

TITLE 26 - INTERNAL REVENUE CODE**Subtitle A - Income Taxes****CHAPTER 1 - NORMAL TAXES AND SURTAXES****Subchapter P - Capital Gains and Losses****PART IV - SPECIAL RULES FOR DETERMINING CAPITAL GAINS AND LOSSES****§ 1256. Section 1256 contracts marked to market****(a) General rule**

For purposes of this subtitle—

- (1) each section 1256 contract held by the taxpayer at the close of the taxable year shall be treated as sold for its fair market value on the last business day of such taxable year (and any gain or loss shall be taken into account for the taxable year),
- (2) proper adjustment shall be made in the amount of any gain or loss subsequently realized for gain or loss taken into account by reason of paragraph (1),
- (3) any gain or loss with respect to a section 1256 contract shall be treated as—
 - (A) short-term capital gain or loss, to the extent of 40 percent of such gain or loss, and
 - (B) long-term capital gain or loss, to the extent of 60 percent of such gain or loss, and
- (4) if all the offsetting positions making up any straddle consist of section 1256 contracts to which this section applies (and such straddle is not part of a larger straddle), sections 1092 and 263 (g) shall not apply with respect to such straddle.

(b) Section 1256 contract defined

For purposes of this section, the term “section 1256 contract” means—

- (1) any regulated futures contract,
- (2) any foreign currency contract,
- (3) any nonequity option,
- (4) any dealer equity option, and
- (5) any dealer securities futures contract.

The term “section 1256 contract” shall not include any securities futures contract or option on such a contract unless such contract or option is a dealer securities futures contract.

(c) Terminations, etc.**(1) In general**

The rules of paragraphs (1), (2), and (3) of subsection (a) shall also apply to the termination (or transfer) during the taxable year of the taxpayer’s obligation (or rights) with respect to a section 1256 contract by offsetting, by taking or making delivery, by exercise or being exercised, by assignment or being assigned, by lapse, or otherwise.

(2) Special rule where taxpayer takes delivery on or exercises part of straddle

If—

- (A) 2 or more section 1256 contracts are part of a straddle (as defined in section 1092 (c)), and
- (B) the taxpayer takes delivery under or exercises any of such contracts,

then, for purposes of this section, each of the other such contracts shall be treated as terminated on the day on which the taxpayer took delivery.

(3) Fair market value taken into account

For purposes of this subsection, fair market value at the time of the termination (or transfer) shall be taken into account.

(d) Elections with respect to mixed straddles

(1) Election

The taxpayer may elect to have this section not to apply to all section 1256 contracts which are part of a mixed straddle.

(2) Time and manner

An election under paragraph (1) shall be made at such time and in such manner as the Secretary may by regulations prescribe.

(3) Election revocable only with consent

An election under paragraph (1) shall apply to the taxpayer's taxable year for which made and to all subsequent taxable years, unless the Secretary consents to a revocation of such election.

(4) Mixed straddle

For purposes of this subsection, the term "mixed straddle" means any straddle (as defined in section 1092 (c))—

(A) at least 1 (but not all) of the positions of which are section 1256 contracts, and

(B) with respect to which each position forming part of such straddle is clearly identified, before the close of the day on which the first section 1256 contract forming part of the straddle is acquired (or such earlier time as the Secretary may prescribe by regulations), as being part of such straddle.

(e) Mark to market not to apply to hedging transactions**(1) Section not to apply**

Subsection (a) shall not apply in the case of a hedging transaction.

(2) Definition of hedging transaction

For purposes of this subsection, the term "hedging transaction" means any hedging transaction (as defined in section 1221 (b)(2)(A)) if, before the close of the day on which such transaction was entered into (or such earlier time as the Secretary may prescribe by regulations), the taxpayer clearly identifies such transaction as being a hedging transaction.

(3) Special rule for syndicates**(A) In general**

Notwithstanding paragraph (2), the term "hedging transaction" shall not include any transaction entered into by or for a syndicate.

(B) Syndicate defined

For purposes of subparagraph (A), the term "syndicate" means 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)).

(C) Holdings attributable to active management

For purposes of subparagraph (B), an interest in an entity shall not be treated as held by a limited partner or a limited entrepreneur (within the meaning of section 464 (e)(2))—

(i) for any period if during such period such interest is held by an individual who actively participates at all times during such period in the management of such entity,

(ii) for any period if during such period such interest is held by the spouse, children, grandchildren, and parents of an individual who actively participates at all times during such period in the management of such entity,

(iii) if such interest is held by an individual who actively participated in the management of such entity for a period of not less than 5 years,

(iv) if such interest is held by the estate of an individual who actively participated in the management of such entity or is held by the estate of an individual if with respect to such individual such interest was at any time described in clause (ii), or

(v) if the Secretary determines (by regulations or otherwise) that such interest should be treated as held by an individual who actively participates in the management of such entity, and that such entity and such interest are not used (or to be used) for tax-avoidance purposes.

For purposes of this subparagraph, a legally adopted child of an individual shall be treated as a child of such individual by blood.

(4) Limitation on losses from hedging transactions

(A) In general

(i) Limitation

Any hedging loss for a taxable year which is allocable to any limited partner or limited entrepreneur (within the meaning of paragraph (3)) shall be allowed only to the extent of the taxable income of such limited partner or entrepreneur for such taxable year attributable to the trade or business in which the hedging transactions were entered into. For purposes of the preceding sentence, taxable income shall be determined by not taking into account items attributable to hedging transactions.

(ii) Carryover of disallowed loss

Any hedging loss disallowed under clause (i) shall be treated as a deduction attributable to a hedging transaction allowable in the first succeeding taxable year.

(B) Exception where economic loss

Subparagraph (A)(i) shall not apply to any hedging loss to the extent that such loss exceeds the aggregate unrecognized gains from hedging transactions as of the close of the taxable year attributable to the trade or business in which the hedging transactions were entered into.

(C) Exception for certain hedging transactions

In the case of any hedging transaction relating to property other than stock or securities, this paragraph shall apply only in the case of a taxpayer described in section 465 (a)(1).

(D) Hedging loss

The term “hedging loss” means the excess of—

(i) the deductions allowable under this chapter for the taxable year attributable to hedging transactions (determined without regard to subparagraph (A)(i)), over

(ii) income received or accrued by the taxpayer during such taxable year from such transactions.

(E) Unrecognized gain

The term “unrecognized gain” has the meaning given to such term by section 1092 (a)(3).

(f) Special rules

(1) Denial of capital gains treatment for property identified as part of a hedging transaction

For purposes of this title, gain from any property shall in no event be considered as gain from the sale or exchange of a capital asset if such property was at any time personal property (as defined in section 1092 (d)(1)) identified under subsection (e)(2) by the taxpayer as being part of a hedging transaction.

(2) Subsection (a)(3) not to apply to ordinary income property

Paragraph (3) of subsection (a) shall not apply to any gain or loss which, but for such paragraph, would be ordinary income or loss.

(3) Capital gain treatment for traders in section 1256 contracts

(A) In general

For purposes of this title, gain or loss from trading of section 1256 contracts shall be treated as gain or loss from the sale or exchange of a capital asset.

(B) Exception for certain hedging transactions

Subparagraph (A) shall not apply to any section 1256 contract to the extent such contract is held for purposes of hedging property if any loss with respect to such property in the hands of the taxpayer would be ordinary loss.

(C) Treatment of underlying property

For purposes of determining whether gain or loss with respect to any property is ordinary income or loss, the fact that the taxpayer is actively engaged in dealing in or trading section 1256 contracts related to such property shall not be taken into account.

(4) Special rule for dealer equity options and dealer securities futures contracts of limited partners or limited entrepreneurs

In the case of any gain or loss with respect to dealer equity options, or dealer securities futures contracts, which are allocable to limited partners or limited entrepreneurs (within the meaning of subsection (e)(3))—

(A) paragraph (3) of subsection (a) shall not apply to any such gain or loss, and

(B) all such gains or losses shall be treated as short-term capital gains or losses, as the case may be.

(5) Special rule related to losses

Section 1091 (relating to loss from wash sales of stock or securities) shall not apply to any loss taken into account by reason of paragraph (1) of subsection (a).

(g) Definitions

For purposes of this section—

(1) Regulated futures contracts defined

The term “regulated futures contract” means a contract—

(A) with respect to which the amount required to be deposited and the amount which may be withdrawn depends on a system of marking to market, and

(B) which is traded on or subject to the rules of a qualified board or exchange.

(2) Foreign currency contract defined

(A) Foreign currency contract

The term “foreign currency contract” means a contract—

(i) which requires delivery of, or the settlement of which depends on the value of, a foreign currency which is a currency in which positions are also traded through regulated futures contracts,

(ii) which is traded in the interbank market, and

(iii) which is entered into at arm’s length at a price determined by reference to the price in the interbank market.

(B) Regulations

The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of subparagraph (A), including regulations excluding from the application of subparagraph (A) any contract (or type of contract) if its application thereto would be inconsistent with such purposes.

(3) Nonequity option

The term “nonequity option” means any listed option which is not an equity option.

(4) Dealer equity option

The term “dealer equity option” means, with respect to an options dealer, any listed option which—

- (A) is an equity option,
- (B) is purchased or granted by such options dealer in the normal course of his activity of dealing in options, and
- (C) is listed on the qualified board or exchange on which such options dealer is registered.

(5) Listed option

The term “listed option” means any option (other than a right to acquire stock from the issuer) which is traded on (or subject to the rules of) a qualified board or exchange.

(6) Equity option

The term “equity option” means any option—

- (A) to buy or sell stock, or
- (B) the value of which is determined directly or indirectly by reference to any stock or any narrow-based security index (as defined in section 3(a)(55) of the Securities Exchange Act of 1934, as in effect on the date of the enactment of this paragraph).

The term “equity option” includes such an option on a group of stocks only if such group meets the requirements for a narrow-based security index (as so defined). The Secretary may prescribe regulations regarding the status of options the values of which are determined directly or indirectly by reference to any index which becomes (or ceases to be) a narrow-based security index (as so defined).

(7) Qualified board or exchange

The term “qualified board or exchange” means—

- (A) a national securities exchange which is registered with the Securities and Exchange Commission,
- (B) a domestic board of trade designated as a contract market by the Commodity Futures Trading Commission, or
- (C) any other exchange, board of trade, or other market which the Secretary determines has rules adequate to carry out the purposes of this section.

(8) Options dealer

(A) In general

The term “options dealer” means any person registered with an appropriate national securities exchange as a market maker or specialist in listed options.

(B) Persons trading in other markets

In any case in which the Secretary makes a determination under subparagraph (C) of paragraph (7), the term “options dealer” also includes any person whom the Secretary determines performs functions similar to the persons described in subparagraph (A). Such determinations shall be made to the extent appropriate to carry out the purposes of this section.

(9) Dealer securities futures contract

(A) In general

The term “dealer securities futures contract” means, with respect to any dealer, any securities futures contract, and any option on such a contract, which—

- (i) is entered into by such dealer (or, in the case of an option, is purchased or granted by such dealer) in the normal course of his activity of dealing in such contracts or options, as the case may be, and

(ii) is traded on a qualified board or exchange.

(B) Dealer

For purposes of subparagraph (A), a person shall be treated as a dealer in securities futures contracts or options on such contracts if the Secretary determines that such person performs, with respect to such contracts or options, as the case may be, functions similar to the functions performed by persons described in paragraph (8)(A). Such determination shall be made to the extent appropriate to carry out the purposes of this section.

(C) Securities futures contract

The term “securities futures contract” has the meaning given to such term by section 1234B.

(Added Pub. L. 97–34, title V, § 503(a), Aug. 13, 1981, 95 Stat. 327; amended Pub. L. 97–354, § 5(a)(38), Oct. 19, 1982, 96 Stat. 1696; Pub. L. 97–448, title I, § 105(c)(1)–(3), (5)(A)–(C), Jan. 12, 1983, 96 Stat. 2385, 2386; Pub. L. 98–369, div. A, title I, §§ 102(a), (b), (e)(1), (5), 104 (a), 107 (c), (d), title VII, § 722(a)(2), July 18, 1984, 98 Stat. 620, 621, 623, 624, 628, 630, 972; Pub. L. 99–514, title XII, § 1261(c), Oct. 22, 1986, 100 Stat. 2591; Pub. L. 106–170, title V, § 532(b)(4), Dec. 17, 1999, 113 Stat. 1930; Pub. L. 106–554, § 1(a)(7) [title IV, § 401(g)(1)–(3)], Dec. 21, 2000, 114 Stat. 2763, 2763A–649, 2763A–650; Pub. L. 107–147, title IV, § 416(b)(1), Mar. 9, 2002, 116 Stat. 55; Pub. L. 108–311, title IV, § 405(a)(2), Oct. 4, 2004, 118 Stat. 1188; Pub. L. 109–135, title IV, § 412(oo), Dec. 21, 2005, 119 Stat. 2639.)

References in Text

Section 3(a)(55) of the Securities Exchange Act of 1934, referred to in subsec. (g)(6)(B), is classified to section 78c(a)(55) of Title 15, Commerce and Trade.

The date of the enactment of this paragraph, referred to in subsec. (g)(6)(B), probably means the date of enactment of Pub. L. 106–554, which amended subsec. (g)(6) generally and which was approved Dec. 21, 2000.

Amendments

2005—Subsec. (f)(1). Pub. L. 109–135 substituted “subsection (e)(2)” for “subsection (e)(2)(C)”.

2004—Subsec. (g)(6). Pub. L. 108–311 added at end of concluding provisions “The Secretary may prescribe regulations regarding the status of options the values of which are determined directly or indirectly by reference to any index which becomes (or ceases to be) a narrow-based security index (as so defined).”

2002—Subsec. (f)(5). Pub. L. 107–147 added par. (5).

2000—Subsec. (b). Pub. L. 106–554, § 1(a)(7) [title IV, § 401(g)(1)(A)], added par. (5) and concluding provisions.

Subsec. (f)(4). Pub. L. 106–554, § 1(a)(7) [title IV, § 401(g)(2)], inserted “and dealer securities futures contracts” after “dealer equity options” in heading and “, or dealer securities futures contracts,” after “dealer equity options” in introductory provisions.

Subsec. (g)(6). Pub. L. 106–554, § 1(a)(7) [title IV, § 401(g)(3)], amended heading and text of par. (6) generally. Prior to amendment, text read as follows:

“(A) In general.—Except as provided in subparagraph (B), the term ‘equity option’ means any option—

“(i) to buy or sell stock, or

“(ii) the value of which is determined directly or indirectly by reference to any stock (or group of stocks) or stock index.

“(B) Exception for certain options regulated by commodities futures trading commission.—The term ‘equity option’ does not include any option with respect to any group of stocks or stock index if—

“(i) there is in effect a designation by the Commodities Futures Trading Commission of a contract market for a contract based on such group of stocks or index, or

“(ii) the Secretary determines that such option meets the requirements of law for such a designation.”

Subsec. (g)(9). Pub. L. 106–554, § 1(a)(7) [title IV, § 401(g)(1)(B)], added par. (9).

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1999—Subsec. (e)(2). Pub. L. 106–170 reenacted heading without change and amended text generally. Prior to amendment, text read as follows: “For purposes of this subsection, the term ‘hedging transaction’ means any transaction if—

“(A) such transaction is entered into by the taxpayer in the normal course of the taxpayer’s trade or business primarily—

“(i) to reduce risk of price change or currency fluctuations with respect to property which is held or to be held by the taxpayer, or

“(ii) to reduce risk of interest rate or price changes or currency fluctuations with respect to borrowings made or to be made, or obligations incurred or to be incurred, by the taxpayer,

“(B) the gain or loss on such transactions is treated as ordinary income or loss, and

“(C) before the close of the day on which such transaction was entered into (or such earlier time as the Secretary may prescribe by regulations), the taxpayer clearly identifies such transaction as being a hedging transaction.”

1986—Subsec. (e)(4), (5). Pub. L. 99–514 redesignated par. (5) as (4) and struck out former par. (4), special rule for banks, which read as follows: “In the case of a bank (as defined in section 581), subparagraph (A) of paragraph (2) shall be applied without regard to clause (i) or (ii) thereof.”

1984—Pub. L. 98–369, § 102(e)(5), substituted “Section 1256 contracts” for “Regulated futures contracts” in section catchline.

Subsec. (a)(1), (3), (4). Pub. L. 98–369, § 102(a)(1), substituted “section 1256 contract” for “regulated futures contract” and “section 1256 contracts” for “regulated futures contracts” wherever appearing.

Subsec. (b). Pub. L. 98–369, § 102(a)(2), in par. (1), substituted “any regulated futures contract” for “with respect to which the amount required to be deposited and the amount which may be withdrawn depends on the system of marking to market; and”, in par. (2), substituted “any foreign currency contract,” for “which is traded on or subject to the rules of a domestic board of trade designated as a contract market by the Commodity Futures Trading Commission or of any board of trade or exchange which the Secretary determines has rules adequate to carry out the purposes of this section. Such term includes any foreign currency contract.”, and added pars. (3) and (4).

Subsec. (c)(1). Pub. L. 98–369, § 102(a)(1)(A), (e)(1)(A), substituted “section 1256 contracts” for “regulated futures contracts”, and “by taking or making delivery, by exercise or being exercised, by assignment or being assigned, by lapse,” for “by taking or making delivery,”.

Subsec. (c)(2). Pub. L. 98–369, § 102(e)(1)(C), substituted “takes delivery on or exercises” for “takes delivery on” in heading.

Subsec. (c)(2)(A). Pub. L. 98–369, § 102(a)(1)(B), substituted “section 1256 contracts” for “regulated futures contracts”.

Subsec. (c)(2)(B). Pub. L. 98–369, § 102(e)(1)(B), substituted “takes delivery under or exercises” for “takes delivery under”.

Subsec. (d)(1), (4)(A). Pub. L. 98–369, § 102(a)(1)(B), substituted “section 1256 contracts” for “regulated futures contracts”.

Subsec. (d)(4)(B). Pub. L. 98–369, § 102(a)(1)(A), substituted “section 1256 contract” for “regulated futures contract”.

Pub. L. 98–369, § 107(c), inserted “(or such earlier time as the Secretary may prescribe by regulations)”.

Subsec. (e)(2)(C). Pub. L. 98–369, § 107(d), inserted “(or such earlier time as the Secretary may prescribe by regulations)”.

Subsec. (e)(5). Pub. L. 98–369, § 104(a), added par. (5).

Subsec. (f)(3), (4). Pub. L. 98–369, § 102(b), added pars. (3) and (4).

Subsec. (g). Pub. L. 98–369, § 102(a)(3), in amending subsec. (g) generally, inserted provisions relating to regulated futures contracts as par. (1), redesignated former pars. (1) and (2) as subpars. (A) and (B), respectively, of par. (2), and added pars. (3) to (8).

Subsec. (g)(1)(A). Pub. L. 98–369, § 722(a)(2), inserted “, or the settlement of which depends on the value of,” after “delivery of”.

1983—Subsec. (b). Pub. L. 97–448, § 105(c)(5)(A), (B), struck out par. (1) which related to contracts requiring delivery of personal property (as defined in section 1092 (d)(1)) or an interest in such property, redesignated pars. (2) and (3) as (1) and (2), respectively, and inserted last sentence providing that such term includes any foreign currency contract.

Subsec. (c). Pub. L. 97–448, § 105(c)(1), inserted “, etc.” after “Terminations” in heading and, in text, designated existing first and second sentences as pars. (1) and (3), respectively, added par. (2), inserted “(or transfer)” after

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“termination” and “(or rights)” after “obligation” in par. (1) as so designated, and substituted “this subsection” for “the preceding sentence” and inserted “(or transfer)” after “termination” in par. (3) as so designated.

Subsec. (d)(4)(B). Pub. L. 97-448, § 105(c)(2), substituted “day on which the first regulated futures contract forming part of the straddle is acquired” for “day on which such position is acquired”.

Subsec. (e)(3)(C)(v). Pub. L. 97-448, § 105(c)(3), inserted “(by regulations or otherwise)” after “determines”.

Subsec. (g). Pub. L. 97-448, § 105(c)(5)(C), added subsec. (g).

1982—Subsec. (e)(3)(B). Pub. L. 97-354 substituted “an S corporation” for “an electing small business corporation within the meaning of section 1371 (b)”.

Effective Date of 2004 Amendment

Amendment by Pub. L. 108-311 effective as if included in section 401 of the Community Renewal Tax Relief Act of 2000 [H.R. 5662, as enacted by Pub. L. 106-554], see section 405(b) of Pub. L. 108-311, set out as a note under section 1234B of this title.

Effective Date of 2002 Amendment

Pub. L. 107-147, title IV, § 416(b)(2), Mar. 9, 2002, 116 Stat. 55, provided that: “The amendment made by this subsection [amending this section] shall take effect as if included in section 5075 of the Technical and Miscellaneous Revenue Act of 1988 [Pub. L. 100-647].”

Effective Date of 1999 Amendment

Amendment by Pub. L. 106-170 applicable to any instrument held, acquired, or entered into, any transaction entered into, and supplies held or acquired on or after Dec. 17, 1999, see section 532(d) of Pub. L. 106-170, set out as a note under section 170 of this title.

Effective Date of 1986 Amendment

Amendment by Pub. L. 99-514 applicable to taxable years beginning after Dec. 31, 1986, with certain exceptions and qualifications, see section 1261(e) of Pub. L. 99-514, set out as an Effective Date note under section 985 of this title.

Effective Date of 1984 Amendment

Section 102 (f)–(j) of Pub. L. 98-369, as amended by Pub. L. 99-514, § 2, title XVIII, § 1808(a)(1), Oct. 22, 1986, 100 Stat. 2095, 2817, provided that:

“(f) Effective Dates.—

“(1) In general.—Except as otherwise provided in this subsection or subsection (g), the amendments made by this section [amending this section, sections 263, 1092, 1212, 1234A, 1362, 1374, and 1402 of this title, and section 411 of Title 42, The Public Health and Welfare, and enacting provisions set out as a note under section 1362 of this title] shall apply to positions established after the date of the enactment of this Act [July 18, 1984], in taxable years ending after such date.

“(2) Special rule for options on regulated futures contracts.—In the case of any option with respect to a regulated futures contract (within the meaning of section 1256 of the Internal Revenue Code of 1986 [formerly I.R.C. 1954]), the amendments made by this section shall apply to positions established after October 31, 1983, in taxable years ending after such date.

“(3) Special rule for self-employment tax.—Except as provided in subsection (g)(2), the amendments made by subsection (c) [amending section 1402 of this title and section 411 of Title 42] shall apply to taxable years beginning after the date of the enactment of this Act [July 18, 1984].

“(4) Gains or losses from certain terminations.—The amendment made by subsection (d)(9) [probably means subsec. (e)(9), which amended section 1234A of this title] shall apply as if included in the amendment made by section 505 (a) [probably means section 507 (a)] of the Economic Recovery Tax Act of 1981 [Pub. L. 97-34], as amended by section 105(e) of the Technical Corrections Act of 1982 [Pub. L. 97-448].

“(g) Elections With Respect to Property Held on or Before the Date of the Enactment of This Act.—At the election of the taxpayer—

“(1) the amendments made by this section [amending this section, sections 263, 1092, 1212, 1234A, 1362, 1374, and 1402 of this title, and section 411 of Title 42, The Public Health and Welfare, and enacting provisions set out as a note under section 1362 of this title] shall apply to all section 1256 contracts held by the taxpayer on the date of the enactment of this Act [July 18, 1984], effective for periods after such date in taxable years ending after such date, or

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“(2) in lieu of an election under paragraph (1), the amendments made by this section shall apply to all section 1256 contracts held by the taxpayer at any time during the taxable year of the taxpayer which includes the date of the enactment of this Act.

“(h) Elections for Installment Payment of Tax Attributable to Stock Options.—

“(1) In general.—If the taxpayer makes an election under subsection (g)(2) and under this subsection—

“(A) the taxpayer may pay part or all the tax for the taxable year referred to in subsection (g)(2) in 2 or more (but not exceeding 5) equal installments, and

“(B) the maximum amount of tax which may be paid in installments under this subsection shall be the excess of—

“(i) the tax for such taxable year determined by taking into account subsection (g)(2), over

“(ii) the tax for such taxable year determined by taking into account subsection (g)(2) and by treating—

“(I) all section 1256 contracts which are stock options, and

“(II) any stock which was a part of a straddle including any such stock options,

as having been acquired for a purchase price equal to their fair market value on the last business day of the preceding taxable year. Stock options and stock shall be taken into account under subparagraph (B)(ii) only if such options or stock were held on the last day of the preceding taxable year and only if income on such options or stock would have been ordinary income if such options or stock were sold at a gain on such last day.

“(2) Date for payment of installment.—

“(A) If an election is made under this subsection, the first installment under paragraph (1) shall be paid on or before the due date for filing the return for the taxable year described in paragraph (1), and each succeeding installment shall be paid on or before the date which is 1 year after the date prescribed for payment of the preceding installment.

“(B) If a bankruptcy case or insolvency proceeding involving the taxpayer is commenced before the final installment is paid, the total amount of any unpaid installments shall be treated as due and payable on the day preceding the day on which such case or proceeding is commenced.

“(3) Interest imposed.—For purposes of section 6601 of the Internal Revenue Code of 1986, the time for payment of any tax with respect to which an election is made under this subsection shall be determined without regard to this subsection.

“(4) Form of election.—An election under this subsection shall be made not later than the time for filing the return for the taxable year described in paragraph (1) and shall be made in the manner and form required by regulations prescribed by Secretary of the Treasury or his delegate. The election shall set forth—

“(A) the amount determined under paragraph (1)(B) and the number of installments elected by the taxpayer,

“(B) the property described in paragraph (1)(B)(ii), and the date on which such property was acquired,

“(C) the fair market value of the property described in paragraph (1)(B)(ii) on the last business day of the taxable year preceding the taxable year described in paragraph (1), and

“(D) such other information for purposes of carrying out the provisions of this subsection as may be required by such regulations.

“(5) Delay of identification requirement.—Section 1256(e)(2)(C) of the Internal Revenue Code of 1986 shall not apply to any stock option or stock acquired on or before the 60th day after the date of the enactment of this Act [July 18, 1984].

“(i) Definitions.—For purposes of subsections (g) and (h)—

“(1) Section 1256 contract.—The term ‘section 1256 contract’ has the meaning given to such term by section 1256(b) of the Internal Revenue Code of 1986 (as amended by this section).

“(2) Stock option.—The term ‘stock option’ means any option to buy or sell stock.

“(j) Coordination of Election Under Subsection (d)(3) With Elections Under Subsections (g) and (h).—The Secretary of the Treasury or his delegate shall prescribe such regulations as may be necessary to coordinate the election provided by subsection (d)(3) with the elections provided by subsections (g) and (h).”

Section 104(b) of Pub. L. 98–369 provided that: “The amendment made by subsection (a) [amending this section] shall apply to taxable years beginning after December 31, 1984.”

Amendment by section 107(c), (d) of Pub. L. 98–369 applicable to positions entered into after July 18, 1984, in taxable years ending after that date, see section 107(e) of Pub. L. 98–369 set out as a note under section 1092 of this title.

NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2010 (see <http://www.law.cornell.edu/uscode/uscprint.html>).

Amendment by section 722(a)(2) of Pub. L. 98–369 effective as if included in the provisions of the Technical Corrections Act of 1984, Pub. L. 97–448, to which such amendment relates, see section 722(a)(6) of Pub. L. 98–369, set out as a note under section 172 of this title.

Effective Date of 1983 Amendment

Amendment by Pub. L. 97–448 effective, except as otherwise provided, as if it had been included in the provision of the Economic Recovery Tax Act of 1981, Pub. L. 97–34, to which such amendment relates, see section 109 of Pub. L. 97–448, set out as a note under section 1 of this title.

Section 105(c)(5)(D) of Pub. L. 97–448, as amended by Pub. L. 99–514, § 2, Oct. 22, 1986, 100 Stat. 2095, provided that:

“(i) In general.—Except as provided in clauses (ii) and (iii), the amendments made by subparagraphs (B) and (C) [amending this section] shall apply only with respect to contracts entered into after May 11, 1982.

“(ii) Election by taxpayer of retroactive application.—

“(I) Retroactive application.—If the taxpayer so elects, the amendments made by subparagraphs (B) and (C) [amending this section] shall apply as if included within the amendments made by title V of the Economic Recovery Tax Act of 1981 [title V of Pub. L. 97–34].

“(II) Additional choices with respect to 1981.—If the taxpayer held a foreign currency contract after December 31, 1980, and before June 24, 1981, and such taxpayer makes an election under subclause (I), such taxpayer may revoke any election made under section 508 (c) [set out as an Effective Date note under section 1092 of this title] or 509(a) [set out below] of such Act, and may make an election under section 508(c) or 509(a) of such Act.

“(III) Additional choices apply to all regulated futures contracts.—Except as provided in subclause (IV), in the case of any taxpayer who makes an election under subclause (I), any election under section 508(c) or 509(a) of such Act or any revocation of such an election shall apply to all regulated futures contracts (including foreign currency contracts).

“(IV) Section 509 (a)(3) and (4) not to apply to foreign currency contracts.—Paragraphs (3) and (4) of section 509(a) of such Act shall not apply to any foreign currency contract.

“(V) Time for making election or revocation.—Any election under subclause (I) and any election or revocation under subclause (II) may be made only within the 90-day period beginning on the date of the enactment of this Act [Jan. 12, 1983]. Any such action, once taken, shall be irrevocable.

“(VI) Definitions.—For purposes of this clause, the terms ‘regulated futures contract’ and ‘foreign currency contract’ have the same respective meanings as when used in section 1256 of the Internal Revenue Code of 1986 [formerly I.R.C. 1954] (as amended by this Act).

“(iii) Election by taxpayer with respect to positions held during taxable years ending after may 11, 1982.—In lieu of the election under clause (ii), a taxpayer may elect to have the amendments made by subparagraphs (B) and (C) [amending subsec. (b) of this section to include foreign currency contracts and enacting subsec. (g) of this section, respectively] applied to all positions held in taxable years ending after May 11, 1982, except that the provisions of section 509(a)(3) and (4) of the Economic Recovery Tax Act of 1981 [set out below] shall not apply.”

Effective Date of 1982 Amendment

Amendment by Pub. L. 97–354 applicable to taxable years beginning after Dec. 31, 1982, see section 6(a) of Pub. L. 97–354, set out as an Effective Date note under section 1361 of this title.

Effective Date

Section (other than subsec. (e)(2)(C)) applicable to property acquired and positions established by the taxpayer after June 23, 1981, in taxable years ending after such date, subsec. (e)(2)(C) of this section applicable to property acquired and positions established by the taxpayer after Dec. 31, 1981, in taxable years ending after such date, and section applicable when so elected with respect to property held on June 23, 1981, see section 508 of Pub. L. 97–34, set out as a note under section 1092 of this title.

Deadline for Determination

Pub. L. 106–554, § 1(a)(7) [title IV, § 401(g)(4)], Dec. 21, 2000, 114 Stat. 2763, 2763A–650, provided that: “The Secretary of the Treasury or his delegate shall make the determinations under section 1256(g)(9)(B) of the Internal Revenue Code of 1986, as added by this Act, not later than July 1, 2001.”

Election for Extension of Time for Payment and Application of This Section for the Taxable Year Including June 23, 1981

Section 509 of Pub. L. 97-34, as amended by Pub. L. 97-448, title I, § 105(c)(6), Jan. 12, 1983, 96 Stat. 2387; Pub. L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095, provided that:

“(a) Election.—

“(1) In general.—In the case of any taxable year beginning before June 23, 1981, and ending after June 22, 1981, the taxpayer may elect, in lieu of any election under section 508 (c) [set out as an Effective Date note under section 1092 of this title], to have this section apply to all regulated futures contracts held during such taxable year.

“(2) Application of section 1256.—If a taxpayer elects to have the provisions of this section apply to the taxable year described in paragraph (1).—

“(A) the provisions of section 1256 of the Internal Revenue Code of 1986 [formerly I.R.C. 1954] (other than section 1256 (e)(2)(C)) shall apply to regulated futures contracts held by the taxpayer at any time during such taxable year, and

“(B) for purposes of determining the rate of tax applicable to gains and losses from regulated futures contracts held at any time during such year, such gains and losses shall be treated as gain or loss from a sale or exchange occurring in a taxable year beginning in 1982.

“(3) Determination of deferred tax liability.—If the taxpayer makes an election under this subsection.—

“(A) the taxpayer may pay part or all of the tax for such year in two or more (but not exceeding five) equal installments;

“(B) the maximum amount of tax which may be paid in installments under this section shall be the excess of—

“(i) the tax for such year, determined by taking into account paragraph (2), over

“(ii) the tax for such year, determined by taking into account paragraph (2) and by treating all regulated futures contracts which were held by the taxpayer on the first day of the taxable year described in paragraph (1), and which were acquired before the first day of such taxable year, as having been acquired for a purchase price equal to their fair market value on the last business day of the preceding taxable year.

“(4) Date for payment of installment.—

“(A) If an election is made under this subsection, the first installment under subsection (a)(3)(A) shall be paid on or before the due date for filing the return for the taxable year described in paragraph (1), and each succeeding installment shall be paid on or before the date which is one year after the date prescribed for payment of the preceding installment.

“(B) If a bankruptcy case or insolvency proceeding involving the taxpayer is commenced before the final installment is paid, the total amount of any unpaid installments shall be treated as due and payable on the day preceding the day on which such case or proceeding is commenced.

“(5) Interest imposed.—For purposes of section 6601 of the Internal Revenue Code of 1986, the time for payment of any tax with respect to which an election is made under this subsection shall be determined without regard to this subsection.

“(b) Form of Election.—An election under this section shall be made not later than the time for filing the return for the taxable year described in subsection (a)(1) and shall be made in the manner and form required by regulations prescribed by the Secretary. The election shall set forth—

“(1) the amount determined under subsection (a)(3)(B) and the number of installments elected by the taxpayer,

“(2) each regulated futures contract held by the taxpayer on the first day of the taxable year described in subsection (a)(1), and the date such contract was acquired,

“(3) the fair market value on the last business day of the preceding taxable year for each regulated futures contract described in paragraph (2), and

“(4) such other information for purposes of carrying out the provisions of this section as may be required by such regulations.”