under paragraph (f)(5)(ii)(H) of this section reduced by—

(*1*) The percentage of the taxpayer's use of property for the taxable year other than in the taxpayer's trade or business (or for the production of income);

(*2*) Any portion of the basis the taxpayer properly elects to treat as an expense under section 179 or section 179C;

(*3*) Any adjustments to basis provided by other provisions of the Code and the regulations thereunder.

(K) *Year of disposition* is the taxable year that includes the time of disposition.

(L) *Year of replacement* is the taxable year that includes the time of replacement.

(iii) *Computation*—(A) *In general.* Assuming all other requirements of section 168(k) and this section are met, the remaining carryover basis for the year of replacement and the remaining excess basis, if any, for the year of replacement for the acquired MACRS property or the acquired computer software, as applicable, are eligible for the additional first year depreciation deduction. The 30-percent additional first year depreciation deduction applies to the remaining carryover basis and the remaining excess basis, if any, of the acquired MACRS property or the acquired computer software if the time of replacement is after September 10, 2001, and before May 6, 2003, or if the taxpayer made the election provided in paragraph (e)(1)(ii)(A) of this section. The 50-percent additional first year depreciation deduction applies to the remaining carryover basis and the remaining excess basis, if any, of the acquired MACRS property or the acquired computer software if the time of replacement is after May 5, 2003, and before January 1, 2005, or, in the case of acquired MACRS property or acquired computer software that is 50-percent bonus depreciation property described in section 168(k)(2)(B) or (C), the time of replacement is after May 5, 2003, and before January 1, 2006 (or the time of replacement is after May 5, 2003, and before January 1, 2007, in the case of 50-percent bonus depreciation property described in section 168(k)(2)(B) or (C) to which section 105 of the Gulf Opportunity Zone Act of 2005 (Pub. L. 109–135, 119 Stat. 2577) applies (for further guidance, see Announcement 2006–29 (2006–19 I.R.B. 879) and § 601.601(d)(2)(ii)(*b*) of this chapter)). The additional first year depreciation deduction is computed separately for the remaining carryover basis and the remaining excess basis.

(B) *Year of disposition and year of replacement.* The additional first year depreciation deduction is allowable for the acquired MACRS property or acquired computer software in the year of replacement. However, the additional first year depreciation deduction is not allowable for the exchanged or involuntarily converted MACRS property or the exchanged or involuntarily converted computer software if the exchanged or involuntarily converted MACRS property or the exchanged or involuntarily converted computer software, as applicable, is placed in service and disposed of in an exchange or involuntary conversion in the same taxable year.

(C) *Property having a longer production period.* For purposes of paragraph (f)(5)(iii)(A) of this section, the total of the remaining carryover basis and the remaining excess basis, if any, of the acquired MACRS property that is qualified property or 50-percent bonus depreciation property described in section 168(k)(2)(B) is limited to the total of the property's remaining carryover basis and remaining excess basis, if any, attributable to the property's manufacture, construction, or production after September 10, 2001 (for qualified property), or May 5, 2003 (for 50-percent bonus depreciation property), and before January 1, 2005.

(D) *Alternative minimum tax.* The 30-percent or 50-percent additional first year depreciation deduction is allowed for alternative minimum tax purposes for the year of replacement of acquired MACRS property or acquired computer software that is qualified property or 50-percent bonus depreciation property. The 30-percent or 50-percent additional first year depreciation deduction for alternative minimum tax purposes is based on the remaining carryover basis and the remaining excess basis, if any, of the acquired MACRS property or the acquired computer software for alternative minimum tax purposes.

(iv) *Sale-leaseback transaction.* For purposes of this paragraph (f)(5), if MACRS property or computer software is sold to a taxpayer and leased back to a person by the taxpayer within three months after the time of disposition of the MACRS property or computer software, as applicable, the time of replacement for this MACRS property or computer software, as applicable, shall not be earlier than the date on which the MACRS property or computer software, as applicable, is used by the lessee under the leaseback.

(v) *Acquired MACRS property or acquired computer software that is acquired and placed in service before disposition of involuntarily converted MACRS property or involuntarily converted computer software.* If, in an involuntary conversion, a taxpayer acquires and places in service the acquired MACRS property or the acquired computer software before the time of disposition of the involuntarily converted MACRS property or the involuntarily converted computer software and the time of disposition of the involuntarily converted MACRS property or the involuntarily converted computer software is after December 31, 2004, or, in the case of property described in section 168(k)(2)(B) or (C), after December 31, 2005 (or after December 31, 2006, in the case of property described in section 168(k)(2)(B) or (C) to which section 105 of the Gulf Opportunity Zone Act of 2005 (Pub. L. 109–135, 119 Stat. 2577) applies (for further guidance, see Announcement 2006–29

(2006–19 I.R.B. 879) and §601.601(d)(2)(ii)(*b*) of this chapter)), then—

(A) *Time of replacement.* The time of replacement for purposes of this paragraph (f)(5) is when the acquired MACRS property or acquired computer software is placed in service by the taxpayer, provided the threat or imminence of requisition or condemnation of the involuntarily converted MACRS property or involuntarily converted computer software existed before January 1, 2005, or, in the case of property described in section 168(k)(2)(B) or (C), existed before January 1, 2006 (or existed before January 1, 2007, in the case of property described in section 168(k)(2)(B) or (C) to which section 105 of the Gulf Opportunity Zone Act of 2005 (Pub. L. 109–135, 119 Stat. 2577) applies (for further guidance, see Announcement 2006–29 (2006–19 I.R.B. 879) and §601.601(d)(2)(ii)(*b*) of this chapter)); and

(B) *Depreciation of acquired MACRS property or acquired computer software.* The taxpayer depreciates the acquired MACRS property or acquired computer software in accordance with paragraph (d) of this section. However, at the time of disposition of the involuntarily converted MACRS property, the taxpayer determines the exchanged basis (as defined in §1.168(i)–6(b)(7)) and the excess basis (as defined in §1.168(i)–6(b)(8)) of the acquired MACRS property and begins to depreciate the depreciable exchanged basis (as defined in §1.168(i)–6(b)(9) of the acquired MACRS property in accordance with §1.168(i)–6(c). The depreciable excess basis (as defined in §1.168(i)–6(b)(10)) of the acquired MACRS property continues to be depreciated by the taxpayer in accordance with the first sentence of this paragraph (f)(5)(v)(B). Further, in the year of disposition of the involuntarily converted MACRS property, the taxpayer must include in taxable income the excess of the depreciation deductions allowable, including the additional first year depreciation deduction allowable, on the unadjusted depreciable basis of the acquired MACRS property over the additional first year depreciation deduction that would have been allowable to the taxpayer on the remaining carryover basis of the acquired MACRS property at the time of replacement (as defined in paragraph (f)(5)(v)(A) of this section) plus the depreciation deductions that would have been allowable, including the additional first year depreciation deduction allowable, to the taxpayer on the depreciable excess basis of the acquired MACRS property from the date the acquired MACRS property was placed in service by the taxpayer (taking into account the applicable convention) to the time of disposition of the involuntarily converted MACRS property. Similar rules apply to acquired computer software.

(vi) *Examples.* The application of this paragraph (f)(5) is illustrated by the following examples:

Example 1. (i) In December 2002, EE, a calendar-year corporation, acquired for $200,000 and placed in service Canopy V1, a gas station canopy. Canopy V1 is qualified property under section 168(k)(1) and is 5-year property under section 168(e). EE depreciated Canopy V1 under the general depreciation system of section 168(a) by using the 200-percent declining balance method of depreciation, a 5-year recovery period, and the half-year convention. EE elected to use the optional depreciation tables to compute the depreciation allowance for Canopy V1. On January 1, 2003, Canopy V1 was destroyed in a fire and was no longer usable in EE's business. On June 1, 2003, in an involuntary conversion, EE acquired and placed in service new Canopy W1 with all of the $160,000 of insurance proceeds EE received due to the loss of Canopy V1. Canopy W1 is 50-percent bonus depreciation property under section 168(k)(4) and is 5-year property under section 168(e). Pursuant to paragraph (g)(3)(ii) of this section and §1.168(i)–6(k)(2)(i), EE decided to apply §1.168(i)–6 to the involuntary conversion of Canopy V1 with the replacement of Canopy W1, the acquired MACRS property.

(ii) For 2002, EE is allowed a 30-percent additional first year depreciation deduction of $60,000 for Canopy V1 (the unadjusted depreciable basis of $200,000 multiplied by .30), and a regular MACRS depreciation deduction of $28,000 for Canopy V1 (the remaining adjusted depreciable basis of $140,000 multiplied by the annual depreciation rate of .20 for recovery year 1).

(iii) For 2003, EE is allowed a regular MACRS depreciation deduction of $22,400 for Canopy V1 (the remaining adjusted depreciable basis of $140,000 multiplied by the annual depreciation rate of .32 for recovery year $2 \times \frac{1}{2}$ year).

(iv) Pursuant to paragraph (f)(5)(iii)(A) of this section, the additional first year depreciation deduction allowable for Canopy W1 equals $44,800 (.50 of Canopy W1's remaining carryover basis at the time of replacement of $89,600 (Canopy V1's remaining adjusted depreciable basis of $140,000 minus 2002 regular MACRS depreciation deduction of $28,000 minus 2003 regular MACRS depreciation deduction of $22,400)).

Example 2. (i) Same facts as in *Example 1*, except EE elected not to deduct the additional first year depreciation for 5-year property placed in service in 2002. EE deducted the additional first year depreciation for 5-year property placed in service in 2003.

(ii) For 2002, EE is allowed a regular MACRS depreciation deduction of $40,000 for Canopy V1 (the unadjusted depreciable basis of $200,000 multiplied by the annual depreciation rate of .20 for recovery year 1).

(iii) For 2003, EE is allowed a regular MACRS depreciation deduction of $32,000 for Canopy V1 (the unadjusted depreciable basis of $200,000 multiplied by the annual depreciation rate of .32 for recovery year 2 × ½ year).

(iv) Pursuant to paragraph (f)(5)(iii)(A) of this section, the additional first year depreciation deduction allowable for Canopy W1 equals $64,000 (.50 of Canopy W1's remaining carryover basis at the time of replacement of $128,000 (Canopy V1's unadjusted depreciable basis of $200,000 minus 2002 regular MACRS depreciation deduction of $40,000 minus 2003 regular MACRS depreciation deduction of $32,000)).

Example 3. (i) In December 2001, FF, a calendar-year corporation, acquired for $10,000 and placed in service Computer X2. Computer X2 is qualified property under section 168(k)(1) and is 5-year property under section 168(e). FF depreciated Computer X2 under the general depreciation system of section 168(a) by using the 200-percent declining balance method of depreciation, a 5-year recovery period, and the half-year convention. FF elected to use the optional depreciation tables to compute the depreciation allowance for Computer X2. On January 1, 2002, FF acquired new Computer Y2 by exchanging Computer X2 and $1,000 cash in a like-kind exchange. Computer Y2 is qualified property under section 168(k)(1) and is 5-year property under section 168(e). Pursuant to paragraph (g)(3)(ii) of this section and §1.168(i)–6(k)(2)(i), FF decided to apply §1.168(i)–6 to the exchange of Computer X2 for Computer Y2, the acquired MACRS property.

(ii) For 2001, FF is allowed a 30-percent additional first year depreciation deduction of $3,000 for Computer X2 (unadjusted basis of $10,000 multiplied by .30), and a regular MACRS depreciation deduction of $1,400 for Computer X2 (the remaining adjusted depreciable basis of $7,000 multiplied by the annual depreciation rate of .20 for recovery year 1).

(iii) For 2002, FF is allowed a regular MACRS depreciation deduction of $1,120 for Computer X2 (the remaining adjusted depreciable basis of $7,000 multiplied by the annual depreciation rate of .32 for recovery year 2 × ½ year).

(iv) Pursuant to paragraph (f)(5)(iii)(A) of this section, the 30-percent additional first year depreciation deduction for Computer Y2 is allowable for the remaining carryover basis at the time of replacement of $4,480 (Computer X2's unadjusted depreciable basis of $10,000 minus additional first year depreciation deduction allowable of $3,000 minus 2001 regular MACRS depreciation deduction of $1,400 minus 2002 regular MACRS depreciation deduction of $1,120) and for the remaining excess basis at the time of replacement of $1,000 (cash paid for Computer Y2). Thus, the 30-percent additional first year depreciation deduction for the remaining carryover basis at the time of replacement equals $1,344 ($4,480 multiplied by .30) and for the remaining excess basis at the time of replacement equals $300 ($1,000 multiplied by .30), which totals $1,644.

Example 4. (i) In September 2002, GG, a June 30 year-end corporation, acquired for $20,000 and placed in service Equipment X3. Equipment X3 is qualified property under section 168(k)(1) and is 5-year property under section 168(e). GG depreciated Equipment X3 under the general depreciation system of section 168(a) by using the 200-percent declining balance method of depreciation, a 5-year recovery period, and the half-year convention. GG elected to use the optional depreciation tables to compute the depreciation allowance for Equipment X3. In December 2002, GG acquired new Equipment Y3 by exchanging Equipment X3 and $5,000 cash in a like-kind exchange. Equipment Y3 is qualified property under section 168(k)(1) and is 5-year property under section 168(e). Pursuant to paragraph (g)(3)(ii) of this section and §1.168(i)–6(k)(2)(i), GG decided to apply §1.168(i)–6 to the exchange of Equipment X3 for Equipment Y3, the acquired MACRS property.

(ii) Pursuant to paragraph (f)(5)(iii)(B) of this section, no additional first year depreciation deduction is allowable for Equipment X3 and, pursuant to §1.168(d)–1T(b)(3)(ii), no regular depreciation deduction is allowable for Equipment X3, for the taxable year ended June 30, 2003.

(iii) Pursuant to paragraph (f)(5)(iii)(A) of this section, the 30-percent additional first year depreciation deduction for Equipment Y3 is allowable for the remaining carryover basis at the time of replacement of $20,000 (Equipment X3's unadjusted depreciable basis of $20,000) and for the remaining excess basis at the time of replacement of $5,000 (cash paid for Equipment Y3). Thus, the 30-percent additional first year depreciation deduction for the remaining carryover basis at the time of replacement equals $6,000 ($20,000 multiplied by .30) and for the remaining excess basis at the time of replacement equals

$1,500 ($5,000 multiplied by .30), which totals $7,500.

Example 5. (i) Same facts as in *Example 4*. GG depreciated Equipment Y3 under the general depreciation system of section 168(a) by using the 200-percent declining balance method of depreciation, a 5-year recovery period, and the half-year convention. GG elected to use the optional depreciation tables to compute the depreciation allowance for Equipment Y3. On July 1, 2003, GG acquired new Equipment Z1 by exchanging Equipment Y3 in a like-kind exchange. Equipment Z1 is 50-percent bonus depreciation property under section 168(k)(4) and is 5-year property under section 168(e). Pursuant to paragraph (g)(3)(ii) of this section and §1.168(i)–6(k)(2)(i), GG decided to apply §1.168(i)–6 to the exchange of Equipment Y3 for Equipment Z1, the acquired MACRS property.

(ii) For the taxable year ending June 30, 2003, the regular MACRS depreciation deduction allowable for the remaining carryover basis at the time of replacement (after taking into account the additional first year depreciation deduction) of Equipment Y3 is $2,800 (the remaining carryover basis at the time of replacement of $20,000 minus the additional first year depreciation deduction of $6,000, multiplied by the annual depreciation rate of .20 for recovery year 1) and for the remaining excess basis at the time of replacement (after taking into account the additional first year depreciation deduction) of Equipment Y3 is $700 (the remaining excess basis at the time of replacement of $5,000 minus the additional first year depreciation deduction of $1,500, multiplied by the annual depreciation rate of .20 for recovery year 1), which totals $3,500.

(iii) For the taxable year ending June 30, 2004, the regular MACRS depreciation deduction allowable for the remaining carryover basis (after taking into account the additional first year depreciation deduction) of Equipment Y3 is $2,240 (the remaining carryover basis at the time of replacement of $20,000 minus the additional first year depreciation deduction of $6,000, multiplied by the annual depreciation rate of .32 for recovery year 2 × ½ year) and for the remaining excess basis (after taking into account the additional first year depreciation deduction) of Equipment Y3 is $560 (the remaining excess basis at the time of replacement of $5,000 minus the additional first year depreciation deduction of $1,500, multiplied by the annual depreciation rate of .32 for recovery year 2 × ½ year), which totals $2,800.

(iv) For the taxable year ending June 30, 2004, pursuant to paragraph (f)(5)(iii)(A) of this section, the 50-percent additional first year depreciation deduction for Equipment Z1 is allowable for the remaining carryover basis at the time of replacement of $11,200 (Equipment Y3's unadjusted depreciable basis of $25,000 minus the total additional first year depreciation deduction of $7,500 minus the total 2003 regular MACRS depreciation deduction of $3,500 minus the total 2004 regular depreciation deduction (taking into account the half-year convention) of $2,800). Thus, the 50-percent additional first year depreciation deduction for the remaining carryover basis at the time of replacement equals $5,600 ($11,200 multiplied by .50).

Example 6. (i) In April 2004, SS, a calendar year-end corporation, acquired and placed in service Equipment K89. Equipment K89 is 50-percent bonus depreciation property under section 168(k)(4). In November 2004, SS acquired and placed in service used Equipment N78 by exchanging Equipment K89 in a like-kind exchange.

(ii) Pursuant to paragraph (f)(5)(iii)(B) of this section, no additional first year deduction is allowable for Equipment K89 and, pursuant to §1.168(d)–1T(b)(3)(ii), no regular depreciation deduction is allowable for Equipment K89, for the taxable year ended December 31, 2004.

(iii) Equipment N78 is not qualified property under section 168(k)(1) or 50-percent bonus depreciation property under section 168(k)(4) because the original use requirement of paragraph (b)(3) of this section is not met. Accordingly, no additional first year depreciation deduction is allowable for Equipment N78.

(6) *Change in use*—(i) *Change in use of depreciable property*. The determination of whether the use of depreciable property changes is made in accordance with section 168(i)(5) and regulations thereunder.

(ii) *Conversion to personal use*. If qualified property or 50-percent bonus depreciation property is converted from business or income-producing use to personal use in the same taxable year in which the property is placed in service by a taxpayer, the additional first year depreciation deduction is not allowable for the property.

(iii) *Conversion to business or income-producing use*—(A) *During the same taxable year*. If, during the same taxable year, property is acquired by a taxpayer for personal use and is converted by the taxpayer from personal use to business or income-producing use, the additional first year depreciation deduction is allowable for the property in the taxable year the property is converted to business or income-producing use (assuming all of the requirements in paragraph (b) of this section are met). See paragraph (b)(3)(ii) of this section relating to the original use rules for a conversion of property to business or income-producing use.

(B) *Subsequent to the acquisition year*. If property is acquired by a taxpayer for personal use and, during a subsequent taxable year, is converted by the taxpayer from personal use to business or income-producing use, the additional first year depreciation deduction is allowable for the property in the taxable year the property is converted to business or income-producing use (assuming all of the requirements in paragraph (b) of this section are met). For purposes of paragraphs (b)(4) and (5) of this section, the property must be acquired by the taxpayer for personal use after September 10, 2001 (for qualified property), or after May 5, 2003 (for 50-percent bonus depreciation property), and converted by the taxpayer from personal use to business or income-producing use by January 1, 2005. See paragraph (b)(3)(ii) of this section relating to the original use rules for a conversion of property to business or income-producing use.

(iv) *Depreciable property changes use subsequent to the placed-in-service year*—(A) If the use of qualified property or 50-percent bonus depreciation property changes in the hands of the same taxpayer subsequent to the taxable year the qualified property or the 50-percent bonus depreciation property, as applicable, is placed in service and, as a result of the change in use, the property is no longer qualified property or 50-percent bonus depreciation property, as applicable, the additional first year depreciation deduction allowable for the qualified property or the 50-percent bonus depreciation property, as applicable, is not redetermined.

(B) If depreciable property is not qualified property or 50-percent bonus depreciation property in the taxable year the property is placed in service by the taxpayer, the additional first year depreciation deduction is not allowable for the property even if a change in the use of the property subsequent to the taxable year the property is placed in service results in the property being qualified property or 50-percent bonus depreciation property in the taxable year of the change in use.

(v) *Examples*. The application of this paragraph (f)(6) is illustrated by the following examples:

Example 1. (i) On January 1, 2002, HH, a calendar year corporation, purchased and placed in service several new computers at a total cost of $100,000. HH used these computers within the United States for 3 months in 2002 and then moved and used the computers outside the United States for the remainder of 2002. On January 1, 2003, HH permanently returns the computers to the United States for use in its business.

(ii) For 2002, the computers are considered as used predominantly outside the United States in 2002 pursuant to §1.48–1(g)(1)(i). As a result, the computers are required to be depreciated under the alternative depreciation system of section 168(g). Pursuant to paragraph (b)(2)(ii)(A)*2*) of this section, the computers are not qualified property in 2002, the placed-in-service year. Thus, pursuant to (f)(6)(iv)(B) of this section, no additional first year depreciation deduction is allowed for these computers, regardless of the fact that the computers are permanently returned to the United States in 2003.

Example 2. (i) On February 8, 2002, *II*, a calendar year corporation, purchased and placed in service new equipment at a cost of $1,000,000 for use in its California plant. The equipment is 5-year property under section 168(e) and is qualified property under section 168(k). *II* depreciates its 5-year property placed in service in 2002 using the optional depreciation table that corresponds with the general depreciation system, the 200-percent declining balance method, a 5-year recovery period, and the half-year convention. On June 4, 2003, due to changes in *II*'s business circumstances, *II* permanently moves the equipment to its plant in Mexico.

(ii) For 2002, *II* is allowed a 30-percent additional first year depreciation deduction of $300,000 (the adjusted depreciable basis of $1,000,000 multiplied by .30). In addition, *II*'s depreciation deduction allowable in 2002 for the remaining adjusted depreciable basis of $700,000 (the unadjusted depreciable basis of $1,000,000 reduced by the additional first year depreciation deduction of $300,000) is $140,000 (the remaining adjusted depreciable basis of $700,000 multiplied by the annual depreciation rate of .20 for recovery year 1).

(iii) For 2003, the equipment is considered as used predominantly outside the United States pursuant to §1.48–1(g)(1)(i). As a result of this change in use, the adjusted depreciable basis of $560,000 for the equipment is required to be depreciated under the alternative depreciation system of section 168(g) beginning in 2003. However, the additional first year depreciation deduction of $300,000 allowed for the equipment in 2002 is not redetermined.

(7) *Earnings and profits.* The additional first year depreciation deduction is not allowable for purposes of computing earnings and profits.

(8) *Limitation of amount of depreciation for certain passenger automobiles.* For a passenger automobile as defined in section 280F(d)(5), the limitation under section 280F(a)(1)(A)(i) is increased by—

(i) $4,600 for qualified property acquired by a taxpayer after September 10, 2001, and before May 6, 2003; and

(ii) $7,650 for qualified property or 50-percent bonus depreciation property acquired by a taxpayer after May 5, 2003.

(9) *Section 754 election.* In general, for purposes of section 168(k) any increase in basis of qualified property or 50-percent bonus depreciation property due to a section 754 election is not eligible for the additional first year depreciation deduction. However, if qualified property or 50-percent bonus depreciation property is placed in service by a partnership in the taxable year the partnership terminates under section 708(b)(1)(B), any increase in basis of the qualified property or the 50-percent bonus depreciation property due to a section 754 election is eligible for the additional first year depreciation deduction.

(10) *Coordination with section 47*—(i) *In general.* If qualified rehabilitation expenditures (as defined in section 47(c)(2) and §1.48–12(c)) incurred by a taxpayer with respect to a qualified rehabilitated building (as defined in section 47(c)(1) and §1.48–12(b)) are qualified property or 50-percent bonus depreciation property, the taxpayer may claim the rehabilitation credit provided by section 47(a) (provided the requirements of section 47 are met)—

(A) With respect to the portion of the basis of the qualified rehabilitated building that is attributable to the qualified rehabilitation expenditures if the taxpayer makes the applicable election under paragraph (e)(1)(i) or (e)(1)(ii)(B) of this section not to deduct any additional first year depreciation for the class of property that includes the qualified rehabilitation expenditures; or

(B) With respect to the portion of the remaining rehabilitated basis of the qualified rehabilitated building that is attributable to the qualified rehabilitation expenditures if the taxpayer claims the additional first year depreciation deduction on the unadjusted depreciable basis (as defined in paragraph (a)(2)(iii) of this section but before the reduction in basis for the amount of the rehabilitation credit) of the qualified rehabilitation expenditures and the taxpayer depreciates the remaining adjusted depreciable basis (as defined in paragraph (d)(2)(i) of this section) of such expenditures using straight line cost recovery in accordance with section 47(c)(2)(B)(i) and §1.48–12(c)(7)(i). For purposes of this paragraph (f)(10)(i)(B), the remaining rehabilitated basis is equal to the unadjusted depreciable basis (as defined in paragraph (a)(2)(iii) of this section but before the reduction in basis for the amount of the rehabilitation credit) of the qualified rehabilitation expenditures that are qualified property or 50-percent bonus depreciation property reduced by the additional first year depreciation allowed or allowable, whichever is greater.

(ii) *Example.* The application of this paragraph (f)(10) is illustrated by the following example.

Example. (i) Between February 8, 2004, and June 4, 2004, UU, a calendar-year taxpayer, incurred qualified rehabilitation expenditures of $200,000 with respect to a qualified rehabilitated building that is nonresidential real property under section 168(e). These qualified rehabilitation expenditures are 50-percent bonus depreciation property and qualify for the 10-percent rehabilitation credit under section 47(a)(1). UU's basis in the qualified rehabilitated building is zero before incurring the qualified rehabilitation expenditures and UU placed the qualified rehabilitated building in service in July 2004. UU depreciates its nonresidential real property placed in service in 2004 under the general depreciation system of section 168(a) by using the straight line method of depreciation, a 39-year recovery period, and the mid-month convention. UU elected to use the optional depreciation tables to compute the depreciation allowance for its depreciable property placed in service in 2004. Further, for 2004, UU did not make any election under paragraph (e) of this section.

(ii) Because UU did not make any election under paragraph (e) of this section, UU is allowed a 50-percent additional first year depreciation deduction of $100,000 for the qualified rehabilitation expenditures for 2004 (the unadjusted depreciable basis of $200,000 (before reduction in basis for the rehabilitation credit) multiplied by .50). For 2004, UU also is allowed to claim a rehabilitation credit of $10,000 for the remaining rehabilitated basis of $100,000 (the unadjusted depreciable basis (before reduction in basis for the rehabilitation credit) of $200,000 less the additional first year depreciation deduction of $100,000). Further, UU's depreciation deduction for 2004 for the remaining adjusted depreciable basis of $90,000 (the unadjusted depreciable basis (before reduction in basis for the rehabilitation credit) of $200,000 less the additional first year depreciation deduction of $100,000 less the rehabilitation credit of $10,000) is $1,059.30 (the remaining adjusted depreciable basis of $90,000 multiplied by the depreciation rate of .01177 for recovery year 1, placed in service in month 7).

(11) *Coordination with section 514(a)(3).* The additional first year depreciation deduction is not allowable for purposes of section 514(a)(3).

(g) *Effective date*—(1) *In general.* Except as provided in paragraphs (g)(2), (3), and (5) of this section, this section applies to qualified property under section 168(k)(2) acquired by a taxpayer after September 10, 2001, and to 50-percent bonus depreciation property under section 168(k)(4) acquired by a taxpayer after May 5, 2003.

(2) *Technical termination of a partnership or section 168(i)(7) transactions.* If qualified property or 50 percent bonus depreciation property is transferred in a technical termination of a partnership under section 708(b)(1)(B) or in a transaction described in section 168(i)(7) for a taxable year ending on or before September 8, 2003, and the additional first year depreciation deduction allowable for the property was not determined in accordance with paragraph (f)(1)(ii) or (iii) of this section, as applicable, the Internal Revenue Service will allow any reasonable method of determining the additional first year depreciation deduction allowable for the property in the year of the transaction that is consistently applied to the property by all parties to the transaction.

(3)(i) *Like-kind exchanges and involuntary conversions.* If a taxpayer did not claim on a federal tax return for a taxable year ending on or before September 8, 2003, the additional first year depreciation deduction for the remaining carryover basis of qualified property or 50-percent bonus depreciation property acquired in a transaction described in section 1031(a), (b), or (c), or in a transaction to which section 1033 applies and the taxpayer did not make an election not to deduct the additional first year depreciation deduction for the class of property applicable to the remaining carryover basis, the Internal Revenue Service will treat the taxpayer's method of not claiming the additional first year depreciation deduction for the remaining carryover basis as a permissible method of accounting and will treat the amount of the additional first year depreciation deduction allowable for the remaining carryover basis as being equal to zero, provided the taxpayer does not claim the additional first year depreciation deduction for the remaining carryover basis in accordance with paragraph (g)(4)(ii) of this section.

(ii) Paragraphs (f)(5)(ii)(F)(*2*) and (f)(5)(v) of this section apply to a like-kind exchange or an involuntary conversion of MACRS property and computer software for which the time of disposition and the time of replacement both occur after February 27, 2004. For a like-kind exchange or an involuntary conversion of MACRS property for which the time of disposition, the time of replacement, or both occur on or before February 27, 2004, see §1.168(i)–6(k)(2)(ii). For a like-kind exchange or involuntary conversion of computer software for which the time of disposition, the time of replacement, or both occur on or before February 27, 2004, a taxpayer may rely on prior guidance issued by the Internal Revenue Service for determining the depreciation deductions of the acquired computer software and the exchanged or involuntarily converted computer software (for further guidance, see §1.168(k)–1T(f)(5) published in the FEDERAL REGISTER on September 8, 2003 (68 FR 53000)). In relying on such guidance, a taxpayer may use any reasonable, consistent method of determining depreciation in the year of disposition and the year of replacement.

(4) *Change in method of accounting*—(i) *Special rules for 2000 or 2001 returns.* If a taxpayer did not claim on the Federal

tax return for the taxable year that included September 11, 2001, any additional first year depreciation deduction for a class of property that is qualified property and did not make an election not to deduct the additional first year depreciation deduction for that class of property, the taxpayer should refer to the guidance provided by the Internal Revenue Service for the time and manner of claiming the additional first year depreciation deduction for the class of property (for further guidance, *see* section 4 of Rev. Proc. 2002–33 (2002–1 C.B. 963), Rev. Proc. 2003–50 (2003–29 I.R.B. 119), and §601.601(d)(2)(ii)(*b*) of this chapter).

(ii) *Like-kind exchanges and involuntary conversions.* If a taxpayer did not claim on a federal tax return for any taxable year ending on or before September 8, 2003, the additional first year depreciation deduction allowable for the remaining carryover basis of qualified property or 50-percent bonus depreciation property acquired in a transaction described in section 1031(a), (b), or (c), or in a transaction to which section 1033 applies and the taxpayer did not make an election not to deduct the additional first year depreciation deduction for the class of property applicable to the remaining carryover basis, the taxpayer may claim the additional first year depreciation deduction allowable for the remaining carryover basis in accordance with paragraph (f)(5) of this section either:

(A) By filing an amended return (or a qualified amended return, if applicable (for further guidance, *see* Rev. Proc. 94–69 (1994–2 C.B. 804) and §601.601(d)(2)(ii)(*b*) of this chapter)) on or before December 31, 2003, for the year of replacement and any affected subsequent taxable year; or,

(B) By following the applicable administrative procedures issued under §1.446–1(e)(3)(ii) for obtaining the Commissioner's automatic consent to a change in method of accounting (for further guidance, *see* Rev. Proc. 2002–9 (2002–1 C.B. 327) and §601.601(d)(2)(ii)(*b*) of this chapter).

(5) *Revision to paragraphs (b)(3)(iii)(B) and (b)(5)(ii)(B) of this section.* The addition of "(or, in the case of multiple units of property subject to the same lease, within three months after the date the final unit is placed in service, so long as the period between the time the first unit is placed in service and the time the last unit is placed in service does not exceed 12 months)" to paragraphs (b)(3)(iii)(B) and (b)(5)(ii)(B) of this section applies to property sold after June 4, 2004.

(6) *Rehabilitation credit.* If a taxpayer did not claim on a Federal tax return for any taxable year ending on or before September 1, 2006, the rehabilitation credit provided by section 47(a) with respect to the portion of the basis of a qualified rehabilitated building that is attributable to qualified rehabilitation expenditures and the qualified rehabilitation expenditures are qualified property or 50-percent bonus depreciation property, and the taxpayer did not make the applicable election specified in paragraph (e)(1)(i) or (e)(1)(ii)(B) of this section for the class of property that includes the qualified rehabilitation expenditures, the taxpayer may claim the rehabilitation credit for the remaining rehabilitated basis (as defined in paragraph (f)(10)(i)(B) of this section) of the qualified rehabilitated building that is attributable to the qualified rehabilitation expenditures (assuming all the requirements of section 47 are met) in accordance with paragraph (f)(10)(i)(B) of this section by filing an amended Federal tax return for the taxable year for which the rehabilitation credit is to be claimed. The amended Federal tax return must include the adjustment to the tax liability for the rehabilitation credit and any collateral adjustments to taxable income or to the tax liability (for example, the amount of depreciation allowed or allowable in that taxable year for the qualified rehabilitated building). Such adjustments must also be made on amended Federal tax returns for any affected succeeding taxable years.

[T.D. 9091, 68 FR 52992, Sept. 8, 2003; 68 FR 63734, Nov. 10, 2003, as amended by T.D. 9115, 69 FR 9546, Mar. 1, 2004; 69 FR 17586, 17587, Apr. 5, 2004. Redesignated and amended by T.D. 9283, 71 FR 51738, Aug. 31, 2006; T.D. 9314, 72 FR 9261, Mar. 1, 2007]

§ 1.168A–1 Amortization of emergency facilities; general rule.

(a) A person (including an estate or trust (see section 642(f) and § 1.642(f)–1) and a partnership (see section 703 and § 1.703–1)) is entitled, by election, to a deduction with respect to the amortization of the adjusted basis (for determining gain) of an emergency facility, such amortization to be based on a period of 60 months. As to the adjusted basis of an emergency facility, see § 1.168A–5. The taxpayer may elect to begin the 60-month amortization period with (1) the month following the month in which such facility was completed or acquired, or (2) the taxable year succeeding that in which such facility was completed or acquired (see § 1.168A–2). The date on which, or the month within which, an emergency facility is completed or acquired is to be determined upon the facts in the particular case. Ordinarily, the taxpayer is in possession of all the facts and, therefore, in a position to ascertain such date. A statement of the date ascertained by the taxpayer, together with a statement of the pertinent facts relied upon, should be filed with the taxpayer's election to take amortization deductions with respect to such facility.

(b) Generally, an amortization deduction will not be allowed with respect to an emergency facility for any taxable year unless such facility has been certified before the date of filing of the taxpayer's income tax return for such taxable year. However, this limitation does not apply in the case of a certificate made after August 22, 1957, for an emergency facility to provide primary processing for uranium ore or uranium concentrate under a program of the Atomic Energy Commission for the development of any sources of uranium ore or uranium concentrate, if application for such certificate was filed either (1) before September 2, 1958, and before the expiration of six months after the beginning of construction, reconstruction, erection, or installation or the date of acquisition of the facility, or (2) after September 1, 1958, and on or before December 2, 1958.

(c) In general, with respect to each month of the 60-month period which falls within the taxable year, the amortization deduction is an amount equal to the adjusted basis of the facility at the end of each month divided by the number of months (including the particular month for which the deduction is computed) remaining in the 60-month period. The adjusted basis at the end of any month shall be computed without regard to the amortization deduction for such month. The total amortization deduction with respect to an emergency facility for a particular taxable year is the sum of the amortization deductions allowable for each month of the 60-month period which falls within such taxable year. The amortization deduction taken for any month is in lieu of the deduction for depreciation which would otherwise be allowable under section 167. See, however, § 1.168A–6, relating to depreciation with respect to any portion of the emergency facility not subject to amortization.

(d) This section may be illustrated by the following examples:

Example 1. On July 1, 1954, the X Corporation, which makes its income tax returns on the calendar year basis, begins the construction of an emergency facility which is completed on September 30, 1954, at a cost of $240,000. The certificate covers the entire construction. The X Corporation elects to take amortization deductions with respect to the facility and to begin the 60-month amortization period with October, the month following its completion. The adjusted basis of the facility at the end of October is $240,000. The allowable amortization deduction with respect to such facility for the taxable year 1954 is $12,000, computed as follows:

Monthly amortization deductions:	
October: $240,000 divided by 60	$4,000
November: $236,000 ($240,000 minus $4,000) divided by 59	4,000
December: $232,000 ($236,000 minus $4,000) divided by 58	4,000
Total amortization deduction for 1954	12,000

Example 2. The Y Corporation, which makes its income tax returns on the basis of a fiscal year ending November 30, purchases an emergency facility (No. 1) on July 29, 1955. On June 15, 1955, it begins the construction of an emergency facility (No. 2) which is completed on August 2, 1955. The entire acquisition and construction of such facilities are covered by the certificate. The Y Corporation elects to take amortization deductions with respect to both facilities and to begin the 60-month amortization period in each case with the month following the month of acquisition or completion. At the end of the first month of the amortization

period the adjusted basis of facility No. 1 is $300,000 and the adjusted basis of facility No. 2 is $54,000. In September 1955, facility No. 1 is damaged by fire, as a result of which its adjusted basis is properly reduced by $25,370. The allowable amortization deduction with respect to such facilities for the taxable year ending November 30, 1955, is $21,410, computed as follows:

Facility No. 1

Monthly amortization deductions:	
August: $300,000 divided by 60	$5,000
September: $269,630 ($300,000 minus $5,000 and $25,370) divided by 59	4,570
October: $265,060 ($269,630 minus $4,570) divided by 58	4,570
November: $260,490 ($265,060 minus $4,570) divided by 57	4,570
Amortization deduction for 1955	18,710

Facility No. 2

Monthly amortization deductions:	
September: $54,000 divided by 60	$900
October: $53,100 divided by 59	900
November: $52,200 divided by 58	900
Amortization deduction for 1955	2,700
Total amortization deduction for 1955	21,410

Example 3. On June 15, 1954, the Z Corporation, which makes its income tax returns on the calendar year basis, completes the construction of an emergency facility at a cost of $110,000. In its income tax return for 1954, filed on March 15, 1955, the Z Corporation elects to take amortization deductions with respect to such facility and to begin the 60-month amortization period with July 1954, the month following its completion. No certificate with respect to such facility is made until April 10, 1955, and therefore no amortization deduction with respect to such facility is allowable for any month in the taxable year 1954. The Z Corporation is entitled, however, to take a deduction for depreciation of such facility for the taxable year 1954, such deduction being assumed, for the purposes of this example, to be $2,000. Accordingly, the adjusted basis of such facility at the end of January 1955 (without regard to the amortization deduction for such month) is $108,000 ($110,000 minus $2,000). For the taxable year 1955, the Z Corporation is, with respect to such facility, entitled to an amortization deduction of $24,000, computed as follows:

Monthly amortization deductions:	
January: $108,000 divided by 54	$2,000
February: $106,000 ($108,000 minus $2,000) divided by 53	2,000
March: $104,000 ($106,000 minus $2,000) divided by 52	2,000
For the remaining nine months (similarly computed)	18,000
Total amortization deduction for 1955	24,000

Since the Z Corporation elected in its return for 1954 to take amortization deductions with respect to such facility and to begin the 60-month amortization period with July 1954, it must compute its amortization deductions for the 12 months in the taxable year 1955 on the basis of the remaining months of the established 60-month amortization period, as indicated in the above computation.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960; 25 FR 14021, Dec. 21, 1960. Redesignated and amended by T.D. 8116, 51 FR 46618, Dec. 24, 1986]

§ 1.168A–2 Election of amortization.

(a) *General rule.* An election by the taxpayer to take amortization deductions with respect to an emergency facility and to begin the 60-month amortization period either with the month following the month in which such facility was completed or acquired, or with the taxable year succeeding the taxable year in which such facility was completed or acquired, shall be made by a statement to that effect in its return for the taxable year in which falls the first month of the 60-month amortization period so elected. However, if the facility is described in section 168(e)(2)(C) and an application for a certificate is filed within the period prescribed by section 9(c) of the Technical Amendments Act of 1958 (72 Stat. 1609) and paragraph (b) of § 1.168A–1, the election may be made by a statement in an amended income tax return for the taxable year in which falls the first month of the 60-month amortization period so elected. The statement and amended return in such case must be filed not later than 90 days after the date the certificate is made or not later than April 4, 1960, whichever is later. Amended income tax returns or claims for credit or refund should also be filed for other taxable years which are within such amortization period and which precede the taxable year in which the election is made. Nothing in this paragraph should be construed as extending the time specified in section 6511 within which a claim for credit or refund may be filed.

(b) *Election not made, in prescribed manner.* If the statement of election is not made by the taxpayer as prescribed in paragraph (a) of this section, it may, in the discretion of the Commissioner and for good cause shown, be made in such manner and form and within such time as may be approved by the Commissioner.

(c) *Other requirements and considerations.* No method of making such election other than those prescribed in this section and corresponding sections of prior regulations is permitted. Any statement of election should contain a description clearly identifying each emergency facility for which an amortization deduction is claimed. A taxpayer which does not elect, in the manner prescribed in this section or corresponding sections of prior regulations, to take amortization deductions with respect to an emergency facility shall not be entitled to such deductions.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960; 25 FR 14021, Dec. 21, 1960. Redesignated and amended by T.D. 8116, 51 FR 46618, Dec. 24, 1986]

§ 1.168A–3 Election to discontinue amortization.

(a) If a taxpayer has elected to take amortization deductions with respect to an emergency facility, it may, after such election and prior to the expiration of the 60-month amortization period, discontinue the amortization deductions for the remainder of the 60-month period. An election to discontinue the amortization deductions shall be made by a notice in writing filed with the district director for the internal revenue district in which the return of the taxpayer is required to be filed, specifying the month as of the beginning of which the taxpayer elects to discontinue such deductions. Such notice shall be filed before the beginning of the month specified therein, and shall contain a description clearly identifying the emergency facility with respect to which the taxpayer elects to discontinue the amortization deductions. If the taxpayer so elects to discontinue the amortization deductions, it shall not be entitled to any further amortization deductions with respect to such facility.

(b) A taxpayer which thus elects to discontinue amortization deductions with respect to an emergency facility is entitled, if such facility is depreciable property under section 167 and the regulations thereunder, to a deduction for depreciation with respect to such facility. The deduction for depreciation shall begin with the first month as to which the amortization deduction is not applicable, and shall be computed on the adjusted basis of the property as of the beginning of such month (see section 1011 and the regulations thereunder).

(c) This section may be illustrated by the following example:

Example. On July 1, 1954, the X Corporation, which makes its income tax returns on the calendar year basis, purchases an emergency facility, consisting of land with a building thereon, at a cost of $306,000 of which $60,000 is allocable to the land and $246,000 to the building. The certificate covers the entire acquisition. The corporation elects to take amortization deductions with respect to the facility and to begin the 60-month amortization period with the taxable year 1955. Depreciation of the building in the amount of $6,000 is deducted and allowed for the taxable year 1954. On March 25, 1956, the corporation files notice with the district director of its election to discontinue the amortization deductions beginning with the month of April 1956. The adjusted basis of the facility on January 31, 1955, is $300,000, or the cost of the facility ($306,000) less the depreciation allowed for 1954 ($6,000). The amortization deductions for the taxable year 1955 and the months of January, February, and March 1956, amount to $75,000, or $5,000 per month for 15 months. Since, at the beginning of the amortization period (January 1, 1955), the adjusted basis of the land ($60,000) is one-fifth of the adjusted basis of the entire facility ($300,000) and since there are no adjustments to basis other than on account of amortization during the period, the adjusted basis of the land should be reduced by $15,000, or one-fifth of the entire amortization deduction, and the adjusted basis of the building should be reduced by $60,000, or four-fifths of the entire amortization deduction. Accordingly, the adjusted basis of the facility as of April 1, 1956, is $225,000, of which $180,000 is allocable to the building for the purpose of depreciation deductions under section 167, and $45,000 is allocable to the land.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960; 25 FR 14021, Dec. 21, 1960. Redesignated by T.D. 8116, 51 FR 46619, Dec. 24, 1986]

§ 1.168A–4 Definitions.

As used in the regulations under section 168, the term—

(a) ''Certifying authority'' means the certifying authority designated by the President by Executive order.

(b) ''Emergency facility'' means any facility, land, building, machinery, or equipment, or any part thereof, the acquisition of which occurred after December 31, 1949, or the construction, reconstruction, erection, or installation of which was completed after such date, and with respect to which a certificate under section 168(e) has been made. In the case of an application for a certificate under section 168(e) which is filed after March 23, 1951, only the part of any such facility which is constructed, reconstructed, erected, or installed by any person not earlier than six months prior to the filing of such application, and which is certified in accordance with section 168(e), shall be deemed to be an emergency facility, notwithstanding that the other part of such facility was constructed, reconstructed, erected, or installed earlier than six months prior to the filing of such application. However, if the facility is one described in section 168(e)(2)(C) and the application was filed after September 1, 1958, and on or before December 2, 1958, the preceding sentence shall not apply. The term ''emergency facility,'' as so defined, may include, among other things, improvements of land, such as the construction of roads, bridges, and airstrips, and the dredging of channels.

(c) ''Emergency period'' means the period beginning on January 1, 1950, and ending on the date on which the President proclaims that the utilization of a substantial portion of the certified emergency facilities is no longer required in the interest of national defense.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960; 25 FR 14021, Dec. 21, 1960. Redesignated by T.D. 8116, 51 FR 46619, Dec. 24, 1986]

§ 1.168A–5 Adjusted basis of emergency facility.

(a) *In general.* (1) The adjusted basis of an emergency facility for the purpose of computing the amortization deduction may differ from what would otherwise constitute the adjusted basis of such emergency facility in that it shall be the adjusted basis for determining gain (see Part II (section 1011 and following), Subchapter 0, Chapter 1 of the Code) and in that it may be only a portion of what would otherwise constitute the adjusted basis. It will be only a portion of such other adjusted basis if only a portion of the basis (unadjusted) is attributable to certified construction, reconstruction, erection, installation, or acquisition taking place after December 31, 1949. Also, it will be only a portion of what would otherwise constitute the adjusted basis of the emergency facility if only a portion of the basis (unadjusted) is certified as attributable to defense purposes or, in the case of a certification after August 22, 1957, if only a portion of the basis (unadjusted) is certified as attributable to the national defense program. It is therefore necessary first to determine the unadjusted basis of the emergency facility from which the adjusted basis for amortization purposes is derived.

(2) The unadjusted basis for amortization purposes is the same as the unadjusted basis otherwise determined only when the entire construction, reconstruction, erection, installation, or acquisition takes place after December 31, 1949, and is certified in its entirety by the certifying authority.

(3) In cases in which only a portion of the construction, reconstruction, erection, installation, or acquisition takes place after December 31, 1949, and that portion is certified in its entirety by the certifying authority, the unadjusted basis for the purpose of amortization is so much of the entire unadjusted basis as is attributable to the certified construction, reconstruction, erection, installation, or acquisition which takes place after December 31, 1949. For example, the X Corporation begins the construction of a facility on November 15, 1949, and such facility is completed on April 1, 1952, at a cost of $5,000,000, of which $4,600,000 is attributable to construction after December 31, 1949. The entire construction after December 31, 1949, is certified by the certifying authority. The unadjusted basis of the emergency facility for amortization purposes is therefore $4,600,000. For depreciation of the remaining portion ($400,000) of the cost see § 1.168A–6.

(4) If the certifying authority certifies only a portion of the construction, reconstruction, erection, installation, or acquisition of property which takes place after December 31, 1949, the

unadjusted basis for amortization purposes is limited to such portion so certified. Assuming the same facts as in the example in subparagraph (3) of this paragraph, except that only 50 percent of the construction, reconstruction, erection, installation, or acquisition after December 31, 1949, is certified, the unadjusted basis for amortization purposes is 50 percent of $4,600,000, or $2,300,000.

(5) The adjusted basis of an emergency facility for amortization purposes is the unadjusted basis for amortization purposes less the adjustments properly applicable thereto. Such adjustments are those specified in sections 1016 and 1017, except that no adjustments are to be taken into account which increase the adjusted basis. (See paragraph (b) of this section.) If the taxpayer constructs, reconstructs, erects, installs, or acquires an emergency facility pursuant to a cost reimbursement contract with an obligation for reimbursement by the United States of all or a part of the cost of such facility, the unadjusted basis of such facility for amortization purposes shall not include that part of the cost for which the taxpayer is entitled to reimbursement, and the amount received as reimbursement shall be treated as a capital receipt. However, amounts received by a taxpayer which represent in fact compensation by reason of termination of a government contract or payment for articles under such a contract, though denominated reimbursements for all or a part of the cost of an emergency facility, are not to be treated as capital receipts but are to be taken into account in computing income, and are therefore not to be applied in reduction of the basis of such facility.

(6) The following examples will illustrate the computation of the adjusted basis of an emergency facility for amortization purposes:

Example 1. The X Corporation completes an emergency facility on July 1, 1954, the entire unadjusted basis of which is $500,000, and the unadjusted basis of which for the purpose of amortization is $300,000. The X Corporation elects to begin amortization as of January 1, 1955. The only adjustment to basis for the period July 1, 1954, to January 31, 1955, other than depreciation or amortization for January 1955, is $5,000 for depreciation for the last six months of 1954. The adjusted basis for the purpose of amortization is therefore $300,000 less $3,000 (300,000/500,000×$5,000), or $297,000.

Example 2. On July 31, 1956, the Y Corporation has an emergency facility (a building) which was completed on July 1, 1952, the entire basis of which is $500,000 and the unadjusted basis of which for the purpose of amortization is $300,000. The corporation elected to begin amortization as of January 1, 1953, at which time it was entitled to $5,000 depreciation for the last six months of 1952. On July 1, 1956, the facility was damaged by fire, as the result of which its adjusted basis is properly reduced by $200,000. The adjusted basis of the emergency facility as of July 1956 for the purpose of amortization and depreciation, and the adjusted basis for other purposes, are $23,849.18, $49,250.82, and $73,100.00, respectively, computed as follows:

	For amortization	For depreciation	For other purposes
Unadjusted basis	$300,000.00	$200,000.00	$500,000
Less depreciation to Jan. 1, 1953	3,000.00	2,000.00	5,000
Adjusted basis January 1953	297,000.00	198,000.00	495,000
Less amortization for 42 months	207,900.00	....	207,900
Less depreciation for 42 months	....	14,000.00	14,000
Adjusted basis at time of fire	89,100.00	184,000.00	273,100
Less fire loss (apportioned as explained below)	65,250.82	134,749.18	200,000
Adjusted basis after fire loss	23,849.18	49,250.82	73,100

The $200,000 fire loss is applied against the adjusted basis for the purpose of amortization and the adjusted basis for the purpose of depreciation in the proportion that each such adjusted basis at the time of the fire bears to their sum, *i.e.*, 89,100/273,100×$200,000 or $65,250.82, against the amortization basis, and 184,000/273,100×$200,000, or $134,749.18 against the depreciation basis.

(b) *Capital additions.* (1) If, after the completion or acquisition of an emergency facility which has been certified by the certifying authority, further expenditures are made for construction, reconstruction, erection, installation, or acquisition attributable to such facility but not covered by such certification, such expenditures shall not be added to the adjusted basis of the emergency facility for amortization purposes under such certification. If such further expenditures are separately certified in accordance with the provisions of section 168(e) (1) or (2) and this section, they are treated as certified expenditures in connection with a new and separate emergency facility and, if proper election is made, will be taken into account in computing the adjusted basis of such new and separate emergency facility for the purpose of amortization.

(2) The application of subparagraph (1) of this paragraph may be illustrated by the following example:

Example. On March 1, 1954, the certifying authority certifies as an emergency facility a heating plant proposed to be constructed by the Z Corporation. Such facility is completed on July 1, 1954. The Z Corporation, on August 1, 1954, begins the installation in the plant of an additional boiler, which is not included in the certification for the plant but is certified as a new and separate emergency facility. For amortization purposes, the adjusted basis of the heating plant is determined without including the cost of the additional boiler. Such cost is taken into account in computing the adjusted basis of the new and separate emergency facility (the boiler), as to which the taxpayer has a separate election for amortization purposes and a separate amortization period.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960; 25 FR 14021, Dec. 21, 1960. Redesignated and amended by T.D. 8116, 51 FR 46619, Dec. 24, 1986]

§ 1.168A–6 Depreciation of portion of emergency facility not subject to amortization.

(a) The rule that an amortization deduction with respect to an emergency facility is in lieu of any deduction for depreciation which would otherwise be allowable under section 167 is subject to the exception provided in section 168(f). Under this exception, if the property constituting such facility is depreciable property under section 167 and the regulations thereunder and if the adjusted basis of such facility as computed under section 1011 for purposes other than the amortization deductions is in excess of the adjusted basis computed for the purpose of the amortization deductions, then the excess shall be charged off over the useful life of the facility and recovered through depreciation deductions. Thus, if the construction of an emergency facility is begun on or before December 31, 1949, and completed after such date, no amortization deductions are allowable with respect to the amount attributable to such construction on or before such date (see §1.168A–5). However, if the property constituting such facility is depreciable property under section 167 and the regulations thereunder, then the depreciation deduction provided by such section and regulations is allowable with respect to the amount attributable to such construction on or before December 31, 1949.

(b) Similarly, if only a portion of the construction, reconstruction, erection, installation, or acquisition after December 31, 1949, of an emergency facility has been certified by the certifying authority, and if such facility is depreciable property under section 167 and the regulations thereunder, then the depreciation deduction provided by such section and regulations is allowable with respect to the portion which has not been so certified.

(c) For illustration of the treatment of a depreciable portion of an emergency facility, see example (2) in paragraph (a)(6) of §1.168A–5.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960; 25 FR 14021, Dec. 21, 1960. Redesignated and amended by T.D. 8116, 51 FR 46619, Dec. 24, 1986]

§ 1.168A–7 Payment by United States of unamortized cost of facility.

(a) Section 168(g) contemplates that certain payments may be made by the United States to a taxpayer as compensation for the unamortized cost of an emergency facility. If any such payment is properly includible in gross income and has been certified, as provided in section 168(g), as having been paid under the circumstances described therein, a taxpayer which is recovering the adjusted basis of an emergency facility through amortization rather than depreciation may elect to take an amount equal to such payment as an amortization deduction with respect to such facility for the month in which such payment is so includible. Such amortization deduction shall be in lieu of the amortization deduction otherwise allowable with respect to such facility for such month, but it shall not in any case exceed the adjusted basis of such facility (see § 1.168A–5) as of the end of such month (computed without regard to any amortization deduction for such month). The election referred to in this paragraph shall be made in the return for the taxable year in which the amount of such payment is includible in gross income.

(b) If a taxpayer is recovering the adjusted basis of an emergency facility through depreciation rather than amortization, the depreciation deduction allowable under section 167 for the month in which the amount of any such payment is includible in gross income shall, at the taxpayer's election, be increased by such amount; but the total deduction with respect to the certified portion of such facility shall not in any case exceed the adjusted basis of such facility (computed as provided in section 168(e) and § 1.168A–5 for amortization purposes) as of the end of such month (computed without regard to any amount allowable for such month under section 167 or 168(g)(2)). The election referred to in this paragraph shall be made in the return for the taxable year in which the amount of such payment is includible in gross income.

(c) This section may be illustrated by the following examples:

Example 1. On January 31, 1954, the X Corporation purchases an emergency facility at a cost of $600,000. The certificate covers the entire acquisition. The X Corporation elects to take amortization deductions with respect to such facility and to begin the 60-month amortization period with February 1954, the month following the month of acquisition. On July 15, 1955, as a result of the cancellation of certain contracts with the X Corporation, the United States makes a payment of $300,000 to the corporation as compensation for the unamortized cost of such facility. The $300,000 payment is includible in the X Corporation's gross income for July 1955. The adjusted basis of such facility for amortization purposes as of the end of July 1955, computed without regard to any amortization deduction for such month, is $430,000. Accordingly, the corporation is entitled to take an amortization deduction of $300,000 for such month, in lieu of the $10,000 amortization deduction which is otherwise allowable.

Example 2. On November 30, 1954, the Y Corporation purchases an emergency facility, consisting of land with a building thereon, at a cost of $500,000, of which $200,000 is allocable to the land and $300,000 to the building. The certificate covers the entire acquisition. The Y Corporation does not elect to take amortization deductions with respect to such facility, but is entitled to a depreciation deduction with respect to the building at the rate of 3 percent per annum, or $750 per month. On August 12, 1956, as a result of cancellation of certain contracts, the United States makes a payment of $400,000 to the corporation as compensation for the unrecovered cost of such facility. The $400,000 is includible in the Y Corporation's gross income for August 1956. The adjusted basis of the facility as of the end of August 1956, computed without regard to depreciation for such month, is $485,000, of which amount $200,000 is allocable to the land and $285,000 to the building. Accordingly, the corporation is entitled to increase the $750 depreciation deduction for August 1956 by the full amount of the $400,000 payment.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960; 25 FR 14021, Dec. 21, 1960. Redesignated and amended by T.D. 8116, 51 FR 46619, Dec. 24, 1986]

§ 1.169–1 Amortization of pollution control facilities.

(a) *Allowance of deduction*—(1) *In general.* Under section 169(a), every person, at his election, shall be entitled to a deduction with respect to the amortization of the amortizable basis (as defined in § 1.169–3) of any certified pollution control facility (as defined in § 1.169–2), based on a period of 60 months. Under section 169(b) and paragraph (a) of § 1.169–4, the taxpayer may further elect to begin such 60-month period either with the month following the month in which the facility is completed or acquired or with the first month of the taxable year succeeding the taxable year in which such facility is completed or acquired. Under section 169(c), a taxpayer who has elected under section 169(b) to take the amortization deduction provided by section 169(a) may, at any time after making such election and prior to the expiration of the 60-month amortization period, elect to discontinue the amortization deduction for the remainder of the 60-month period in the manner prescribed in paragraph (b)(1) of § 1.169–4. In addition, if on or before May 18, 1971, an election under section 169(a) has been made, consent is hereby given to revoke such election without the consent of the Commissioner in the manner prescribed in (b)(2) of § 1.169–4.

(2) *Amount of deduction.* With respect to each month of such 60-month period which falls within the taxable year, the amortization deduction shall be an amount equal to the amortizable basis of the certified pollution control facility at the end of such month divided by the number of months (including the month for which the deduction is computed) remaining in such 60-month period. The amortizable basis at the end of any month shall be computed without regard to the amortization deduction for such month. The total amortization deduction with respect to a certified pollution control facility for a taxable year is the sum of the amortization deductions allowable for each month of the 60-month period which falls within such taxable year. If a certified pollution control facility is sold or exchanged or otherwise disposed of during 1 month, the amortization deduction (if any) allowable to the original holder in respect of such month shall be that portion of the amount to which such person would be entitled for a full month which the number of days in such month during which the facility was held by such person bears to the total number of days in such month.

(3) *Effect on other deductions.* (i) The amortization deduction provided by section 169 with respect to any month shall be in lieu of the depreciation deduction which would otherwise be allowable under section 167 or a deduction in lieu of depreciation which would otherwise be allowable under paragraph (b) of § 1.162–11 for such month.

(ii) If the adjusted basis of such facility as computed under section 1011 for purposes other than the amortization deduction provided by section 169 is in excess of the amortizable basis, as computed under § 1.169–3, such excess shall be recovered through depreciation deductions under the rules of section 167. See section 169(g).

(iii) See section 179 and paragraph (e)(1)(ii) of § 1.179–1 and paragraph (b)(2) of § 1.169–3 for additional first-year depreciation in respect of a certified pollution control facility.

(4) [Reserved]

(5) *Special rules.* (i) In the case of a certified pollution control facility held by one person for life with the remainder to another person, the amortization deduction under section 169(a) shall be computed as if the life tenant were the absolute owner of the property and shall be allowable to the life tenant during his life.

(ii) If the assets of a corporation which has elected to take the amortization deduction under section 169(a) are acquired by another corporation in a transaction to which section 381 (relating to carryovers in certain corporate acquisitions) applies, the acquiring corporation is to be treated as if it were the distributor or transferor corporation for purposes of this section.

(iii) For the right of estates and trusts to amortize pollution control facilities see section 642(f) and § 1.642 (f)–1. For the allowance of the amortization deduction in the case of pollution control facilities of partnerships, see section 703 and § 1.703–1.

(6) *Depreciation subsequent to discontinuance or in the case of revocation of amortization.* A taxpayer which elects in the manner prescribed under paragraph (b) (1) of § 1.169–4 to discontinue amortization deductions or under paragraph (b) (2) of § 1.169–4 to revoke an election under section 169(a) with respect to a certified pollution control facility is entitled, if such facility is of a character subject to the allowance for depreciation provided in section 167, to a deduction for depreciation (to the extent allowable) with respect to such facility. In the case of an election to discontinue an amortization deduction, the deduction for depreciation shall begin with the first month as to which such amortization deduction is not applicable and shall be computed on the adjusted basis of the property as of the beginning of such month (see section 1011 and the regulations thereunder). Such depreciation deduction shall be based upon the remaining portion of the period authorized under section 167 for the facility as determined, as of the first day of the first month as of which the amortization deduction is not applicable. If the taxpayer so elects to discontinue the amortization deduction

under section 169(a), such taxpayer shall not be entitled to any further amortization deduction under this section and section 169(a) with respect to such pollution control facility. In the case of a revocation of an election under section 169(a), the deduction for depreciation shall begin as of the time such depreciation deduction would have been taken but for the election under section 169(a). See paragraph (b)(2) of §1.169–4 for rules as to filing amended returns for years for which amortization deductions have been taken.

(7) *Definitions.* Except as otherwise provided in §1.169–2, all terms used in section 169 and the regulations thereunder shall have the meaning provided by this section and §§1.169–2 through 1.169–4.

(b) *Examples.* This section may be illustrated by the following examples:

Example 1. On September 30, 1970, the X Corporation, which uses the calendar year as its taxable year, completes the installation of a facility all of which qualifies as a certified pollution control facility within the meaning of paragraph (a) of §1.169–2. The cost of the facility is $120,000 and the period referred to in paragraph (a)(6) of §1.169–2 is 10 years in accordance with the rules set forth in paragraph (a) of §1.169–4, on its income tax return filed for 1970, X elects to take amortization deductions under section 169(a) with respect to the facility and to begin the 60-month amortization period with October 1970, the month following the month in which it was completed. The amortizable basis at the end of October 1970 (determined without regard to the amortization deduction under section 169(a) for that month) is $120,000. The allowable amortization deduction with respect to such facility for the taxable year 1970 is $6,000, computed as follows:

Monthly amortization deductions:	
October: $120,000 divided by 60	$2,000
November: $118,000 (that is, $120,000 minus $2,000) divided by 59	2,000
December: $116,000 (that is, $118,000 minus $2,000) divided by 58	2,000
Total amortization deduction for 1970	6,000

Example 2. Assume the same facts as in example (1). Assume further that on May 20, 1972, X properly files notice of its election to discontinue the amortization deductions with the month of June 1972. The adjusted basis of the facility as of June 1, 1972, is $80,000, computed as follows:

Yearly amortization deductions:	
1970 (as computed in example (1))	$6,000
1971 (computed in accordance with example (1))	24,000
1972 (for the first 5 months of 1972 computed in accordance with example (1))	10,000
Total amortization deductions for 20 months	40,000
Adjusted basis as beginning of amortization period	120,000
Less: Amortization deductions	40,000
Adjusted basis as of June 1, 1972	80,000

Beginning as of June 1, 1972, the deduction for depreciation under section 167 is allowable with respect to the property on its adjusted basis of $80,000.

[T.D. 7116, 36 FR 9012, May 18, 1971; 36 FR 9770, May 28, 1971, as amended by T.D. 7203, 37 FR 17133, Aug. 25, 1972]

§ 1.169–2 Definitions.

(a) *Certified pollution control facility*—(1) *In general.* Under section 169 (d), the term ''certified pollution control facility'' means a facility which—

(i) The Federal certifying authority certifies, in accordance with the rules prescribed in paragraph (c) of this section, is a ''treatment facility'' described in subparagraph (2) of this paragraph, and

(ii) Is ''a new identifiable facility'' (as defined in paragraph (b) of this section).

For profitmaking abatement works limitation, see paragraph (d) of this section.

(2) *Treatment facility.* For purposes of subparagraph (1)(i) of this paragraph, a ''treatment facility'' is a facility which (i) is used to abate or control water or atmospheric pollution or contamination by removing, altering, disposing, or storing of pollutants, contaminants, wastes, or heat and (ii) is used in connection with a plant or other property in operation before January 1, 1969. Determinations under subdivision (i) of this subparagraph shall be made solely by the Federal certifying authority. See subparagraph (3) of this paragraph. For meaning of the phrases ''plant or other property'' and ''in operation before January 1, 1969,'' see subparagraphs (4) and (5), respectively, of this paragraph.

(3) *Facilities performing multiple functions or used in connection with several plants, etc.* (i) If a facility is designed to perform or does perform a function in addition to abating or controlling

water or atmospheric pollution or contamination by removing, altering, disposing or storing pollutants, contaminants, wastes, or heat, such facility shall be a treatment facility only with respect to that part of the cost thereof which is certified by the Federal certifying authority as attributable to abating of controlling water or atmospheric pollution or contamination. For example, if a machine which performs a function in addition to abating water pollution is installed at a cost of $100,000 in, and is used only in connection with, a plant which was in operation before January 1, 1969, and if the Federal certifying authority certifies that $30,000 of the cost of such machine is allocable to its function of abating water pollution, such $30,000 will be deemed to be the adjusted basis for purposes of determining gain for purposes of paragraph (a) of § 1.169–3.

(ii) If a facility is used in connection with more than one plant or other property, and at least one such plant or other property was not in operation before January 1, 1969, such facility shall be a treatment facility only to the extent of that part of the cost thereof certified by the Federal certifying authority as attributable to abating or controlling water or atmospheric pollution in connection with plants or other property in operation before January 1, 1969. For example, if a machine is constructed after December 31, 1968, at a cost of $100,000 and is used in connection with a number of plants only some of which were in operation before January 1, 1969, and if the Federal certifying authority certifies that $20,000 of the cost of such machine is allocable to its function of abating or controlling water pollution in connection with the plants or other property in operation before January 1, 1969, such $20,000 will be deemed to be the adjusted basis for purposes of determining gain for purposes of paragraph (a) of § 1.169–3. In a case in which the Federal certifying authority certifies the percentage of a facility which is used in connection with plants or other property in operation before January 1, 1969, the adjusted basis for the purposes of determining gain for purposes of paragraph (a) of § 1.169–3 of the portion of the facility so used shall be the adjusted basis for determining gain of the entire facility multiplied by such percentage.

(4) *Plant or other property.* As used in subparagraph (2) of this paragraph, the phrase ''plant or other property'' means any tangible property whether or not such property is used in the trade or business or held for the production of income. Such term includes, for example, a papermill, a motor vehicle, or a furnace in an apartment house.

(5) *In operation before January 1, 1969.* (i) For purposes of subparagraph (2) of this paragraph and section 169 (d), a plant or other property will be considered to be in operation before January 1, 1969, if prior to that date such plant or other property was actually performing the function for which it was constructed or acquired. For example, a papermill which is completed in July 1968, but which is not actually used to produce paper until 1969 would not be considered to be in operation before January 1, 1969. The fact that such plant or other property was only operating at partial capacity prior to January 1, 1969, or was being used as a standby facility prior to such date, shall not prevent its being considered to be in operation before such date.

(ii)(*a*) A piece of machinery which replaces one which was in operation prior to January 1, 1969, and which was a part of the manufacturing operation carried on by the plant but which does not substantially increase the capacity of the plant will be considered to be in operation prior to January 1, 1969. However, an additional machine that is added to a plant which was in operation before January 1, 1969, and which represents a substantial increase in the plant's capacity will not be considered to have been in operation before such date. There shall be deemed to be a substantial increase in the capacity of a plant or other property as of the time its capacity exceeds by more than 20 percent its capacity on December 31, 1968.

(*b*) In addition, if the total replacements of equipment in any single taxable year beginning after December 31, 1968, represents the replacement of a substantial portion of a manufacturing plant which had been in operation before such date, such replacement shall be considered to result in a new plant which was not in operation before such date. Thus, if a substantial portion of a plant which was in existence before January 1, 1969, is subsequently destroyed by fire and such substantial portion is replaced in a taxable year beginning after that date, such replacement property shall not be considered to have been in operation before January 1, 1969. The replacement of a substantial portion of a plant or other property shall be deemed to have occurred if, during a single taxable year, the taxpayer replaces manufacturing or production facilities or equipment which comprises such plant or other property and which has an adjusted basis (determined without regard to the adjustments provided in section 1016(a) (2) and (3)) in excess of 20 percent of the adjusted basis (so determined) of such plant or other property determined as of the first day of such taxable year.

(6) *Useful life.* For purposes of section 169 and the regulations thereunder, the terms ''useful life'' and ''actual useful life'' shall mean the shortest period authorized under section 167 and the regulations thereunder if an election were not made under section 169.

(b) *New identifiable facility*—(1) *In general.* For purposes of paragraph (a)(1)(ii) of this section, the term ''new identifiable facility'' includes only tangible property (not including a building and its structural components referred to in subparagraph (2)(i) of this paragraph, other than a building and its structural components which under subparagraph (2)(ii) of this paragraph is exclusively a treatment facility) which—

(i) Is of a character subject to the allowance for depreciation provided in section 167,

(ii)(*a*) Is property the construction, reconstruction, or erection (as defined in subparagraph (2)(iii) of this paragraph) of which is completed by the taxpayer after December 31, 1968, or

(*b*) Is property acquired by the taxpayer after December 31, 1968, if the original use of the property commences with the taxpayer and commences after such date (see subparagraph (2)(iii) of this paragraph), and

(iii) Is placed in service (as defined in subparagraph (2)(v) of this paragraph) prior to January 1, 1975.

(2) *Meaning of terms.* (i) For purposes of subparagraph (1) of this paragraph, the terms ''building'' and ''structural component'' shall be construed in a manner consistent with the principles set forth in paragraph (e) of §1.48–1. Thus, for example, the following rules are applicable:

(*a*) The term ''building'' generally means any structure or edifice enclosing a space within its walls, and usually covered by a roof, the purpose of which is, for example, to provide shelter or housing, or to provide working, office, parking, display, or sales space. The term includes, for example, structures such as apartment houses, factory and office buildings, warehouses, barns, garages, railway or bus stations, and stores. Such term includes any such structure constructed by, or for, a lessee even if such structure must be removed, or ownership of such structure reverts to the lessor, at the termination of the lease. Such term does not include (*1*) a structure which is essentially an item of machinery or equipment, or (*2*) an enclosure which is so closely combined with the machinery or equipment which it supports, houses, or serves that it must be replaced, retired, or abandoned contemporaneously with such machinery or equipment, and which is depreciated over the life of such machinery or equipment. Thus, the term ''building'' does not include such structures as oil and gas storage tanks, grain storage bins, silos, fractioning towers, blast furnaces, coke ovens, brick kilns, and coal tipples.

(*b*) The term ''structural components'' includes, for example, chimneys, and other components relating to the operating or maintenance of a building. However, the term ''structural components'' does not include machinery or a device which serves no function other than the abatement or control of water or atmospheric pollution.

(ii) For purposes of subparagraph (1) of this paragraph, a building and its structural components will be considered to be exclusively a treatment facility if its only function is the abatement or control of air or water pollution. However, the incidental recovery of profits from wastes or otherwise shall not be deemed to be a function other than the abatement or control of air or water pollution. A building and its structural components which serve no function other than the treatment of wastes will be considered to be exclusively a treatment facility even if it contains areas for employees to operate the treatment facility, rest rooms for such workers, and an office for the management of such treatment facility. However, for example, if a portion of a building is used for the treatment of sewage and another portion of the building is used for the manufacture of machinery, the building is not exclusively a treatment facility. The Federal certifying authority will not certify as to what is a building and its structural components within the meaning of subdivision (i) of this subparagraph.

(iii) For purposes of subparagraph (1)(ii) (*a*) and (*b*) of this paragraph (relating to construction, reconstruction, or erection after December 31, 1968, and original use after December 31, 1968) and paragraph (b)(1) of § 1.169–3 (relating to definition of amortizable basis), the principles set forth in paragraph (a) (1) and (2) of § 1.167(c)–1 and in paragraphs (b) and (c) of § 1.48–2 shall be applied. Thus, for example, the following rules are applicable:

(*a*) Property is considered as constructed, reconstructed, or erected by the taxpayer if the work is done for him in accordance with his specifications.

(*b*) The portion of the basis of property attributable to construction, reconstruction, or erection after December 31, 1968, consists of all costs of construction, reconstruction, or erection allocable to the period after December 31, 1968, including the cost or other basis of materials entering into such work (but not including, in the case of reconstruction of property, the adjusted basis of the property as of the time such reconstruction is commenced).

(*c*) It is not necessary that materials entering into construction, reconstruction or erection be acquired after December 31, 1968, or that they be new in use.

(*d*) If construction or erection by the taxpayer began after December 31, 1968, the entire cost or other basis of such construction or erection may be taken into account for purposes of determining the amortizable basis under section 169.

(*e*) Construction, reconstruction, or erection by the taxpayer begins when physical work is started on such construction, reconstruction, or erection.

(*f*) Property shall be deemed to be acquired when reduced to physical possession or control.

(*g*) The term ''original use'' means the first use to which the property is put, whether or not such use corresponds to the use of such property by the taxpayer. For example, a reconditioned or rebuilt machine acquired by the taxpayer after December 31, 1968, for pollution control purposes will not be treated as being put to original use by the taxpayer regardless of whether it was used for purposes other than pollution control by its previous owner. Whether property is reconditioned or rebuilt property is a question of fact. Property will not be treated as reconditioned or rebuilt merely because it contains some used parts.

(iv) For purposes of subparagraph (1)(iii) of this paragraph (relating to property placed in service prior to January 1, 1975), the principles set forth in paragraph (d) of § 1.46–3 are applicable. Thus, property shall be considered placed in service in the earlier of the following taxable years:

(*a*) The taxable year in which, under the taxpayer's depreciation practice, the period for depreciation with respect to such property begins or would have begun; or

(*b*) The taxable year in which the property is placed in a condition or state of readiness and availability for the abatement or control of water or atmospheric pollution.

Thus, if property meets the conditions of (*b*) of this subdivision in a taxable year, it shall be considered placed in service in such year notwithstanding that the period for depreciation with respect to such property begins or would have begun in a succeeding taxable year because, for example, under the taxpayer's depreciation practice such property is or would have been accounted for in a multiple asset account and depreciation is or would have been computed under an ''averaging convention'' (§1.167(a)–10), or depreciation with respect to such property would have been computed under the completed contract method, the unit of production method, or the retirement method. In the case of property acquired by a taxpayer for use in his trade or business (or in the production of income), property shall be considered in a condition or state of readiness and availability for the abatement or control of water or atmospheric pollution if, for example, equipment is acquired for the abatement or control of water or atmospheric pollution and is operational but is undergoing testing to eliminate any defects. However, materials and parts acquired to be used in the construction of an item of equipment shall not be considered in a condition or state of readiness and availability for the abatement or control of water or atmospheric pollution.

(c) *Certification*—(1) *In general.* For purposes of paragraph (a)(1) of this section, a facility is certified in accordance with the rules prescribed in this paragraph if—

(i) The State certifying authority (as defined in subparagraph (2) of this paragraph) having jurisdiction with respect to such facility has certified to the Federal certifying authority (as defined in subparagraph (3) of this paragraph) that the facility was constructed, reconstructed, erected, or acquired in conformity with the State program or requirements for the abatement or control of water or atmospheric pollution or contamination applicable at the time of such certification, and

(ii) The Federal certifying authority has certified such facility to the Secretary or his delegate as (*a*) being in compliance with the applicable regulations of Federal agencies (such as, for example, the Atomic Energy Commission's regulations pertaining to radiological discharge (10 CFR Part 20)) and (*b*) being in furtherance of the general policy of the United States for cooperation with the States in the prevention and abatement of water pollution under the Federal Water Pollution Control Act, as amended (33 U.S.C. 1151–1175) or in the prevention and abatement of atmospheric pollution and contamination under the Clean Air Act, as amended (42 U.S.C. 1857 *et seq.*).

(2) *State certifying authority.* The term ''state certifying authority'' means—

(i) In the case of water pollution, the State water pollution control agency as defined in section 23(a) of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1173(a)),

(ii) In the case of air pollution, the air pollution control agency designated pursuant to section 302(b)(1) of the Clean Air Act, as amended (42 U.S.C. 1857h(b)), and

(iii) Any interstate agency authorized to act in place of a certifying authority of a State. See section 23(a) of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1173(b)) and section 302(c) of the Clean Air Act, as amended (42 U.S.C. 1857h(c)).

(3) *Federal certifying authority.* The term ''Federal certifying authority'' means the Administrator of the Environmental Protection Agency (see Reorganization Plan No. 3 of 1970, 35 FR 15623).

(d) *Profitmaking abatement works, etc.*—(1) *In general.* Section 169(e) provides that the Federal certifying authority shall not certify any property to the extent it appears that by reason of estimated profits to be derived through the recovery of wastes or otherwise in the operation of such property its costs will be recovered over the period referred to in paragraph (a) (6) of this section for such property. The Federal certifying authority need not certify the amount of estimated profits to be derived from such recovery of wastes or otherwise with respect to such facility. Such estimated profits shall be determined pursuant to subparagraph (2) of this paragraph. However, the Federal certifying authority shall certify—

(i) Whether, in connection with any treatment facility so certified, there is potential cost recovery through the recovery of wastes or otherwise, and

(ii) A specific description of the wastes which will be recovered, or the nature of such cost recovery if otherwise than through the recovery of wastes.

For effect on computation of amortizable basis, see paragraph (c) of §1.169–3.

(2) *Estimated profits.* For purpose of this paragraph, the term ''estimated profits'' means the estimated gross receipts from the sale of recovered wastes reduced by the sum of the (i) estimated average annual maintenance and operating expenses, including utilities and labor, allocable to that portion of the facility which is certified as a treatment facility pursuant to paragraph (a)(1)(i) of this section which produces the recovered waste from which the gross receipts are derived, and (ii) estimated selling expenses. However, in determining expenses to be subtracted neither depreciation nor amortization of the facility is to be taken into account. Estimated profits shall not include any estimated savings to the taxpayer by reason of the taxpayer's reuse or recycling of wastes or other items recovered in connection with the operation of the plant or other property served by the treatment facility.

(3) *Special rules.* The estimates of cost recovery required by subparagraph (2) of this paragraph shall be based on the period referred to in paragraph (a)(6) of this section. Such estimates shall be made at the time the election provided for by section 169 is made and shall also be set out in the application for certification made to the Federal certifying authority. There shall be no redetermination of estimated profits due to unanticipated fluctuations in the market price for wastes or other items, to an unanticipated increase or decrease in the costs of extracting them from the gas or liquid released, or to other unanticipated factors or events occurring after certification.

[T.D. 7116, 36 FR 9013, May 18, 1971; 36 FR 9770, May 28, 1971]

§ 1.169–3 Amortizable basis.

(a) *In general.* The amortizable basis of a certified pollution control facility for the purpose of computing the amortization deduction under section 169 is the adjusted basis of the facility for purposes of determining gain (see part II (section 1011 and following), subchapter O, chapter 1 of the Internal Revenue Code), in conjunction with paragraphs (b), (c), and (d) of this section. The adjusted basis for purposes of determining gain (computed without regard to paragraphs (b), (c), and (d) of this section) of a facility that performs a function in addition to pollution control, or that is used in connection with more than one plant or other property, or both, is determined under §1.169–2(a)(3). For rules as to additions and improvements to such a facility, see paragraph (f) of this section. Before computing the amortization deduction allowable under section 169, the adjusted basis for purposes of determining gain for a facility that is placed in service by a taxpayer after September 10, 2001, and that is qualified property under section 168(k)(2) or §1.168(k)–1, 50-percent bonus depreciation property under section 168(k)(4) or §1.168(k)–1, or qualified New York Liberty Zone property under section 1400L(b) or §1.1400L(b)–1 must be reduced by the amount of the additional first year depreciation deduction allowed or allowable, whichever is greater, under section 168(k) or section 1400L(b), as applicable, for the facility.

(b) *Limitation to post-1968 construction, reconstruction, or erection.* (1) If the construction, reconstruction, or erection was begun before January 1, 1969, there shall be included in the amortizable basis only so much of the adjusted basis of such facility for purposes of determining gain (referred to in paragraph (a) of this section) as is properly attributable under the rules set forth in paragraph (b)(2)(iii) of §1.169–2 to construction, reconstruction, or erection after December 31, 1968. See section 169 (d)(4). For example, assume a certified pollution control facility for which the shortest period authorized under section 167 is 10 years has a cost of $500,000, of which $450,000 is attributable to construction after December 31, 1968. Further, assume such facility does not perform a function in addition to pollution control and is used only in connection with a plant in operation before January 1, 1969. The facility would have an amortizable basis of $450,000 (computed without regard to paragraphs (c) and (d) of this section).

For depreciation of the remaining portion ($50,000) of the cost, see section 169(g) and paragraph (a)(3)(ii) of § 1.169–1. For the definition of the term ''certified pollution control facility'' see paragraph (a) of § 1.169–2.

(2) If the taxpayer elects to begin the 60-month amortization period with the first month of the taxable year succeeding the taxable year in which the facility is completed or acquired and a depreciation deduction is allowable under section 167 (including an additional first-year depreciation allowance under former section 179; for a facility that is acquired by the taxpayer after September 10, 2001, and that is qualified property under section 168(k)(2) or § 1.168(k)–1 or qualified New York Liberty Zone property under section 1400L(b) or § 1.1400L(b)–1, the additional first year depreciation deduction under section 168(k)(1) or 1400L(b), as applicable; and for a facility that is acquired by the taxpayer after May 5, 2003, and that is 50-percent bonus depreciation property under section 168(k)(4) or § 1.168(k)–1, the additional first year depreciation deduction under section 168(k)(4)) with respect to the facility for the taxable year in which it is completed or acquired, the amount determined under paragraph (b)(1) of this section shall be reduced by an amount equal to the amount of the depreciation deduction allowed or allowable, whichever is greater, multiplied by a fraction the numerator of which is the amount determined under paragraph (b)(1) of this section, and the denominator of which is the facility's total cost. The additional first-year allowance for depreciation under former section 179 will be allowable only for the taxable year in which the facility is completed or acquired and only if the taxpayer elects to begin the amortization deduction under section 169 with the taxable year succeeding the taxable year in which such facility is completed or acquired. For a facility that is acquired by a taxpayer after September 10, 2001, and that is qualified property under section 168(k)(2) or § 1.168(k)–1 or qualified New York Liberty Zone property under section 1400L(b) or § 1.1400L(b)–1, see § 1.168(k)–1(f)(4) or § 1.1400L(b)–1(f)(4), as applicable, with respect to when the additional first year depreciation deduction under section 168(k)(1) or 1400L(b) is allowable. For a facility that is acquired by a taxpayer after May 5, 2003, and that is 50-percent bonus depreciation property under section 168(k)(4) or § 1.168(k)–1, see § 1.168(k)–1(f)(4) with respect to when the additional first year depreciation deduction under section 168(k)(4) is allowable.

(c) *Modification for profitmaking abatement works, etc.* If it appears that by reason of estimated profits to be derived through the recovery of wastes or otherwise (as determined by applying the rules prescribed in paragraph (d) of § 1.169–2) a portion or all of the total costs of the certified pollution control facility will be recovered over the period referred to in paragraph (a)(b) of § 1.169–2, its amortizable basis (computed without regard to this paragraph and paragraph (d) of this section) shall be reduced by an amount equal to (1) its amortizable basis (so computed) multiplied by (2) a fraction the numerator of which is such estimated profits and the denominator of which is its adjusted basis for purposes of determining gain. See section 169(e).

(d) *Cases in which the period referred to in paragraph (a)(6) of § 1.169–2 exceeds 15 years.* If as to a certified pollution control facility the period referred to in paragraph (a)(6) of § 1.169–2 exceeds 15 years (determined as of the first day of the first month for which a deduction is allowable under the election made under the section 169(b) and paragraph (a) of § 1.169–4), the amortizable basis of such facility shall be an amount equal to (1) its amortizable basis (computed without regard to this paragraph) multiplied by (2) a fraction the numerator of which is 15 years and the denominator of which is the number of years of such period. See section 169(f) (2)(A).

(e) *Examples.* This section may be illustrated by the following example:

Example 1. The X Corporation, which uses the calendar year as its taxable year, began the installation of a facility on November 1, 1968, and completed the installation on June 30, 1970, at a cost of $400,000. All of the facility qualifies as a certified pollution control facility within the meaning of paragraph (a) of § 1.169–2. $40,000 of such cost is attributable to construction prior to January 1, 1969. The X Corporation elects to take amortization deductions under section 169(a) with respect to the facility and to begin the 60-month amortization period with January 1, 1971. The corporation takes a depreciation deduction under sections 167 and 179 of $10,000 (the amount allowable, of which $2,000 is for additional first year depreciation under section 179) for the last 6 months of 1970. It is estimated that over the period referred to in paragraph (a) (6) of § 1.169–2 (20 years) as to such facility, $80,000 in profits will be realized from the sale of wastes recovered in its operation. The amortizable basis of the facility for purposes of computing the amortization deduction as of January 1, 1971, is $210,600, computed as follows:

(1) Portion of $400,000 cost attributable to post-1968 construction, reconstruction, or erection ...		$360,000
(2) Reduction for portion of depreciation deduction taken for the taxable year in which the facility was completed:		
(a) $10,000 depreciation deduction taken for last 6 months of 1970 including $2,000 for additional first year depreciation under section 179	$10,000	
(b) Multiplied by the amount in line (1) and divided by the total cost of the facility ($360,000/ $400,000)	0.9	$9,000
(3) Subtotal		$351,000
(4) Modification for profitmaking abatement works: Multiply line (3) by estimated profits through waste recovery ($80,000) and divide by the adjusted basis for determining gain of the facility ($400,000).		
(5) Reduction		$70,200
(6) Subtotal		$280,800
(7) Modification for period referred to in paragraph (a)(6) of § 1.169–2 exceeding 15 years: Multiply by 15 years and divide by such period (determined in accordance with paragraph (d) of this section) (20 years)		0.75
(8) Amortizable basis		$210,600

Example 2. Assume the same facts as in example (1) except that the facility is used in connection with a number of separate plants some of which were in operation before January 1, 1969, that the Federal certifying authority certifies that 80 percent of the capacity of the facility is allocable to the plants which were in operation before such date, and that all of the waste recovery is allocable to the portion of the facility used in connection with the plants in operation before January 1, 1969. The amortizable basis of such facility, for purposes of computing the amortization deduction as of January 1, 1971, is $157,950 computed as follows:

(1) Adjusted basis for purposes of determining gain: Multiply percent certified as allocable to plants in operation before January 1, 1969 (80 percent) by cost of entire facility ($400,000)		$320,000
(2) Portion of adjusted basis for determining gain attributable to post-1968 construction, reconstruction, or rection: Multiply line (1) by portion of total cost of facility attributable to post-1968 construction, reconstruction, or erection ($360,000) and divide by the total cost of the facility ($400,000)		$288,000
(3) Reduction for portion of depreciation deduction taken for the taxable year in which the facility was completed:		
(a) $10,000 depreciation deduction taken for last 6 months of 1970 including $2,000 for additional first year depreciation under section 170	$10,000	
(b) Multiplied by the amount in line (2) and divided by the total cost of the facility ($288,000/$400,000)	0.72	$7,200
(4) Subtotal		$280,800
(5) Modification for profitmaking abatement works; Multiply line (4) by estimated profits through waste recovery ($80,000) and divide by the amount in line (1) ($320,000).		
(6) Reduction		$70,200
(7) Subtotal		$210,600
(8) Modification for period referred to in paragraph (a)(6) of § 1.169–2 exceeding 15 years: Multiply by 15 years and divide by such period (determined in accordance with paragraph (d) of this section) (20 years)		0.75
(9) Amortizable basis		$157,950

(f) *Additions or improvements.* (1) If after the completion or acquisition of a certified pollution control facility further expenditures are made for additional construction, reconstruction, or improvements, the cost of such additions or improvements made prior to the beginning of the amortization period shall increase the amortizable basis of such facility, but the cost of additions or improvements made after the amortization period has begun, shall not increase the amortizable basis. See section 169(f)(2)(B).

(2) If expenditures for such additional construction, reconstruction, or improvements result in a facility which is new and is separately certified as a certified pollution control facility as defined in section 169(d)(1) and paragraph (a) of § 1.169–2, and, if proper election is made, such expenditures shall be taken into account in computing under paragraph (a) of this section the amortizable basis of such new and separately certified pollution control facility.

(g) *Effective date for qualified property, 50-percent bonus depreciation property, and qualified New York Liberty Zone property.* This section applies to a certified pollution control facility. This section also applies to a certified pollution control facility that is qualified property under section 168(k)(2) or qualified New York Liberty Zone property under section 1400L(b) acquired by a taxpayer after September 10, 2001, and to a certified pollution control facility that is 50-percent bonus depreciation property under section 168(k)(4) acquired by a taxpayer after May 5, 2003.

[T.D. 7116, 36 FR 9015, May 18, 1971; 36 FR 9770, May 28, 1971, as amended by T.D. 9091, 68 FR 53004, Sept. 8, 2003; T.D. 9283, 71 FR 51746, Aug. 31, 2006]

§ 1.169–4 Time and manner of making elections.

(a) *Election of amortization*—(1) *In general*. Under section 169(b), an election by the taxpayer to take an amortization deduction with respect to a certified pollution control facility and to begin the 60-month amortization period (either with the month following the month in which the facility is completed or acquired, or with the first month of the taxable year succeeding the taxable year in which such facility is completed or acquired) shall be made by a statement to that effect attached to its return for the taxable year in which falls the first month of the 60-month amortization period so elected. Such statement shall include the following information (if not otherwise included in the documents referred to in subdivision (ix) of this subparagraph):

(i) A description clearly identifying each certified pollution control facility for which an amortization deduction is claimed;

(ii) The date on which such facility was completed or acquired (see paragraph (b)(2)(iii) of § 1.169–2);

(iii) The period referred to in paragraph (a)(6) of § 1.169–2 for the facility as of the date the property is placed in service;

(iv) The date as of which the amortization period is to begin;

(v) The date the plant or other property to which the facility is connected began operating (see paragraph (a)(5) of § 1.169–2);

(vi) The total costs and expenditures paid or incurred in the acquisition, construction, and installation of such facility;

(vii) A description of any wastes which the facility will recover during the course of its operation, and a reasonable estimate of the profits which will be realized by the sale of such wastes whether pollutants or otherwise, over the period referred to in paragraph (a)(6) of § 1.169–2 as to the facility. Such estimate shall include a schedule setting forth a detailed computation illustrating how the estimate was arrived at including every element prescribed in the definition of estimated profits in paragraph (d)(2) of § 1.169–2;

(viii) A computation showing the amortizable basis (as defined in § 1.169–3) of the facility as of the first month for which the amortization deduction provided for by section 169(a) is elected; and

(ix)(*a*) A statement that the facility has been certified by the Federal certifying authority, together with a copy of such certification, and a copy of the application for certification which was filed with and approved by the Federal certifying authority or (*b*), if the facility has not been certified by the Federal certifying authority, a statement that application has been made to the proper State certifying authority (see paragraph (c)(2) of § 1.169–2) together with a copy of such application and (except in the case of an election to which subparagraph (4) of this paragraph applies) a copy of the application filed or to be filed with the Federal certifying authority.

If subdivision (ix)(*b*) of this subparagraph applies, within 90 days after receipt by the taxpayer, the certification from the Federal certifying authority shall be filed by the taxpayer with the district director, or with the director of the internal revenue service center, with whom the return referred to in this subparagraph was filed.

(2) *Special rule*. If the return for the taxable year in which falls the first month of the 60-month amortization period to be elected is filed before November 16, 1971, without making the election for such year, then on or before December 31, 1971 (or if there is no State certifying authority in existence on November 16, 1971, on or before the

90th day after such authority is established), the election may be made by a statement attached to an amended income tax return for the taxable year in which falls the first month of the 60-month amortization period so elected. Amended income tax returns or claims for credit or refund must also be filed at this time for other taxable years which are within the amortization period and which are subsequent to the taxable year for which the election is made. Nothing in this paragraph should be construed as extending the time specified in section 6511 within which a claim for credit or refund may be filed.

(3) *Other requirements and considerations.* No method of making the election provided for in section 169(a) other than that prescribed in this section shall be permitted on or after May 18, 1971. A taxpayer which does not elect in the manner prescribed in this section to take amortization deductions with respect to a certified pollution control facility shall not be entitled to such deductions. In the case of a taxpayer which elects prior to May 18, 1971, the statement required by subparagraph (1) of this paragraph shall be attached to its income tax return for either its taxable year in which December 31, 1971, occurs or its taxable year preceding such year.

(4) *Elections filed before February 29, 1972.* If a statement of election required by subparagraph (1) of this paragraph is attached to a return (including an amended return referred to in subparagraph (2) of this paragraph) filed before February 29, 1972, such statement of election need not include a copy of the Federal application to be filed with the Federal certifying authority but a copy of such application must be filed no later than February 29, 1972, by the taxpayer with the district director, or with the director of the internal revenue service center, with whom the return or amended return referred to in this subparagraph was filed.

(b) *Election to discontinue or revoke amortization*—(1) *Election to discontinue.* An election to discontinue the amortization deduction provided by section 169(c) and paragraph (a)(1) of §1.169–1 shall be made by a statement in writing filed with the district director, or with the director of the internal revenue service center, with whom the return of the taxpayer is required to be filed for its taxable year in which falls the first month for which the election terminates. Such statement shall specify the month as of the beginning of which the taxpayer elects to discontinue such deductions. Unless the election to discontinue amortization is one to which subparagraph (2) of this paragraph applies, such statement shall be filed before the beginning of the month specified therein. In addition, such statement shall contain a description clearly identifying the certified pollution control facility with respect to which the taxpayer elects to discontinue the amortization deduction, and, if a certification has previously been issued, a copy of the certification by the Federal certifying authority. If at the time of such election a certification has not been issued (or if one has been issued it has not been filed as provided in paragraph (a)(1) of this section), the taxpayer shall file, with respect to any taxable year or years for which a deduction under section 169 has been taken, a copy of such certification within 90 days after receipt thereof. For purposes of this paragraph, notification to the Secretary or his delegate from the Federal certifying authority that the facility no longer meets the requirements under which certification was originally granted by the State or Federal certifying authority shall have the same effect as a notice from the taxpayer electing to terminate amortization as of the month following the month such facility ceased functioning in accordance with such requirements.

(2) *Revocation of elections made prior to May 18, 1971.* If on or before May 18, 1971, an election under section 169(a) has been made, such election may be revoked (see paragraph (a)(1) of §1.169–1) by filing on or before August 16, 1971, a statement of revocation of an election under section 169(a) in accordance with the requirements in subparagraph (1) of this paragraph for filing a notice to discontinue an election. If such election to revoke is for a period which falls within one or more taxable years for which an income tax return has been filed, amended income tax returns

shall be filed for any such taxable years in which deductions were taken under section 169 on or before August 16, 1971.

[T.D. 7116, 36 FR 9016, May 18, 1971, as amended by T.D. 7135, 36 FR 14183, July 31, 1971; 36 FR 24995, Dec. 28, 1971]